Circumventing the 1951 Convention Relating to the Status of Refugees

States refusing to assess asylum applications - International trends

Kandidatnummer: 614
Leveringsfrist: 25. november 2018
Antall ord: 15 793
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1 Introduction

The purpose of this thesis is to discover to what extent states are redefining or circumventing their obligation to admit asylum seekers at their border under the 1951 Convention Relating to the Status of Refugees (1951 Convention).

How States limit such entry, and what legal justification they provide for these limitations will be explored.

Furthermore, three case studies will serve to illustrate developing, international trends on the subject; recent amendments to the Norwegian Immigration Law, the Australian Pacific Solution, and the EU-Turkey migration agreement of 2015/16.

Finally, observing the investigated developments, the functionality of the 1951 Convention itself will be discussed.

1.1 Methodology

This thesis will attempt to look at the overarching structure and the broader perspective in international refugee law. As such, treaties, customary international law, documents from the Norwegian and Australian Parliaments, as well as UN-documents and legal literature are the sources receiving most attention.

Even though various regional and national courts and tribunals provide judgements that under the circumstances may serve to clarify some aspects of international refugee law, the scope of this thesis limit the relevance of day-to-day case law. This thesis tries to examine international developments from the view of the state, not the view of the courts. Some key judgements are nevertheless discussed briefly when they serve to illustrate international or regional developments.
2 Legal Sources

2.1 International Refugee Law

International Law has a dual nature. International law seeks to realize the political interests and values of international actor and states. At the same time, international standards and human rights may serve as a control mechanism for those in powerful positions. Few areas illustrate the conflicting standards of these different and legitimate approaches to international law better than international refugee law.

Interpretation of refugee law and the 1951 convention is complicated even further by the fact that there is no definitive single authoritative entity entitled to resolve questions that have arisen over the years. The Refugee Convention does not establish an international court, tribunal, or committee for resolution of states interpretation, as have become common in more recent human rights conventions.

The office of the United Nations High Commissioner for Refugees (UNHCR), although tasked with “supervising the provisions of the refugee convention”, do not have any mandate to force one interpretation or the other upon the states. UNHCRs documents are considered “soft law”. This has the consequence that domestic decision-makers in principle can apply the provisions of the convention without any overruling or correction of an international court.

Hathaway and Foster describe the situation in the following way:

“When a single definition is interpreted and applied by the authorities of a widely divergent group of states – with not only different legal systems, but distinct social and other lenses through which the theoretically common Convention definition might be viewed – there is a risk of fragmentation. Inconsistency and divergence in interpretation of the Convention definition would clearly undermine the principled goal of ensuring a single, universal standard for access to refugee protection. And at a political level, significant differences of interpretation could skew decisions about where refugees would be inclined to seek protection – a situation fundamentally at odds with the Conventions commitment to the equitable sharing of responsibilities among states.”

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1 Evans 2010 p. 29
2 Hathaway/Foster 2014 p.3
3 Ibid.
4 Hathaway/Foster 2014 p.3-4
2.2 **Legal sources in international refugee Law**

Treaties, international custom and general principles of international law are the primary legal sources for interpreting international law. The most important document for the interpretation of treaties, in general, is the Vienna Convention. The 1951 refugee convention with the 1967 protocol, documents from UNHCR and various national and international verdicts are key to understand international refugee law in particular.

Several international conventions have indirect, but immediate and practical consequences for the legal status of refugees. This includes, but is not limited to, the European convention on human rights (ECHR, 1950), the convention against torture (CAT, 1984), International Covenant on Civil and Political Rights (ICCPR, 1966) and Convention on the rights of the child (CRC, 1989). Although practically important for the use and implementation of refugee law, these conventions fall out of the scope of this thesis.

It is also worth noting that it exists regional treaties on refugee law. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969) and the Cartagena Declaration on Refugees (Cartagena Declaration, 1984) are regional instruments for Africa and South America. These conventions have a broader refugee definition than the 1951/67 convention.

2.2.1 **Vienna Convention of treaties**

Having uniformly agreed upon standards for interpretation of treaties are essential for the stability and legitimacy of international law. The Vienna convention is considered the most important set of rules for interpretation of treaties, and the key provisions of the treaty are now considered the customary law. As a consequence, even states that have not ratified the treaty are subject to its key provisions.

A good illustration of this development into customary international law is the statutes of the International Court of Justice (ICJ). Art. 38 (1) in the Statutes of the International Court of Justice absorbs the key provisions in the Vienna Convention, and are universally recognized as a codification of customary, international law. Nations that have not ratified the Statutes of

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5 ICJ art. 38 (1)
6 Arboleda, Eduardo 1991
7 Ruud/Ulfstein 2008, p. 70
the ICJ or the Vienna convention are therefore nevertheless assumed to be bound by these rules of interpretation:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
international custom, as evidence of a general practice accepted as law;
the general principles of law recognized by civilized nations;
subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\textsuperscript{8}.”

The relevant provisions for interpreting treaties in the Vienna-Convention are found in article 31-34, as well as art. 26 and the preamble.

According to Art. 31 (1) In the Vienna-convention, any treaty should be interpreted in good faith, and the text should be viewed in the light of a normal understanding of the wording, context and the purpose of the treaty. This is the most fundamental and general rule in the interpretation of treaties. An interpretation in “good faith” will demonstrate fidelity to the context, object, and purpose of the treaty and its text.\textsuperscript{9}

In the context of this thesis, two arguments modify the general “good faith” interpretation regarding the 1951 refugee convention. First, interpretation must consider the conventions “effectiveness”. Hathaway and Foster site the International Law Commission: “When a treaty is open to two interpretations one of which does, and the other does no enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”\textsuperscript{10}

A second possible modification of a pure good faith interpretation of the 1951 conventions wording is an adaption to present social reality and the contemporary legal context\textsuperscript{11}. The refugee convention is written in general terms, and an evolving approach might be necessary to

\textsuperscript{8} Statutes of the International Court of Justice (ICJ). Art. 38 (1)
\textsuperscript{9} Hathaway and Foster 2014, p. 5-6.
\textsuperscript{10} International Law Commission, 1966, Draft articles on the Law of Treaties with Commentaries, in Hathaway/Foster 2014 p. 6
\textsuperscript{11} Hathaway and Foster 2014, p. 6
secure the conventions relevance in the long term. In “Sepet v. Secretary of State for the Home Department, this point was underlined:

“Unless it [the Convention] is seen as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism.” 12

In article 31 (2), the Vienna-convention clarifies how the “context” is to be interpreted. The text itself, the preamble and any annexes to the treaty should be used to establish the proper context for interpretation.

Although the text itself and any relevant context are the primary factors for interpretation of a treaty, this will not always be sufficient. Article 31 (3) specifies subsidiary means of interpretation:

“3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.”

A point to note is the limited role legal theory as an instrument for interpretation have in both the Vienna convention and the Statutes of the International Court of Justice (ICJ). The same applies to the preparatory work of the treaty.

Coherent state practice or non-binding statements from international organizations can also be a legal source under the circumstances.

2.2.2 Convention relating to the status of refugees (1951).

According to Hathaway and Foster, refugee law may be the world’s most powerful international human rights mechanism.13 At the core of the refugee legal system is the 1951 Convention Relating to the Status of Refugees.

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12 Sepet v. Secretary of State for the Home Department, 2003
13 Hathaway and Foster 2014, p. 1
The 1951 Convention contains the legal framework for determining refugee status, and what extent of protection and benefits a state needs to provide for anybody who meets this definition on their territory.

2.2.3 Protocol to the refugee convention (1967)

The 1951 Convention was limited in both time and scope. The 1951 Convention only encompassed European refugees that had become refugees before January 1, 1951. Without the addition of the protocol, the original convention would be of minor practical use today. The 1967 Protocol made the provisions in the 1951 Convention both universal and applicable to contemporary refugees\textsuperscript{14}.

2.2.4 UNHCR

The United Nations High Commissioner for Refugees (UNHCR) is tasked with supervising international conventions providing for the protection of refugees, as well as facilitate cooperation between UNHCR and states in for the best interests of refugees\textsuperscript{15}. UNHCR supervises the state's adherence to the 1951 Convention, as well as the 1967 Protocol. Important in this respect is the UNHCRs role in controlling that no refuge is returned to situations that would mean refoulment.

Documents produced by UNHCR are considered soft law. Soft law is not binding to states or other international legal actors but may under the circumstances provide guidelines for interpretation. Of special note is the “UNHCR Handbook and guidelines on procedures and criteria for determining refugee status”\textsuperscript{16}, as well as notes and conclusions from both UNHCR and UNCHCR Executive Committee.

\textsuperscript{14} Ibid.
\textsuperscript{15} Convention relating to the status of refugees 1951, preamble, number 6.
\textsuperscript{16} UNHCR Handbook, 2011
3 Refugees in the 1951 convention

3.1 Who is considered a refugee?

To be considered a refugee, the individual in question needs to meet the requirements in article 1 in the refugee convention. Meeting the requirements, refugees are entitled to the convention rights, including the right to non-refoulment after article 33.

According to article 1 (2), a refugee is any person who is outside his home country owing to well-founded fear of persecution for reasons, of race, religion, nationality or political opinion.

3.1.1 Asylum seekers and refugees

Very few people presenting themselves at the border of the host country will have determined refugee status. The vast majority will present themselves as asylum seekers, with their status to be decided at a later point. “Every refugee is, initially, also an asylum-seeker.”17

It is, therefore an important question whether asylum seekers shall be treated as refugees before their status as refugees are formally decided. In other words: do potential refugees have a right to be treated as refugees before their claim is established?

According to UNHCR, the case is quite clear18:

“From an analysis of the international legal instruments relating to refugees, it is obvious that the determination of refugee status can only be of a declaratory nature. Indeed, any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not.”

In other words: any asylum seeker is considered a refugee if he or she meets the criteria, and it is irrelevant whether the claim is decided through legal procedures or not19. If the criteria in article 1 a (2) of the 1951 convention are meet, you are a refugee regardless of formal recognition. As UNHCR puts it in the UNHCR Handbook:

17 Executive Committee 1993, para 11
18 UNHCR 1977, para. 5
19 Hathaway/Foster 2014 p. 25
“A refugee is within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.”

The declaratory nature of refugee law makes it clear that at least some refugee rights are present as soon as an asylum seeker enters a state’s jurisdiction, regardless of formal status. As soon as a potential refugee enters a state’s jurisdiction, he or she has at a minimum have the rights described in the articles 3, 12-13, 16(1), 20, 22, 25, 29, 33 and 34.

Consequently, some states have developed systems that decrease the risk of asylum seekers getting within the state’s legal jurisdiction, as well as mechanisms of responsibility sharing and relocation of asylum seekers. States are also increasingly relying upon the principles of “The first country of asylum” and “safe third country.”

3.2 The right to non-refoulement

3.2.1 Non-refoulement
The principle of non-refoulement is the cornerstone of asylum and international refugee law. The essence of the principle of non-refoulement, is that no refugee should be returned to any country where the individual is likely to face persecution, other ill-treatment, or torture.

The principle of non-refoulement is now recognized as a norm of customary international law.

As early as 1994, UNHCR claimed that “the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law.”

The 2008 Saadi v. Italy verdict by the Grand Chamber in the European Court of Human Rights (ECHR) is a good illustration of the absolute character non-refoulement in current international human rights law. The applicant, a Tunisian national, was convicted in absentia to

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20 UNHCR Handbook 2011, p. 9
21 Hathaway/Foster 2014 p. 26
22 Eg. Prop. 16 L (2015–2016), 2015, also see chapter 3 and 4 in this thesis.
23 Executive Committee 1993, para 10
24 Goodwin-Gill/McAdam 2007, p. 201
25 UNHCR 2013 para 71
26 UNHCR 1994
a 20-year sentence for terrorism by a Tunisian military court. He was also sentenced in Italy for preparations with the intent to commit terrorism. The Italian government wanted to extradite the applicant to Tunisia, but the ECHR put an end to the extradition procedure:

“However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country.” 27

The principle of state sovereignty is limited by customary international law regarding non-refoulmen. Any attempt by a state to limit entry, reject, return or extradite asylum seekers need to consider these implications.

ECHR has taken an absolute approach to return of asylum seekers to areas where the applicant may risk treatment in violation of Article 3:

“No one shall be subjected to torture or inhuman or degrading treatment or punishment.” 28

The ECHR precedence applies both to third countries and the country of origin. ECHR has put a strong emphasis on what constitutes “efficient protection” under the 1951 convention.

In the case M.S.S. v. Belgium and Greece (2011), the court outlined Belgium’s responsibilities regarding article 3, and what amounted to “efficient protection”. The grand chamber state the following:

“(…) the Court considers that at the time of the applicant’s expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. (…) Having regard to the above considerations, the Court finds that the applicant’s transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention.” 29

The court underlined that it was the actual situation in the receiving country, not the formal signing of international treaties that should be the legal consideration. The overload of the

27 Saadi v. Italy, 2008, para. 125
28 1950ECHR art. 3.
29 M.S.S. v. Belgium and Greece, 2011, para. 358
Greek asylum system increased the asylum seekers probability of being sent out of Greece without a proper assessment of refoulment. Belgium’s return of the asylum seeker to Greece in accordance with the Dublin-agreement might in this instance amount to chain-refoulment.

The importance of the absolute nature of the principle of non-refoulment cannot be understated. It serves as a definitive benchmark restricting nations from expulsion. A perhaps unintended consequence of the definitive nature of this principle may be that states can be deterred from allowing asylum seekers to enter their jurisdiction and get the opportunity to have their claims to asylum assessed. The Norwegian Government has been quite direct when stating that they see the principle of non-refoulment as the only real restriction on states sovereignty when deciding residency for asylum seekers:

“None of the human right conventions give aliens a legal claim to residency in a state to which they are not already citizens. The conventions are also void of rules regarding an alien’s legal status of residency. The protection against return to a country where the person may be at risk of torture, inhumane or degrading treatment or punishment is the most robust human rights clause for aliens. The ban on refoulment is absolute, even though the ban has a temporary nature. Legal interpretation is very clear regarding the other rights the human rights conventions provide for aliens. Even if these rights in principle are universal, they have limited impact faced with the states sovereign and legitimate need to regulate which aliens gets access to the state’s territory.”

3.2.2 Non-refoulment in the 1951 convention

In the 1951 Convention, the non-refoulment principle can be found in article 33.

It is worth noting that the provision in the convention in some cases allow refoulment, notably in article 33 (2). While the protection from refoulment is absolute in other key human rights conventions, such as the EHRC and CAT, it is possible to refouler in some circumstances if the 1951 convention is interpreted literally.

This is however of little practical importance, as absolute non-refoulment now is considered customary international law.

30 Prop. 90 L (2015–2016), 2016 p. 18, translated by author
31 UNHCR 1994
The principle of non-refoulement has surfaced in several other conventions in the aftermath of the 1951 refugee convention. The 1984 UN Convention against Torture (CAT84) addresses non-refoulement in article 3. Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR66), states that “No one shall be subject to torture or cruel, inhumane or degrading treatment or punishment”. This has been interpreted as containing an implied prohibition on refoulement.32

The 1950 European Convention on Human Rights (1950ECHR) prohibits removal to torture, cruel, inhuman or degrading treatment or punishment. 33 1950ECHR goes further than the non-refoulement in the 1951 convention, as it is absolute, and do not contain the exceptions in the 1951 conventions article 32 and 3334.

All states party to the CSR51 and/or the 67 protocol made a declaration adopted on 13 December 2001, where the states affirmed the continued relevance of the international regime of rights and principles, “including at its core the principle of non-refoulement, whose applicability is embedded in customary international law.”35

3.3 Important legal constructions

3.3.1 Safe third Country

Under the circumstances, a country may return an asylum seeker to another country if this country is considered safe36. If the individual is returned to his native country, this principle is termed “safe country of origin”. If the asylum seeker is returned to a country that is not his or her native country, the principle is called “safe third country”.

Although the concept of the safe third country standard still is subject for a discussion about its legitimacy, it forms a long-standing state practice with the aim to reduce secondary movements.37 The concept has been widely accepted by states, and the UN Executive Committee is among the bodies that have addressed and attempted to regulate the standard.38

32 Goodwin-Gill/Mcadam 2007, p. 208-209
33 1950 European Convention on Human Rights art. 3.
34 Goodwin-Gill/Mcadam 2007, p. 211
35 UNHCR 2002, para. 4
36 A country can only be considered safe if efficient protection against refoulement taken into consideration, see chapter 2.2, 3 and 4.
37 Zimmermann, 2011, p 1110-1111.
38 Executive Committee 1993
The asylum seeker must have a real possibility to have his or her asylum request assessed in the third country. He or she needs to enter the third state territory and have access to fair and efficient procedures for asylum.\(^39\)

The asylum seeker needs to have effective protection against chain-refoulment, cases in which the refugee may not fear persecution directly in the safe third country, “but will be at risk of being expelled, returned, or transferred to from that safe country to another State in which he or she does actually fear persecution or other serious human rights violations.”\(^40\)

On the issue whether a safe third country only needs to protect the asylum seeker from refoulment, or if the third country also needs to provide all rights that refugees benefit from, the Lords of Appeal have made the following conclusion: “It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it.”\(^41\)

On the other hand, the Council of Ministers is of the opinion that non-refoulment is just one of the many rights that need to be secured before removal to a third country: “observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments including compliance with the prohibition of torture, inhuman or degrading treatment or punishment.”\(^42\) Note that the word “including” in reference to non-refoulment implicitly states the importance of other rights.

It has been a development in declaring some states presumably and automatically safe, limiting the need for assessment in each individual case. The Norwegian parliament has followed this line in “Restrictions Package I and II”, focusing almost exclusively on the right to protection against refoulment, assuming that Neighboring Nordic countries automatically constitute a safe, third country.\(^43\)

The principle of safe third country is on their grounds firmly connected with the principle of non-refoulment. While most legal boundaries in international refugee law can be somewhat negated by the principle of state sovereignty, manifested as the states “margin of appreciation” regarding the ECHR, the right to protection from refoulment is absolute.

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\(^39\) Zimmermann, 2011, p. 1112, UNHCR 2015 p. 3
\(^40\) Zimmermann, 2011, p 1111-1112.
\(^41\) HOL 2002
\(^42\) CoM 1997, litra a
\(^43\) Prop. 16 L (2015–2016), 2015 p. 2, 3 and 22
Assessing whether a refugee returned to a third country is secured efficient protection according to the requirements in the 1951 convention is therefore paramount when assessing if a country can be described as a safe third country.\textsuperscript{44}

3.3.2 First country of asylum

The first country of asylum principle is closely related to that of a safe third country. The concept of safe third country is applicable if an asylum seeker could have claimed protection in another country, while the first country of asylum principle is applicable when asylum seekers have applied for protection in another country. Both principles serve to reduce irregular second movements. The first country of asylum concept is seen as consistent with international law.\textsuperscript{45}

Refugees must be protected against refoulement, be permitted to remain within the first country of asylum and be treated with recognized basic human standards.\textsuperscript{46} However, it is argued that both the principle of the first country of asylum, and the safe third country standard should have the same requirements.\textsuperscript{47}

3.3.3 Mass influx

The Executive Committee (ExCom), has outlined four elements for a situation to be branded as a mass influx-situation:\textsuperscript{48}

1. A considerable number of people arriving over an international border
2. A rapid rate of arrival
3. Inadequate absorption or response capacity in the host state
4. The inability of the asylum procedures, if they exist, to deal with the assessment of such numbers.

The important question is whether a situation of mass influx may allow for exemptions from the principle of non-refoulement.

\textsuperscript{44} M.S.S. v. Belgium and Greece, 2011
\textsuperscript{45} Zimmermann, 2011, p 1114
\textsuperscript{46} Executive Committee 1989
\textsuperscript{47} Zimmermann, 2011 p 1114-1115
\textsuperscript{48} Executive Committee 1994
During the draft process, some states wanted to include an exemption from article 33 in the 1951 convention in the event of mass influx. This did, however, not materialize in the final treaty.

Interpreting the wording in art. 33, it is unnatural to include an exception is situations of mass influx. The exception in art. 33 (2) do not include such a situation. It is reasons to believe, in a situation when an exception is mentioned specifically, that there is a reason why other exception are omitted. This is especially true when we know that the inclusion of such an exemption was discussed during the draft process but failed to make the cut. Neither the wording, nor the purpose of article 33 would support the possibility of an exemption in case of mass influx.

Zimmermann makes the following statement on the topic: “In conclusion, art.33, para. 1 of the 1951 Convention is applicable in situations of mass influx.” In other words, a situation of mass influx does not remove an individual’s right to protection against refoulment.

4  How do states limit access to asylum?

Many states have made efforts to deny or transfer asylum seekers to other countries for assessment of any claims to refugee status. While such systems are prevalent, they lack positive legal authority in the 1951 convention.

The UN Executive committee has expressed concern for many of the practices that today are used by states, such as the application of legal and administrative measures that prevent asylum seekers from reaching host countries, procedures for refusal of admission, interceptions and push-offs. The committee claims that “whether direct or indirect, such practices violate the most basic principle of international protection.”

Nevertheless, such practices are widespread and apparent, and many new mechanisms and legal constructs have developed in recent years.

This thesis will take a closer look at three such mechanisms for denial of asylum. This list is not complete but is intended to show a selection of some of the most prevalent mechanisms

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49 Zimmermann, 2011 p 1377  
50 Zimmermann, 2011, p. 1379  
51 Executive Committee, 1993, para 9
for denial of asylum assessment. First, we look at regional agreements that limit an asylum seekers limit of choice and allow states to transfer the asylum seeker for assessment of their application in another country. The most famous system for transfer and burden sharing is perhaps the European Union’s Dublin-agreement.

Secondly, we will look at the interception of asylum seekers outside a state’s territory, and outright refusal of entry at the country’s frontier.

Finally, accelerated procedures and admissibility procedures for refusal of an assessment of an asylum seekers material claim to asylum will be addressed.

In all cases, such systems and mechanisms need to consider the right of non-refoulement.

4.1.1 Responsibility sharing and limits of choice

The positive legal basis for denying an asylum application based on the possibility of seeking asylum elsewhere, are limited and specific\(^52\). The possible specific situations are positively being mentioned in the 1951- convention, mainly refugees to UN protection or assistance, and access to protection as a de facto national of a country of former residence\(^53\).

Even though the positive rules regarding transfer of an asylum seeker to another country are specific and limited in scope, domestic and regional rules that limit refugee’s choice of country to apply for asylum have emerged in many different forms in recent years. Sophisticated bilateral and multilateral agreements designate the “first country of arrival” as solely responsible for assessing an asylum claim\(^54\). The European Union Dublin-agreements is a good example of this kind of arrangement. Australia “direct flight” construction is an example of a unilaterally declared policy.

It may have developed several uni-, bi-, and multilateral structures to restrict refugees choice of country of asylum. Even though these kinds of legal constructions are common, they have no positive legal authority in the 1951 convention. Hathaway and Foster describe the situation as follows\(^55\):

\(^{52}\) Hathaway/Foster 2014 p. 32
\(^{53}\) Refugee convention art. 1 (D) and (E)
\(^{54}\) Hathaway/Foster 2014 p. 30
\(^{55}\) Hathaway/Foster 2014 p. 33
“It is commonly argued that authorization for (protection elsewhere) practices is derived from an omission in the Convention text, that is, a negative implication is drawn from the limits of the positive obligations actually imposed on state parties.”

The Dublin-agreement regulates what state is responsible for assessing an asylum claim. The member of the Dublin-agreement is the EU-members, and some select other countries. The dominant rule in practice under the agreement is that the country of the first arrival regulate where the asylum application is assessed. “Thus, if an applicant lodges an asylum claim in Member State A although member state B is responsible for determining this claim, Member State A may reject the claim as inadmissible and send the applicant to Member State B without examining his claim at all. In other words (...) the act of the Member State of failing to guard its borders against asylum seekers is a ground for responsibility.”

The idea of responsibility sharing is legitimate, given that the rules of asylum are harmonized between all participating members. Internally in the EU, this is not always the case. Although some deviation is accepted in practice, ECHR have in M.S.S. v. Belgium and Greece pointed out that if the practice deviates too much, and the asylum seeker for these reasons risk refoulment, transfer should be suspended regardless of the formal agreements. The states are obliged to not return asylum seekers to member states where it is serious grounds to believe that the conditions may constitute a risk that the applicant is subject to inhuman or degrading treatment in accord with the EU charter article 4.

4.1.2 Interception or refused entry for asylum seekers

According to the 1948 Universal declaration of human rights, article 14 (1), “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. This principle is now considered customary international law. Despite this fact, the consequences are still not

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56 The rules for determining witch country that should assess an asylum application is found in the agreement’s chapter III. One of the other rules deciding country of assessment is in what country the applicant’s family has residence.
57 Zimmermann, 2011 p. 1117
58 Zimmermann, 2011 p-1117-1118
59 M.S.S. v. Belgium and Greece, 2011
60 EU Charter 2000 art. 4
62 Øyen 2013 p. 181
necessarily clear, as the act of granting asylum regarding the definition in the 1948 declaration have no clear legal definition\textsuperscript{63}.

According to the principle of state sovereignty, states have a right to control entry at their borders. ECHR, applying the European convention on human rights (ECHR 1953) make the following statement in Saadi v. Italy: “(...) Contracting States have the right to control the entry, residence and removal of aliens.”\textsuperscript{64} However, the court notes in the same paragraph that there is no right to asylum in the ECHR1950.

While there is no obligation for a state to grant asylum, and nations have some degree of autonomy in the assessment of refugees, states have a duty under international law not to obstruct the right to seek asylum\textsuperscript{65}. This view is in accordance with a statement the UN General Assembly made in 1997\textsuperscript{66}:

\begin{quote}
"While it is the prerogative of the State to grant asylum to a particular individual, asylum-seekers are, at a minimum, entitled to receive temporary refuge or have their claim determined as a first step towards giving content to the right to seek and enjoy asylum in another country."
\end{quote}

Following this line of argument, Goodwin-Gill and McAdam question the legality of non-arrival and non-admission policies increasingly employed by States in migration control\textsuperscript{67}. In practice, states do not necessarily seem to agree with this interpretation, a fact that Goodwin-Gill and McAdam also seem to acknowledge\textsuperscript{68}. European states are increasingly making efforts to extend their border control beyond their territorial borders to prevent asylum seekers from reaching their territory.\textsuperscript{69}

\begin{footnotes}
\item[63] Goodwin-Gill/McAdam 2007, p. 356
\item[64] Saadi v. Italy, 2008, para. 124
\item[65] Goodwin-Gill/McAdam 2007, p. 358
\item[66] UN General Assembly 1997, para 12
\item[67] Goodwin-Gill/McAdam 2007, p. 358.
\item[68] Ibid.
\item[69] Costello 2012, Abstract/introduction
\end{footnotes}
While states seem to put little weight behind the principle in the 1948 declaration art. 14 (1), States do respect the right to non-refoulement. Defining the limits of non-refoulement is therefore important. It is impossible to ignore the close connection between refugee status, the principle of non-refoulement and the concept of asylum. If rejection at the border or in international waters constitutes non-refoulement, such a practice will amount to a serious breach of international human rights law, as the ban on refoulement to torture or other inhumane treatment is considered a core human right. It is easier for states to circumvent the mostly undefined right to asylum after the 1948 declaration, than the legally clear right to non-refoulement. Defining the limits of the non-refoulement principle in article 33 is important for this reason.

Australian and American practice deviate from the European view. In the 1993 Sale v. Haitian Centers Council verdict, the US Supreme Court ruled that aliens intercepted on the high seas could be repatriated without breaching the 1951 conventions article 33 on non-refoulement. The US Supreme Court formulates their opinion as follow:

“Like the text and the history of § 243(h), the text and negotiating history of Article 33 of the United Nations Convention are both completely silent concerning the Article's possible application to actions taken by a country outside its own borders. (...) In spite of the moral weight of that argument, both the text and negotiating history of Article 33 affirmatively indicate that it was not intended to have extraterritorial effect.”

This verdict has substantial consequences for American refugee law. The US Supreme Court maintains that it is impossible to draw the conclusion that the states agreed to include rejection outside the state’s territory in the non-refoulement clause studying the predatory work of the 1951 convention. Costello is deeply critical to this interpretation, calling it a misinterpretation: “The views of international human rights monitoring bodies have little impact internally, so these domestic misinterpretations persist. In the European context in contrast, national and supranational courts are more closely enmeshed, so we expect aberrant national practices and decisions to be challenged before supranational courts more promptly, routinely and effectively than in other regions.”

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70 This argument is given little to no weight in both Norwegian restriction package I and II, Prop. 16 L (2015–2016), 2015, Prop. 90 L (2015–2016), 2016
71 Goodwin-Gill/McAdam 2007, p. 357
72 Vrachnas et. al, 2008
73 Sale v. Haitian Centers Council, inc, 1993
75 Costello 2012, litra b
In Hirsi Jamaa and Others v. Italy\textsuperscript{76}, applying the European Convention of Human Rights and the 1951 Convention, the ECHR reached the opposite conclusion. The Court decided that interception of boats in international waters constituted an embodiment of jurisdiction by the state, and as such triggered the state’s other responsibilities after ECHR1950. Returning refugees to Libya might breach the implicit non-refoulement principle in art. 3, and where thus not permitted.\textsuperscript{77}

Even though Italy had a bilateral treaty with Libya, the human rights situation in Libya made the country insufficient as a safe third country. UNHCR noted in a 2009 press release:

“\textit{Libya has not signed the 1951 UN Refugee Convention and does not have a functioning national asylum system. UNHCR urges Italian authorities to reconsider their decision and to avoid repeating such measures.}”\textsuperscript{78}

Following the principles for interpretation in the Vienna-convention\textsuperscript{79}, we need to take a broad look on the article 33 in the 1951 Convention to establish the true meaning of the clause. Just interpreting the natural understanding of the wording in art. 33 would at first glance imply that the article only applies for refugees who have entered a state’s territory\textsuperscript{80}.

However, a broader interpretation needs to be undertaken taking to account the purpose of the convention. Goodwin-Gill and McAdam have the following opinion on the issue:

“\textit{Let it be assumed that, in 1951, the principle of non-refoulement was binding solely on the conventional level, and that it did not encompass non-rejection at the frontier. Today’s analysis requires full account of State practice since that date, as well as international organizations. States have allowed large number of asylum seekers not only to cross their frontiers, for example in Africa, Europe, and South East Asia, but also to remain pending a solution.\textellipsis} State practice have introduced varied factual element before the principle is triggered, but the concept now encompasses both non-return and non-rejection.”\textsuperscript{81}

\textsuperscript{76} ECHR 2012: Hirsi Jamaa and Others v. Italy,
\textsuperscript{77} Ibid
\textsuperscript{78} In ECHR 2012: Hirsi Jamaa and Others v. Italy, p. 15
\textsuperscript{79} Vienna-convention art. 32
\textsuperscript{80} Zimmermann 2011, p. 1367/Goodwin-Gill/McAdam 2007 p. 206
\textsuperscript{81} Goodwin-Gill/McAdam 2007, p. 208
“Thus, although non-refoulment is not synonymous with a right to admission, the principle of non-rejection at the frontier implies at least temporary admission to determine an individual’s status.”

This argument has an inherent weakness when we are to determine current and future refugee law. If the legal argument for extending non-refoulment to also include non-rejection is coherent state- and organizational practice, what is stopping states from changing this practice in a coherent manner? After all, the primary interpretive instrument according to the Vienna convention is the text, object, purpose and context. According to article 31 3(b), subsequent state practice is only one element to establish context, and state practice may change over time.

A stronger argument might be found in the 1951 Convention text itself. Art. 33 (1) states that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories (...).” This reference to non-return to the frontier can be interpreted as referencing rejection at the border. Zimmermann differentiates clearly between the right to asylum, and the right to protection against refoulment, and summarizing the development in international law, makes it clear that non-refoulment also encompasses non-rejection: “The argument that the 1951 Convention does not want to regulate the right to asylum, while as such correct, is no reason why the non-refoulment principle should not apply to rejection at the border.”

However, it is worth noting that rejection to a third country do not constitute refoulment if the third country is in fact safe, and there is no risk of chain-refoulment. This is in accordance with the principles of safe third country and country of first asylum.

A form of de facto rejection is outsourcing border control to a third country. EU and EU countries have had, and currently have, such agreements with several countries. Morocco, Libya and the more recent EU-Turkey agreement are all agreements that de facto outsources the border control. Gammeltoft-Hansen describes the situation like this:

“States have also outsourced the protection of their boarders in an attempt to prevent asylum seekers from reaching their jurisdiction, and benefit from the consequent rights. Under EU

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82 Goodwin-Gill/McAdam 2007, p.215
83 Zimmermann, 2011 p. 1367
84 Zimmermann, 2011 p. 1368
and bilateral agreements, Libya and Morocco have had the responsibility of preventing potential asylum seekers to exit towards the EU borders, while most asylum-receiving countries impose fines on airlines who allow passengers to board without a valid visa or documentation.”

It should also briefly be noted that states often refuse visa for persons arriving from countries in conflict and use visa requirements to limit the number of asylum seekers. This includes fining airlines that allow people without visa or adequate documents to board. “Moreover, most States will not issue visas for protection reasons. Thus, refugees are banned from any but illegal entry to potential host States.”

While there are fundamental differences in interception at the high seas and rejection at the border, the key points in the material discussion about the situation in the country the asylum seeker is rejected or dropped off at will be the same regarding the principle of non-refoulment. No refugee should be returned to, or rejected to, any country where the individual is likely to face persecution, other ill-treatment, or torture, regardless of whether the asylum seeker is returned or rejected.

### 4.1.3 Accelerated and admissibility procedures

Accelerated procedures encompass procedures for the quick assessment of asylum claims. Admissibility procedures are procedures for rejection of asylum claims. Such procedures are often used in cases for unwanted and/or obviously unfounded asylum claims, normally because the individual is presumed to be eligible for protection elsewhere, i.e. a safe third country.

By instigating an accelerated or admissibility procedure, a state may reduce the access to legal remedies. Using the “protection elsewhere” standard, these procedures are allowed under international law, as long as the states respect the principle of non-refoulment. Zimmermann states that “Consequently, States may refuse admittance to their territory as long as it is guaranteed that the refugee will not be refoule, i.e. that he or she will find protection elsewhere.”

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86 Zimmermann, 2011, p. 1108
87 Zimmermann, 2011, p. 1109
88 Ibid.
89 The standard encompasses safe first country of asylum, safe third country and safe country of origin
90 Zimmermann, 2011, p. 1110
However, to avoid refoulment or chain-refoulment, there are some minimal standards of assessment that also applies to accelerated and admissibility procedures. First, any application for asylum must be decided upon individually, objectively, and impartially. The states need to be up to date concerning the status of human rights in relevant countries. According to the UNHCR Handbook, the assessment needs to be individual, in writing and grounded in facts. It needs to be performed by qualified personnel, as well as bases on the results of a hearing of the individual. There are also some minimum requirements for legal aid and appeal.

5 Case studies

“Arriving in a state party does not in practice guarantee the refugees right to have her claim processed and protection need met in that country. To the contrary, domestic and regional rules that constrain individual choice have emerged in many different forms in recent years. These range from unilaterally declared «direct flight» and «safe third country» rules, to sophisticated bilateral and multilateral arrangements that purport to designate the refugees «first country of arrival as solely responsible to assess protection needs.”

5.1 Case study: Norway

5.1.1 Introduction

Norway has recently enacted two substantial changes in domestic refugee and asylum law. The new proposals where called «Changes in the immigration act (Restrictions package) I (2015) and II (2016). The proposals where put forward as a consequence of the 2015 refugee crisis.

In 2015, the number of people seeking asylum in Europe reached a record of 1,3 million applicants. The rapid increase in asylum applications resulted in a new record, almost doubling

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91 Zimmermann, 2011, p. 1119
92 UNHCR 2011
93 Hathaway/Foster 2014, p. 30
the old one of around 700,000 asylum seekers dating back to the fall of the Soviet Union in 1992.\textsuperscript{94}

Even though the pressure on Europe as a whole was substantial, the number of asylum seekers where not evenly distributed among European countries. Hungary, Sweden, Austria and Norway received the largest number of asylum applications per 100,000 inhabitants.\textsuperscript{95}

The number of yearly asylum applicants to Norway almost tripled, from an average of 11,000 in the 2009-14 period to 31,000 in 2015 alone.\textsuperscript{96} After the implementation of the new laws, the number of asylum applicants to Norway dropped rapidly and almost immediately. 2016 saw a drop of 89 percent, to 3,460 applications - the lowest amount since 1997.\textsuperscript{97} In 2017, only 2,294 persons applied for asylum on Norwegian territory.\textsuperscript{98}

5.1.2 Innstramninger I/ Restrictions package I (2015)

This law proposition from the Norwegian government is controversial, because it was decided to suspend the normal government and parliamentary procedures in law-making. Neither the Government nor the Parliament conducted a hearing,\textsuperscript{99} and the law was run through the system much quicker than usual. The Department of Justice (TDJ) put forth the following argument for this swift procedure:

\begin{quote}
\textit{The department has decided to make an exception to the main rule of ordinary hearing, as the rapid arrival of a large number of asylum seekers to Norway necessitate the quick implementation of extraordinary measures. The department assess the need to quickly conduct changes in the immigration act that may serve to limit the large number of arrivals must take precedent over the opportunity for public and private institutions to provide hearing statements.}\textsuperscript{100}
\end{quote}

\textsuperscript{94} Pew Reaserch Senter, 2016
\textsuperscript{95} Pew Reaserch Senter, 2016
\textsuperscript{96} Tv2, 2018
\textsuperscript{97} UDI, 2017
\textsuperscript{98} UDI, 2017 (December)
\textsuperscript{99} Although some of the changes in § 76 para 2 had a hearing in 2010, it had not been a hearing for most of the changes, see Prop. 16 L (2015–2016), 2015 p. 3.
\textsuperscript{100} Prop. 16 L (2015–2016), 2015 p. 4, translated by author
Several organizations, including Amnesty, The Norwegian Bar association and Norwegian Peoples Aid wrote a joint letter addressed to the political parties in Parliament, protesting both the procedure, as well as the material changes in the law:101

“We are critical to how the government approaches the situation. We are worried the Parliament may adopt dramatic changes in the field of asylum law without having the consequences properly assessed. (...) It is unacceptable that changes of this magnitude are rushed through the parliamentary process in less than a week, with no formal possibility to voice counter-arguments.”

Despite resistance from many organizations, most of the provisions where adopted with an unprecedented large majority. Parties representing 152 out of 169 representatives in parliament gave their support to the bill102. A proposal from the Christian Democratic Party to make the changes temporary and give them an expiry date of two years was narrowly passed with 55 vs 50 votes103. After a 2017-bill was presented to parliament two years later, the changes in §§ 32 and 106 became permanent, while the possibility for the Government to instruct the Directorate of Immigration where repealed104.

The changes made in Norwegian refugee law that are most relevant for this thesis, are the changes that may allow the immigration authorities to refuse to assess an application for asylum (§ 32 (1) d in the Immigration Act) and the corresponding rules of detaining asylum seekers that are assumed to have a weak claim with the intend of expulsion in the Immigration Acts § 106.

The changes in the autonomy of the Immigration Directorate, although important in a domestic Norwegian context, fall out of the scope of this thesis as they have little relevance in illustrating international trends.

5.1.2.1 Asylum seekers from a “safe third country” – Immigration Act § 32

The material changes proposed in the new law are removal of the condition that a rejected asylum seeker is guaranteed to have their application assessed in a third country. The bill also

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101 Letter to the political parties in the Norwegian Parliament, 18.11.2015
102 Vote in Parliament 2015
103 Vote in Parliament 2015
104 Innst. 54 L (2017-2018), 2017
included persons who have other means of legal presence in a third country other than an application for asylum, i.e. a student visa\textsuperscript{105}.

The Norwegian Immigration Act recognized and implemented the principles of “first country of asylum” and “safe third country” even before this bill was passed\textsuperscript{106}. Theoretically, it was possible to refuse the assessment of asylum application from persons coming from a safe third country before these changes in the law. However, the criteria that the Norwegian government needed to be sure that the applicant had his asylum request assessed by the third country limited the provisions practical value as a tool for restricting immigration.

It’s worth noting that there is no mention of the “right to seek asylum” in the 1948 Universal declaration of human rights\textsuperscript{107} in the proposition. The Norwegian government seems to interpret international refugee law in a way that leave art. 33 in the 1951 Convention and the equaling provisions in other treaties as the material benchmark for rejection of asylum seekers.\textsuperscript{108} TDJ states clearly that it doesn’t necessarily recognize a right to choose the country of asylum:

“The refugee convention does not contain an expressed clause on the right to apply for asylum. Article 33 in the convention prohibits return to any area where a person risk persecution and may be interpreted as an indirect commitment for the states to receive and assess an application for protection. Neither the refuge convention nor any other international conventions contain any unconditional right of choice of country for asylum application. The principle of rejection of an assessment of asylum if the applicant already has protection in another country or may be implored to seek protection in a safe third country have manifested itself in different bilateral and regional treaties. An example of this is the Dublin III-agreement.”\textsuperscript{109}

The changes in § 32 does in theory open for the rejection of any asylum seekers coming from a third country. TJD addresses the changes as follows:

“The key point in assessing if a person can be returned to a third country, is whether or not it is a real risk for persecution or treatment in breach of the refugee conventions article 33 or

\textsuperscript{105} Prop. 16 L (2015–2016), 2015 p. 11-12
\textsuperscript{106} Prop. 16 L (2015–2016), 2015 p. 9
\textsuperscript{107} Universal declaration of human rights, 1948 article 14 (1)
\textsuperscript{108} Prop. 16 L (2015–2016), 2015 p. 11-12
\textsuperscript{109} Prop. 16 L (2015–2016), 2015 p. 9, translated by author
the European convention on human rights article 3, or returned again (from the third country) to his country of origin, if there is a real risk for such a treatment there.”

On these grounds, the government proposes that an alien may be returned to a third country when there is no real risk for refoulement or chain-refoulement\textsuperscript{111}. Using non-refoulement as the only real benchmark, combined with the acceptance of the principle of first country of asylum and Norway’s geographical location makes it possible for Norway to theoretical refuse to assess almost all applications for asylum. Norway only shares a land boarder with three countries—two of which are undisputed safe Nordic countries. The third – Russia- was also considered safe by the government in most cases.\textsuperscript{112}

Although the 2015 changes in the law where rushed, and no hearing was performed, the clause that the changes should be automatically terminated after two years made the government put forth a bill to make the changes permanent in 2017. This time a hearing was concluded. While most of the police agencies where positive to the changes, the majority of the recipients had a negative view of the changes. JURK, a legal service for women, had made the following statement that summarizes the essence of many contributions from various NGOs:

“JURK is of the opinion that the Department of Justice are undermining the institute of asylum if they allow asylum seekers to be rejected at the boarder without making sure that they will have their application assessed in a third country. It is a risk that rejected asylum seekers fail to get their application assessed in the country they are returned to. These applicants may get in a situation where their asylum claims never get an assessment, and because of this never get the refugee status de are entitled to under international rules.

If the institute of asylum are to function, states must take responsibility for asylum seekers by clarifying their situation through assessment of their applications. Most asylum seekers arrive from a safe third country. Norway cannot use its geographical location to avoid responsibility.”\textsuperscript{113}

\textsuperscript{110} Prop. 16 L (2015–2016), 2015 p. 3, translated by author
\textsuperscript{111} Prop. 16 L (2015–2016), 2015 p. 3
\textsuperscript{112} Prop. 16 L (2015–2016), 2015 p. 2, 3 and 22
\textsuperscript{113} Høringssvar, prop. 179 L (2016-2017)
5.1.2.2 Detaining asylum seekers – Immigration Act § 106

As the changes in the Immigration Act § 32 does not allow for rejection at the border but must be seen as a form of accelerated procedure, TDJ also proposed corresponding changes for detaining asylum seekers with a low probability of getting a material assessment of the asylum application.

It is undisputed that nations under the circumstances have the competence to detain non-nationals pending decisions on entry. The 1951 Convention explicitly states that states have this right. There are however, some limitations to this principle.

In the new amendment to the Immigration Acts § 106, the Norwegian government proposed a provision that made it possible to detain asylum seekers if he or she most likely would have their assessment refused on the grounds that the individual have protection in another country or have had residency in a safe third country.

The department of justice referenced ECHR Saadi v. United Kingdom, and the new law seems molded after this verdict:

“In the case Saadi v. United Kingdom the ECHR accepted a seven-day period of imprisonment, without suggesting an upper limit. The department now suggest a maximum period of imprisonment of seven days. The department finds it clear that detention when deciding whether or not an application should be materially assessed, is “closely connected to the purpose of preventing unauthorized entry”, as is demanded by ECHR precedent regarding art. 5 (1) litra F.”

5.1.3 Innstramnninger II/ Restrictions Package II (2016)

Restrictions Package II is a further tightening in the possibility to access the asylum process in Norway, specifically in situations of “mass influx”.

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114 Goodwin-Gill/McAdam 2007, p. 462
115 Convention Relating to the Status of Refugees, 1951 Art. 31 (2)
116 See i.e. Saadi v. United Kingdom, 2008
117 Prop. 16 L (2015–2016), 2015 p. 20
118 Saadi v. United Kingdom, 2008
119 Prop. 16 L (2015–2016), 2015 p.20
The bill also contains several other changes and restrictions, most of them restricting residence permits and citizenship. It was also proposed to reduce Norway’s extended refugee-definition to the convention minimum, but this did not obtain the necessary votes in parliament.\textsuperscript{120}

Although many of the changes proposed may serve to illustrate an international trend in restricting the rights of asylum seekers, most of the amendments regarding residence permits, citizenship and the refugee definition are of most interest in a domestic context, and they do not have much relevance in assessing asylum seekers access to the asylum procedure as such.

Contrasting, other changes may be of international interest in the context of states limiting the access to assessment of asylum applications. The focus point of this chapter will be the amendments to § 32, and to a lesser extent, §9 in the Immigration Act.

5.1.3.1 Turning asylum seekers back at the border – Immigration Act §§ 9 and 32

The changes in the Immigration Acts §§ 9 and 32 are somewhat connected\textsuperscript{121}. Previously, it was possible for all asylum seekers to enter Norway without a visa. The changes in § 9 makes it so that an asylum seeker needs permission to pass the border if a valid visa is not present.\textsuperscript{122} After the proposition went through parliament, some changes were made to § 9. It was underlined that the visa requirement could only enter into force in a situation of mass influx, making the connection to the changes in § 32 more obvious.\textsuperscript{123} Even if the bill had not been changes by parliament, the original proposal from the government would still allow entry without visa in ordinary circumstances.\textsuperscript{124}

Asylum seekers will now be refused entry without a valid visa if the conditions in the new § 32 are met\textsuperscript{125}. The amendment to the Immigration Acts § 32 gives the government the right to declare a state of mass influx if the number of asylum applicants rises sharply, and the Dublin

\textsuperscript{120} Norway have a broad refugee-definition, that also include situations that otherwise would amount to subsidiary protection in most countries. See Prop. 90 L (2015–2016).
\textsuperscript{121} § 9 is only one of the provisions that may be used in conjunction with § 32. § 17 concerning rejection is another example.
\textsuperscript{122} Prop. 90 L (2015–2016), 2016 p. 23
\textsuperscript{123} Innst. 391 L (2015–2016), 2016 p. 25
\textsuperscript{124} Prop. 90 L (2015–2016), 2016 p. 19
\textsuperscript{125} Prop. 90 L (2015–2016), 2016 p. 24 and 36
III-agreement in practice have stopped functioning. It is no condition that Dublin III formally have ceased to exist. It is enough that other states don’t register asylum seekers as presumed, and the conditions for the agreement are failing on these grounds.

If these conditions are met, the government will have the authority to reject all asylum seekers who try to enter Norway from any Nordic country. This extraordinary provision can not be applied to asylum seekers who have already entered Norway. The individual asylum seeker needs to be turned back at the border, and the provision cannot be used on individuals already inside Norwegian territory. The parliament amended the bill slightly and limited the government’s authority to enforce the new § 32 to a maximum of 18 weeks (three times six weeks), unless further extension is approved by parliament.

The Norwegian Government make a general assumption that any Nordic neighboring countries are considered safe third countries, and a rejection bordering such a country do not constitute refoulement.

Most organizations responding to the hearing had a negative opinion of the changes. Several organizations claimed that the proposal would breach or undermine the right to asylum under the 1951 Convention, and that this might lead to refoulement after art. 33. Amnesty International Norway made the statement that the amendment would constitute a serious restriction of the fundamental human right of seeking and receiving asylum. Several organizations warned that a ban on entry without a valid visa could lead to situations where some asylum seekers find that no state wants to accept responsibility.

Norwegian Peoples Aid addressed the right to asylum in the UN declaration of 1948, stated that seeking asylum is a human right, and that this right now is customary international law. They also claimed that the proposal undermined the principle of non-refoulement. The Norwegian Bar Association underlined that “the proposal doesn’t resonate with the intent and purpose behind the 1951 Convention.” Furthermore, they pointed out the oxymoron in that “it

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126 Ibid
130 Ibid
131 Prop. 90 L (2015–2016), 2016 p. 20
132 Ibid
133 Prop. 90 L (2015–2016), 2016 p. 21
gives little meaning from a lawmaker’s perspective to give expansive, positive rights to asylum, and at the same time define such an action as illegal."  

TDJ maintained the states right to limit foreigners access to its territory under international law, and that demanding a valid visa from asylum seekers would not in itself breach the principle of non-refoulment. Establishing that Norwegian authorities could build on a general assumption that rejection to a Nordic neighboring country would amount to rejection to a safe third country, and thus not be in violation of the principle of non-refoulment.

Furthermore, TDJ, paraphrasing the ECHR Hirsi Jamaa-case, suggested that the terms of this case did not apply to the proposed amendments of the Immigration Act. The department claimed that it was a substantial legal difference in forcibly return an individual to a third country, as was done in by the Italian government and the proposed rejection at the border in the new amendment to the Norwegian Immigration Act.

5.2 Case study: Australia

5.2.1 Introduction

Compared to most European countries, Australia has had a stronger focus on pure national interest in immigration law. Although the 1958 Migration Act mentions a commitment to international refuge protection as one concern, the main purpose of all immigration take into account what is beneficial for Australia as a country. In assessing what is beneficial, “long- and short term economic needs and interest; the needs of individuals and families who have previously migrated; and an international commitment to humanitarian settlement” are important factors.

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135 Prop. 90 L (2015–2016), 2016 p.21
138 Vrachnas et. al. 2008, p. 24
139 Migration Act, 1958, para 4 (1)
140 Vrachnas et. al. 2008, p. 24
Australia also has a large focus on the sovereignty of domestic courts. This is exemplified in para. 40 (2) in the 1958 Immigration act, which states that "(…) the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain."

In 2001, Australia introduced new legislation to prevent asylum seekers from entering the country without a visa.\footnote{Vrachnas et. al. 2008, p. 297} Not having a valid visa makes you an unlawful citizen. This is not a criminal offence, but unlawful citizens face mandatory detention, removal from Australia and must pay for the cost of enforcement.\footnote{Vrachnas et. al. 2008, p 159} As a consequence, all asylum seekers arriving in Australia without a valid visa will be detained.\footnote{Vrachnas et. al. 2008, p 160-161}

Note that the Australian authorities don’t just have the discretion to decide to detain unlawful citizens, they must detain all such individuals: “The Migration Act 1958 (Cth) states that unlawful non-citizens must be detained. They must be held on detention (in either an immigration detention center or prison) until a visa is granted or the person is removed or deported. (…) Unlawful non-citizens are liable to pay the cost of their detention.”\footnote{Vrachnas et. al. 2008, p 167-168} This also applies to asylum seekers, and there is no mention of a time limitation on the detention period in the Migration Act.\footnote{Vrachnas et. al. 2008, p 179}

It is still possible for asylum seekers who have entered Australia unlawfully to receive refugee. This is in practice difficult and initially only temporary residence will be granted.\footnote{Vrachnas et. al. 2008, p 178} Australia sets a yearly quota on how many refugees who receive residency each year, and in 2005-06 only 10 percent of such permits where given to asylum seekers on Australian soil, the rest were given to refugees elsewhere from the UNHCR resettlement program.\footnote{Vrachnas et. al. 2008, p 176}

Refugees falling under the “Pacific Solution” amendments in the Migration Act are excluded from the ordinary procedure for refugee assessment.

### 5.2.2 The Pacific Solution

In August 2001, the Norwegian ship “Tampa Bay” rescued hundreds of asylum seekers from a sinking vessel in international waters between Indonesia and Australia. The Australian gov-
ernment refused disembarkment in Australia. Australia sent the asylum seekers to New Zealand, and the small island nation of Nauru. The first country had accepted to allot the asylum seekers assessment of their application, while the latter followed a hastily bilateral agreement with Australia and had not signed the 1951 Convention\textsuperscript{148}. In addition, the Australian government prevented any new vessels carrying asylum seekers from penetrating Australian territorial waters, resulting in some ships being pushed back onto the high seas\textsuperscript{149}.

In the subsequent trial in Australian Federal Court, applying mostly domestic law, the majority concluded that “\textit{the only relevant provision of the Convention was a duty not to return asylum seekers to a country where they might face persecution.”}\textsuperscript{150}

After the Tampa-incident Australia launched a policy called the “Pacific Solution” and made bilateral agreements with Nauru and Papua New Guinea. Australia would intercept all asylum seekers trying to arrive by boat. Asylums seekers that tried to enter Australia without a valid visa would be detained in Nauru and Papua New Guinea awaiting assessment of their claim.\textsuperscript{151} Asylum seekers detained on these pacific islands have no access to Australian courts and may not appeal their assessment.

The policy was in force from 2001-2007 but was temporarily abolished by the Rudd administration in 2008.\textsuperscript{152} A modified version of the Pacific Solution was re-established in August 2012 and is still in force.\textsuperscript{153}

The Australian “Pacific Solution” consists of three policies:

1. The Australian navy intercepts vessels carrying asylum seekers
2. Asylum seekers are intercepted, and either turned around or transferred to detention centers in Nauru or Papua New Guinea (the latter closed in November 2017).
3. Thousands of islands are legally defined to be exempt from Australia’s jurisdiction in terms of refugee law. Any asylum seekers landing on these islands are unable to apply for asylum in Australia. Such individuals are to be detained in the pacific detention centers and are subject to a special legal procedure.\textsuperscript{154}

\textsuperscript{148} Nauru became a party to the Convention in 2011
\textsuperscript{149} Magner, 2004, p. 53-55
\textsuperscript{150} Magner, 2004, p. 55
\textsuperscript{151} Magner, 2004, p. 55-56
\textsuperscript{152} The Sydney Morning Herald, 2008
\textsuperscript{153} The Sydney Morning Herald, 2013
\textsuperscript{154} Magner, 2004, p. 62
Furthermore, Australian authorities have made it illegal to travel to, enter, or remain in Australia without a valid visa. A non-citizen without a visa is defined as “an unlawful non-citizen who must be detained.”

The purpose of these changes was to deter asylum seekers from making the dangerous journey by boat and receive asylum seekers primarily through the UNHCRs mechanism refugee settlement in safe third countries for relocation. “Australia’s refugee program has generally been implemented thought overseas resettlement, an approach the government strongly prefers to unauthorized arrivals of any type.”

When it became clear that Australia intended to send all asylum seekers intercepted at sea to Nauru and Papua New Guinea, the UNHCR declined to review any claims. “UNHCR asserted that Australia’s practice was inconsistent with international obligations under the Refugee Convention, and stated that the government should admit asylum seekers to Australia for screening.” Australia responded by sending officials to review the asylum seekers applications. However, they did not initially grant anybody residency in Australia, but rather cleared refugees for residency in other safe, third countries. However, in 2006 Australia had given mainland refuge to 586 of 1509 asylum seekers after asylum assessment in Nauru, some 39 percent.

The Australian parliament has put down some conditions to transfer an asylum seeker to a third country for application assessment. The country must satisfy the following criteria to be considered a safe third country:

- provides access, for persons seeking asylum, to effective procedures for assessing the person’s need for protection;
- provides protection for persons seeking asylum pending determination of their refugee status;
- provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- meets relevant human rights standards in providing that protection.”

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155 Vrachnas et. al. 2008, p. 23
156 Magner, 2004, p. 59
157 Magner, 2004, p. 56
158 Ibid
159 AHRC 2006. Para 4.12
160 Explanatory memorandum, 2016, para 7
The Pacific Solution policy may be problematic in a human rights context, especially problematic is perhaps the theoretical probability of individuals being detain indefinitely. However, Australian authorities have taken care not to breach their interpretation\(^1\) of the non-refoulment principle, and “there are no reports of the Australian government forcibly returning asylum seekers from Nauru or Papua New Guinea to countries where their lives of freedom would be threatened.”\(^2\)

### 5.3 Case study: Agreement between the EU and Turkey

#### 5.3.1 The agreements of 2015 and 2016

In November 2015, the EU and Turkey agreed to outsource EU’s boarder control to Turkey. In return, Turkey would receive monetary benefits and long term, political breakthroughs.\(^3\)

Although the text in the agreement itself did not specifically state that Turkey should try to stop all migration to the EU, this was a clear understanding, and nevertheless the result of the 2015 agreement:

“Results must be achieved in particular in stemming the influx of irregular migrants. The EU and Turkey agreed to implement the Joint Action Plan which will bring order into migratory flows and help to stem irregular migration. As a consequence, both sides will, as agreed and with immediate effect, step up their active cooperation on migrants who are not in need of international protection, preventing travel to Turkey and the EU, ensuring the application of the established bilateral readmission provisions and swiftly returning migrants who are not in need of international protection to their countries of origin. (...) Both sides underlined their shared commitment to take decisive and swift action to enhance the fight against criminal smuggling networks.”\(^4\)

In order to agree to this deal, Turkey received several political victories. The EU accession process was to be “re-energized”\(^5\), EU should pay Turkey 3 billion Euros\(^6\), visa-

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3. European Parliament 2018
4. European Council 2015, para 7
5. European Council 2015, para 2
6. European Council 2015, para 6
requirements where to be removed for Turkish citizens by 2016\textsuperscript{167}, and the agreement contain various provisions for tighter cooperation in customs, business and energy\textsuperscript{168}.

This agreement was expanded and clarified on March 18, 2016, and now also includes provisions for return of “irregular migrants” to Turkey, and a resettlement program for refugees already in Turkey. Turkey will accept return of all asylum seekers crossing the border from Turkey to the Greek islands, and EU will resettle one refugee from Turkey for every Syrian asylum seeker returned this way. As compensation, Turkey receives additional 3 billion Euros (for a total of 6), more lenient visa requirements for Turkish citizens entering the EU, and a renewal of negotiations with the intent of accepting Turkey as an EU-member are maintained.\textsuperscript{169}

Breaking the business model of people smugglers by interception and return of asylum seekers are a key component of the agreement. “\textit{Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece, and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU decided to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea.}”\textsuperscript{170}

The return of asylum seekers and migrants to Turkey, are grounded on the safe third country standard. According to international and EU law, asylum seekers arriving from Turkey can only be returned to Turkey if the country is in fact considered safe, otherwise this would constitute refoulment.

In M.S.S. v. Belgium and Greece ECHR emphasizes the right to efficient protection, and protection from chain refoulment. The quality of the asylum procedure was a fundamental point in the determination. “\textit{Whether Turkey truly meets the criteria to be designated a safe country, as it has been under the deal, remains in question.}”\textsuperscript{171} To this point its worth noting that the ECHR in the M.S.S-verdict found the asylum procedure in Greece to be insufficient. In the year 2015 was 2,5 million asylum seekers and migrants in Turkey\textsuperscript{172}, putting considerable strain on the asylum administration. With such a huge strain on the asylum administration, it is worth remembering that according to the ECHR it is the actual situation and treatment of

\textsuperscript{167} European Council 2015, para 5  
\textsuperscript{168} European Council 2015, para 8-10  
\textsuperscript{169} Prop. 90 L (2015–2016), 2016 p. 6  
\textsuperscript{170} European Parliament 2018  
\textsuperscript{171} Collett 2016  
\textsuperscript{172} IOM 2017
asylum seekers that should be considered, not the extent of formal agreements signed when deciding if a return to a third country fails to grant efficient protection from (chain) refoulement.\textsuperscript{173}

There are also several concerns with the general human rights situation in Turkey. The UN Human Rights office recently released a report that paints a grim picture of human rights in Erdogan’s Turkey. Torture and other ill-treatment, together with arbitrary detentions are among of the findings. \textsuperscript{174}

5.3.2 How does the EU-Turkey agreement compare to the Pacific Solution?

Some might say that the EU countries now are hoist by their own petard. It is a paradox that the European Union has preached its own high asylum standards to the rest of the world, but now seem to circumvent the intention of the 1951 convention by outsourcing border control, as well as returning asylum seekers to Turkey, a country with a questionable reputation on human rights.\textsuperscript{175}

The similarities between the EU-Turkey agreement and Australia’s Pacific Solution should not be ignored.

Despite obvious differences leading from the nature of geography and legal systems and traditions, there are fundamental and principal similarities between the two policies:

1. Both policies open for interception of asylum seekers at sea.
2. Intercepted asylum seekers are to be transferred and/or detained in a third country that is presumed safe
3. Both policies open for transfer of asylum seekers that reach a designated migration-zone to said third country. (Greece and Australian island exempt from the ordinary migration zone).
4. It is reasons to believe that the material living standard for the asylum seekers while awaiting assessment will be worse in both Nauru and Turkey, compared to Australia or any EU country.
5. There are discussions about the legality of the treatment the asylum seekers will face in the safe third country from a human rights standpoint. It can be argued that the EU-

\textsuperscript{173} M.S.S. v. Belgium and Greece, 2012 \textsuperscript{174} UN Human Rights Office, 2018 \textsuperscript{175} Collett 2016
Turkey deal is a breach of the principles ECHR outlined in the M.S.S-verdict, and the possibility of indefinite detention in Nauru is problematic for Australia.

6. The justification is in both cases to reduce people smuggling and avoid asylum seekers drowning trying to reach their preferred destination.

7. Both cases are a de facto suspension of the right to seek asylum. Australia is receiving most of its refugee’s through UN resettlement programs, and the EU have agreed to receive asylum seekers that are already declared convention refugees from Turkey. However, no individual may seek direct asylum in neither of the two immigration zones.

The human rights developments in Turkey under president Erdogan have largely been negative, and cooperation between EU and Turkey on other areas is strained. European diplomats say the refugee deal is one of the few areas where constructive co-operation with Turkey has continued after bitter public disputes erupted with Germany, the Netherlands, Austria and the EU.

6 Refusing assessment of asylum applications – international trends

6.1 Possible implications of state practice

As we have seen in the chapters above, international refugee law has somewhat of a dual and conflicted nature. On one hand, states have agreed to conventions that give refugees asylum seekers as potential refugee’s expansive rights. At the same time, these rights, especially the unrestricted right to non-refoulment, limit the state’s sovereignty considerably.

To combat this, states have adopted several different practices to avoid losing control over admission and expulsion of immigrants. Regional agreements that limit an asylum seekers limit of choice, interception or refused entry for asylum seekers and accelerated and admissibility procedures are all legal constructions that prevent asylum seekers to have their application assessed in their country of choice.

The states in the case studies respect the principle of non-refoulment. Non-refoulment is by some seen as the only right that may surpass the national sovereignty in domestic refugee law.

176 Financial Times, 2018
This have had the consequence that EU and Australia have defined special zones as exempt from the possibility to seek asylum, and Norway have passed a bill allowing for mass rejection of asylum seekers in case of mass influx. As Costello puts it: “the non-refoulement principle presupposes some kind of contact between the State and the protection-seeker.”

Australia and USA have for some time had a different view of turning asylum seekers in international waters. The ECHR and the Supreme Court of the United States have reached opposite conclusions in the Hirsi Jamaa-case and Sale v. Haitian Centers Council. On the other hand, it can be argued that agreements outsourcing the border control to Morocco, Libya or Turkey, as performed by EU or EU countries are not morally different from an interception and return in international waters. The outcome for the refugee is the same in both situations; the only difference is that the access to the desired country of asylum is halted one step earlier in the process. The EU-Turkey agreement also allows for interception and return in the Aegean Sea. This agreement may be a turning point in European refugee law.

We have also seen that Norway recently have done significant amendments to the domestic Immigration Act. The changes give a wide margin for refusing to assess asylum claims arriving from any land border, as well as opening for the possibility of refusing all asylum seekers trying to enter from a Nordic neighboring country in the event of a large influx.

If the development continues, the divide between the 1951 Convention’s intentions and the practical reality might increase even further. One consequence could be that only the most resourceful, that have the means and ability to pay off people smugglers to circumvent the legal barriers get to enjoy the possibility of asylum. It is hard to believe that an interpretation of the 1951 Convention, using the principle of good faith in the Vienna Convention, would deem such a situation satisfactory.

There is no doubt that there is quite some cognitive dissonance in how most States publicly appraise the current asylum regime, and at the same time make legal workarounds that limit the systems effectiveness and intention. Gibney might me correct when he states that “Liberal democratic states publicly avow the principle of asylum but use fair means and foul to prevent as many asylum seekers as possible from arriving on their territory where they could claim its protections.”

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177 Costello 2012, Para 1
178 ECHR 2012: Hirsi Jamaa and Others v. Italy
179 Sale v. Haitian Centers Council, inc, 1993
6.2 Fundamental problems with the 1951 Convention

Looking at a strict legal interpretation of the 1951 Convention, it may seem peculiar why states would go to such lengths to avoid the consequences of its provisions. From the lawyer’s perspective, it may sometimes seem like some states are regularly trying to circumvent and undermine human rights law in general, and refugee law in particular.

The divide between the ability and political will of states to receive asylum seekers, and the potential number of refugees and economic migrants wishing for protection in a developed country makes for quite a paradox.

As we have seen, States are continuously developing mechanisms to prevent potential refugees from accessing their rights after the 1951 Convention. States have agreed to give refugees strong rights but are doing what they can to prevent individuals from accessing these rights. Current practice makes it so that “Refugees may thus never be able to reach the territory of a country which has in principle agreed to receive them; they may never be in a position to state their claim to a person with the legal responsibility and authority to protect them; or both.”

This paradox may perhaps make the 1951 Convention itself a problem in aiding refugees.

The relatively few refugees that manage to reach and file a claim to asylum in a developed country initiate legal rights that states cannot ignore if they are to oblige by international humanitarian law. As such, states are obliged to follow up these rights with funds. In contrast, the funds going to aid the rest of the world’s refugees, who constitute the vast majority, consist of voluntary contributions.

These contributions must be weighed against all other “good causes” in a nation’s budget. During the asylum crisis in 2015, Norway even pulled 1,1 billion NOK from the aid budget to finance the increase in asylum applicants.

Acknowledging that resources allocated to protecting refugees is limited, it may be morally questionable to continue a system that is not efficient. Let’s look at some examples to elaborate this point:

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182 Prop. 1 S Tillegg 1 (2015–2016)
1. In 2017, the “Global Refugee Program” of UNHCR had a budget of 5 564 billion USD, or approx. 46 billion NOK. This budget is supposed to provide for 68,5 million people, thereof 25,4 million refugees.  

   In the same budget year, Norway alone allocated 27 billion NOK to “domestic immigration and integration”. This is more than half of the UNHCR global budget, but only benefits a few thousand asylum seekers, refugees and migrants.

2. Germany only accepted 48 percent of asylum applications in the first assessment in the last quarter of 2017. This is not unique for Germany, but all states processing asylum applications have rejections. Assessing application from people without protection needs drains large amount of resources that could have been used to help convention refugees. The UN General assembly are aware of the difficult task of differentiating refugees from other migrants and have warned that this may create a harsh and unreceptive climate for protection. That may be true, but it is nevertheless a problem that assessment of applications that in the end doesn’t provide refugee status is an inefficient use of resources.

   It is unrealistic to assume that the states making up the international community at any time will allocate indefinite resources to improve the situation for refugees. Collingson believes that “the international community is not infinitely generous. An obligation to protect refugees, and the needs of refugees themselves, will in practice always be balanced against the political and economic interests and concerns of potential asylum states.” This argument seem to find backing in the state’s behavior examined in the case studies of this thesis. If we assume that Collingson are at least somewhat right in this statement, the efficiency of the system for refugee aid is paramount. The functionality, as well of the results of the 1951 Convention, should be assessed with this in mind.

The scope of the 2015-16 asylum-crisis challenged the European asylum system. The number of refugees has risen sharply in the last decades. In 1993 the number of refugees in the world constituted 18 million. As far back as 1993, the UN Executive Committee recognized that

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183 UNHCR 2018  
184 NOU 2017:2  
185 Deutsche Welle, 2017  
186 UN General Assembly (1997), paragraph 2  
188 Executive Committee (1993), paragraph 3
the institute of asylum might face problems with overload: “The cumulative effect of these developments has been to place even more severe strains on the international system for the protection of refugees and particularly on the institution of asylum\textsuperscript{189}. (…) the sheer numbers of refugees requiring asylum are a daunting challenge to the international community, and it is perhaps not surprising that the institution is under serious pressure and that the Office must contend with threats to asylum on several fronts.”\textsuperscript{190}

At the time of writing this thesis, there are 25,4 million refugees in the world, and an unprecedented 68.5 million people around the world have been displaced.\textsuperscript{191} The numbers of refugees are increasing and are expected to increase further. The demographic development in the world will likely see this figure rise dramatically in the upcoming years. According to a UN report, the population in Africa will quadruple by 2100, from one billion to four billion people.\textsuperscript{192} This is assumed to lead to more conflict, famine and an increase in the number of refugees and internally displaced.

It now seems that the EU is taking lessons from Australia and America, not the other way around. The EU-Turkey deal has many similarities with Australia’s Pacific Solution. How EUs new policy can be harmonized with ECHR case law is an open question.

In 2016 alone, 5069 asylum seekers drowned in the Mediterranean Sea.\textsuperscript{193} I would be wrong to say that this is an effect of the EU-Turkey agreement, as these tragedies have been a problem for two decades. More than 33 000 migrants have died since 2000.\textsuperscript{194} Nevertheless, people smuggling, and capsizing have become a tragic consequence of today’s asylum and refugee system.

Vrachnas et.al have argued that the refugee definition itself is arbitrary and resolves from a specific historical context. They argue that the definition of the convention grounds was rooted in the western democracies experience after world war II, rather than principle. “The right to express witch political party or political ideology one prefers, for example, is of little use

\begin{flushleft}
\textsuperscript{189} Executive Committee (1993), para 5  \\
\textsuperscript{190} Executive Committee (1993), para 8  \\
\textsuperscript{191} UNHCR 2018  \\
\textsuperscript{192} Gerland mf, 2014  \\
\textsuperscript{193} IOM 2017  \\
\textsuperscript{194} Independent, 2017
\end{flushleft}
“unless one has food and shelter.”195 They contend that the refugee definition is fundamentally flawed, unduly narrow and ultimately arbitrary. 196

With the 1951 Convention’s record as an instrument for refugee aid being questionable from a utilitarian standpoint, the refugee definition itself not being based on an overarching principle197, and states feeling incentivized to establish legal constructions that opposes the Convention’s intention, there may be a need for a fundamental de lege ferenda discussion about international refugee law.

7 Concluding remarks

Even though refugees in theory have expansive rights under international law, we have seen that many western democracies have introduced several legal creations that minimize the opportunity for asylum seekers to ever exercise this right. Based upon more or less internationally recognized principles such as the principles of safe third country and accelerated and admissibility procedures, the constructions nevertheless severely undermine the right to seek asylum.

The case studies have shown that many states in practice don’t recognize a right to asylum, at least not the right to asylum in the country of the asylum seekers choice. States do however generally respect the right to non-refoulment. This leads to a situation where states are incentivized to allow for the assessment of as few asylum applications as possible. Once an asylum seeker formally has entered an asylum process in a country, the individual benefits from a strong protection against refoulement, limiting the states sovereignty considerably.

Australia has been known for its restrictive asylum policy since the Tampa-incident in 2001. The case studies have shown that there are many similarities between Australia’s “Pacific Solution” and the European Union’s 2015/16 agreement with Turkey. Norway, also traditionally known for a liberal policy, adopted clear restrictions with an overwhelming support in Parliament when put under pressure during the 2015- asylum crisis.

195 Vrachnas et. al. 2008, p. 302
196 Vrachnas et. al. 2008, p. 298
197 Vrachnas et. al. 2008, p. 302
The Lords of appeal\textsuperscript{198} may have been right when they stated that the 1951 Convention would eventually become an anachronism if it did not evolve. The recent behavior of traditionally liberal European states may suggest that the refugee Convention is not adapting fast enough.

The 1951 Convention and the 1967 Protocol should not be exempt from a \textit{de lege ferenda} assessment. As all laws and treaties, they are a product of their time. Neither the Convention nor its Protocol does necessarily constitute the best way for aiding refugees in our time.

\footnote{198}{HOL 2003}
8 Reference list

8.1 Books
Evans 2010: Evans, Malcolm D, International Law, 2010


Hathaway/Foster 2014: Hathaway, James C., Foster, Michelle, The law of refugee status, 2014


Øyen 2013: Øyen, Øyvind. Lærebok i Utlendingsrett, 2013

8.2 International conventions and treaties


United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York December 10, 1984

8.3 UN Documents

UNHCR 1977: Note on Determination of Refugee Status under International Instruments EC/SCP/5, 1977
URL: http://www.unhcr.org/excom/scip/3ae68cc04/notedetermination-refugee-status-under-international-instruments.html
(Last accessed November 23, 2018)

UNHCR 1994: UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law, 1994
URL: http://www.refworld.org/docid/437b6db64.html
(Last accessed November 23, 2018)

UNHCR 2001: UN High Commissioner for Refugees (UNHCR), Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12,
URL: http://www.refworld.org/docid/3b36f2fca.html
(Last accessed November 23, 2018)

URL: https://www.unhcr.org/419c74d64.pdf
(Last accessed November 23, 2018)

UNHCR 2011: UNHCR Handbook and guidelines on procedures and criteria for determining refugee status, 2011
(Last accessed November 23, 2018)

UNHCR 2013: UN High Commissioner for Refugees (UNHCR), In the Court of final appeal of The Hong Kong Special Administrative Region Civil Appeal Nos. 18, 19 & 20 of 2011 (On Appeal from CAVC 132, 134 & 136 of 2008)
(Last accessed November 23. 2018)

UNHCR 2018: UNHCR Refugee Agency, Figures at a glance, 2018
URL: http://www.unhcr.org/figures-at-a-glance.html
(Last accessed November 23. 2018)

URL: http://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html
(Last accessed November 23. 2018)

Executive Committee (1993): The Executive Committee of the High Commissioner’s Programme (Executive Committee), Note on international protection, UN Doc. A/AC.96/815, 1993 URL: http://www.refworld.org/pdfid/3ae68d5d10.pdf
(Last accessed November 23. 2018)

Executive Committee (1994): Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations
No. 100 (LV) – 2004 Executive Committee 55th session. Contained in United Nations General Assembly document A/AC.96/1003
(Last accessed November 23. 2018)

URL: http://www.refworld.org/pdfid/3ae68d9310.pdf
(Last accessed November 23. 2018)
UN Human Right Office, 2018, Turkey: UN report details extensive human rights violations during protracted state of emergency, 2018
(Last accessed November 23. 2018)

URL: https://www.unhcr.org/419c74d64.pdf
(Last accessed November 23. 2018)

8.4 EU documents

URL: http://www.refworld.org/docid/3ae6b39f10.html
(Last accessed November 23. 2018)

(Last accessed November 23. 2018)

European Council 2015: Meeting of heads of state or government with Turkey - EU-Turkey statement, 29/11/2015
(Last accessed November 23. 2018)

European Parliament 2018: Legislative train schedule, towards a new policy on migration, EU-Turkey statement & action plan.
(Last accessed November 23. 2018)

8.5 Academic Articles

8.6 Court rulings

HOL 2002: House of Lords, Lords of Appeal 2002, - Regina v Secretary of State For The Home Department Ex p Thangarasa and Regina v Secretary of State for the Home Department, Ex p Yogathas
URL: http://www.refworld.org/cases,GBR_HL,478cbf942.html
(Last accessed November 23. 2018)
HOL 2003: House of Lords; Lords of Appeal 2003, Sepet (FC) and Another (FC) v. Secretary of State for the Home Department
URL: http://www.refworld.org/cases,GBR_HL,3e92d4a44.html
(Last accessed November 23. 2018)

ECHR 2008 (1): European Court of Human Rights (ECHR), Grand Chamber: Saadi v. Italy, 2008
URL: http://www.refworld.org/cases,ECHR,47c6882e2.html
(Last accessed November 23. 2018)

URL: http://www.refworld.org/cases,ECHR,47a074302.html
(Last accessed November 23. 2018)

ECHR 2011: European Court of Human Rights (ECHR), Grand Chamber: M.S.S. v. Belgium and Greece, 2011
(Last accessed November 23. 2018)

ECHR 2012: Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012
URL: http://www.refworld.org/cases,ECHR,4f4507942.html
(Last accessed November 23. 2018)

URL: https://www.uio.no/studier/emner/jus/jus/JUR5530/v08/undervisningsmateriale/Sale%20v%2C%20Haitian.pdf
(Last accessed November 23. 2018)

8.7  **Documents from the Norwegian Parliament**

Endringer i utlendingsloven (innstramninger), 2015, debate, vote and decision 16.11.2015
URL: https://www.stortinget.no/no/Saker-ogpublikasjoner/Vedtak/Beslutninger/Lovvedtak/2015-2016/vedtak-201516-005/
(Last accessed November 23. 2018)

Letter to the political parties in the Norwegian Parliament, 18.11.2015,
Vote in parliament 2015: Vote in the Norwegian Parliament, November 16, 2015:
https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt/?p=63964&dnid=1&id=6408&view=party-vote
(Last accessed November 23, 2018)

URL: https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstilling/Statortinget/2015-2016/inns-201516-391/
(Last accessed November 23, 2018)

Innst. 54 L (2017-2018), 2017 Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), 30.11.2017
URL: https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstilling/Statortinget/2017-2018/inns-201718-054l/
(Last accessed November 23, 2018)

8.8 Documents from the Norwegian Government

URL: https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/
(Last accessed November 23, 2018)

URL: https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/
(Last accessed November 23, 2018)

URL: https://www.statsbudsjettet.no/Upload/Statsbudsjett_2016/dokumenter/pdf/Prop_1_s_tillegg1_2015-2016.pdf
(Last accessed November 23, 2018)
8.9 Documents from the Australian Parliament

(Last accessed November 23, 2018)

(Last accessed November 23, 2018)

8.10 Online articles

Deutsche Welle, 2017: EU asylum applications drop off drastically in 2017
(Last accessed November 23, 2018)

Financial Times, 2018: Turkey migration deal sparks second-phase EU funding row.
URL: https://www.ft.com/content/1e9aeb34-0100-11e8-9650-9c0ad2d7c5b5
(Last accessed November 23, 2018)

Independent, 2017: German newspaper publishes names of 33,000 refugees who died trying to reach Europe, 2017
URL: https://www.iom.int/countries/turkey
(Last accessed November 23. 2018)

(Last accessed November 23. 2018)

Tv2, 2018: Antallet asylsøkere har stupt – men det har ikke antall ansatte, 7.10.2018
URL: https://www.tv2.no/a/10099728/
(Last accessed November 23. 2018)

Pew Reaserch Senter, 2016: Number of Refugees to Europe Surges to Record 1.3 Million in 2015
Number of Refugees to Europe Surges to Record 1.3 Million in 2015, 2.08.2016
URL: www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/
(Last accessed November 23. 2018)

UDI, 2017: Hvem og hvor mange søkte om beskyttelse i 2016?
URL: https://www.udi.no/statistikk-og-analyse/arsrapporter/tall-og-fakta-2016/faktaskriv-2016/hvor-mange-sokte-om-beskyttelse/
(Last accessed November 23. 2018)

UDI, 2017 (December): Forventninger om antall asylsøkere til Norge i 2018 og 2019 (anslag per desember 2017)
(Last accessed November 23. 2018)

The Sydney Morning Herald, 2008, Flight from Nauru ends Pacific Solution
(Last accessed November 23. 2018)
The Sydney Morning Herald, 2013, Kevin Rudd to send asylum seekers who arrive by boat to Papua New Guinea
(Last accessed November 23, 2018)