Faculty of Law
University of Helsinki

THE IMPLICATIONS OF THE SECURITISATION OF IMMIGRATION UPON THE RIGHT TO SEEK ASYLUM IN THE EUROPEAN UNION

AN INTERDISCIPLINARY LEGAL ANALYSIS

Mehrnoosh Farzamfar

DOCTORAL DISSERTATION

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Supervisors:	Professor Tuomas Ojanen Professor of Constitutional Law Faculty of Law University of Helsinki
	Professor Reetta Toivanen Professor of Sustainability Science Faculty of Arts University of Helsinki
Thesis advisor:	Professor Magdalena Kmak Professor of Public International Law Åbo Akademi University University Researcher University of Helsinki
Preliminary examiners:	Professor Elspeth Guild Jean Monnet Professor *ad personam* Queen Mary University of London
	Professor Eeva Nykänen Faculty of Social Sciences and Business Studies University of Eastern Finland
Opponent:	Professor Elspeth Guild Jean Monnet Professor *ad personam* Queen Mary University of London

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DEDICATION

I would like to dedicate this work to all those people, who lost their lives in search of a safe home. Even one life missed is too many for humanity. This reminds me of a poem entitled 'Bani-Adam' – meaning 'the Humankind' – by Saadi Shirazi, the Persian poet of the thirteenth century:

'Human beings are members of a whole,
in creation of one essence and soul.

If one member is afflicted with pain,
other members uneasy will remain.

If you have no sympathy for human pain,
the name of human you may not retain.'[1]

[1] Shaykh Mushrifuddin Sa'di of Shiraz, *The Gulistan, Rose Garden of Sa'di: Bilingual English and Persian Edition with Vocabulary* (translated by Wheeler M. Thackston, Maryland: Ibex Publishers, 2008), pp. 21 and 22. In this regard, also see: Homa Katouzian, *Sa'di: The Poet of Life, Love and Compassion* (Oxford: Oneworld Publications, 2006), p. 31.

ABSTRACT

In this doctoral dissertation, I study the tense relationship between the obligations to protect human rights of immigrants, on the one hand, and the need to safeguard the internal security of the European Union (EU), on the other. Although a considerable amount of research is available on the link between immigration and security, there is a clear lack of understanding of what this tension actually means for the right to seek asylum in the EU as a fundamental right. The aim is thus to fill this knowledge gap by analysing the possible impacts of EU security narratives on the human rights discourse, particularly on the right to seek asylum as a fundamental right protected under Article 18 of the EU Charter of Fundamental Rights.

Being a fundamental right implies that there is an inviolable essence that may not be limited or balanced against in anyway – even if the security concerns of the EU or its Member States are allegedly at stake. The inviolable essence of the right to seek asylum includes two core elements: (1) that asylum seekers should be allowed to enter the territory of the EU in order to submit claims for asylum; and (2) that they should not be returned to places where their lives are clearly at risk (the principle of *non-refoulement*). However, portraying immigrants, especially those arriving from the Global South, as potential threats to EU internal security and the national security of its Member States, has led to restrictive immigration policies and practices, which affect the inviolable essence of this right. Accordingly, the main research question addressed here is what the implications are of the securitisation of immigration in the EU upon the right to seek asylum as a fundamental right.

Studying the concept of security and its different aspects lies beyond the field of jurisprudence. Therefore, to answer the main research question, an interdisciplinary approach combining the methods of law and social sciences is to be adopted. To be precise, the method applied here is critical discourse analysis – an analytical tool available to both critical legal studies and critical security studies. To address the possible results of securitising immigration on the right to seek asylum as a fundamental right in the EU, I critically analyse the practices of EU Member States, the content of EU laws, and the jurisprudences of the Court of Justice of the European Union and the European Court of Human Rights in relevant immigration cases.

In conclusion, I show that the official narrative of fear, anxiety, and emergency – that immigration poses existential threats to EU internal security and the national security of its Member States – is eroding the status of the right to seek asylum to less than that of a fundamental right. The significance of the findings of this research is that if the right to seek asylum is to remain a real and effective right, rather than only a theoretical or illusionary one, we should take this right *seriously* by protecting its essence.

TIIVISTELMÄ

Väitöskirjassani tutkin, mikä on pakolaisten ihmisoikeuksien suojan ja Euroopan unionin (EU) alueellisen turvallisuuden suhde. Aiheesta on olemassa lukuisia tutkimuksia, mutta missään niistä ei keskitytä tarkastelemaan, miten näiden välinen jännite vaikuttaa turvapaikkaoikeuteen EU:n takaamana perusoikeutena. Koska oikeus turvapaikkaan on taattu EU:n perusoikeuskirjan 18 artiklassa, sillä voidaan katsoa olevan loukkaamaton ydinalue, jota ei voida rajoittaa mahdollisten turvallisuussyiden perusteellakaan.

Turvapaikkaoikeuden ydinalueeseen kuuluu ensinnäkin se, että turvapaikanhakijoiden tulee olla mahdollista saapua EU:n alueelle hakemustensa jättämiseksi. Toiseksi turvapaikanhakijoita ei tule palauttaa paikkoihin, joissa heitä uhkaisi hengenvaara (palautuskiellon periaate, non-refoulement). Etenkin globaalista etelästä EU-maihin saapuvia turvapaikanhakijoita on kuitenkin enenevässä määrin luokiteltu turvallisuusriskiksi, joka on johtanut kumpaakin ydinalueen osatekijää rajoittaviin käytäntöihin. Keskeinen tutkimuskysymykseni on, miten maahanmuuton turvallistaminen (securitisation) EU:ssa vaikuttaa perusoikeutena turvattuun oikeuteen hakea turvapaikkaa.

Turvallistamisen käsite on lähtöisin yhteiskuntatieteestä eikä sitä voi tarkastella pelkästään oikeustieteen menetelmin. Tutkimusmetodini on siten tieteidenvälinen. Esimerkiksi käyttämääni kriittistä diskurssianalyysia, hyödynnetään sekä oikeustutkimuksessa ja turvallisuustutkimuksessa. Maahanmuuton turvallistamisen perusoikeusvaikutusten selvittämiseksi analysoin EU:n jäsenmaiden käytäntöjä ja unionin lainsäädäntöä yhdessä keskeisten EU:n tuomioistuimen ja Euroopan ihmisoikeustuomioistuimen ratkaisujen kanssa.

Osoitan väitöskirjassani, että EU:n virallislähteissä turvapaikanhakijoihin liitetään usein pelon, ahdistuksen ja hätätilan narratiiveja. Turvapaikanhakijoiden pitäminen uhkana EU:n ja sen jäsenmaiden sisäiselle turvallisuudelle heikentää turvapaikkaoikeuden asemaa perusoikeutena. Jotta oikeus turvapaikkaan säilyisi tehokkaana eikä muuttuisi pelkästään teoreettiseksi, se tulisi ottaa vakavammin ja suojata tehokkaasti sen ydinalueen osatekijöitä.

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In 2018, I was lucky to join the Academy-of-Finland funded Centre of Excellence in Law, Identity and the European Narratives (EuroStorie with funding decision numbers 312431 and 336678). Moreover, in 2021, I joined the research consortium JuRe funded by the Strategic Research Council at the Academy of Finland (PI Grant 345950). Besides EuroStorie and JuRe consortium, the Doctoral School in Humanities and Social Sciences (HYMY), the Doctoral Programme in Law at the Faculty of Law, the Finnish Constitutional Law Society (V*altiosääntöoikeudellinen seura*), and the Nordic Federation of Public Administration (*Nordiska administrativa förbundet*, NAF) have generously funded academic visits and learning activities during my doctoral studies.

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LIST OF ABBREVIATIONS

ACHR	The American Convention on Human Rights (1969)
A.D.	*Anno Domini*, Latin for 'in the year of the Lord'
ADX Florence	The United States' Penitentiary, Administrative Maximum Facility
AG	Advocate General of the Court of Justice of the European Union
Banjul Charter	The African (Banjul) Charter on Human and Peoples' Rights (1981)
CAT Comm.	The United Nations Committee against Torture
CAT	The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
CEAS	The Common European Asylum System
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women (1979)
CIA	The Central Intelligence Agency (of the Federal Government of the United States)
CJEU	The Court of Justice of the European Union
CoE	The Council of Europe
COI	The Country of Origin Information
CRC	The United Nations Convention on the Rights of the Child (1989)
Doc.	Document
Docs	Documents
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECJ	The European Court of Justice
ECRI	The European Commission against Racism and Intolerance
ECtHR	The European Court of Human Rights
ed.	Editor
edn	Edition
eds	Editors
EEC	The Treaty establishing the European Economic Community (1957 Treaty of Rome)
EU Charter	The European Charter of Fundamental Rights (2000)
EU	The European Union
Europol	The European Union Agency for Law Enforcement Cooperation
Frontex	The European Border and Coast Guard Agency
GID	The Jordanian General Intelligence Directorate
HRC	The United Nations Human Rights Committee
ICCPR	The International Covenant on Civil and Political Rights (1966)

ICERD	The International Convention on the Elimination of All Forms of Racial Discrimination (1965)
ICJ Statute	The Statute of the International Court of Justice (1946)
ICJ	The International Court of Justice
ICTY	The International Criminal Tribunal for the former Yugoslavia
ILC	The International Law Commission
INGO	International Non-Governmental Organization
INGOs	International Non-Governmental Organizations
IR	International Relations (as a field of study in political science)
ISIS	The Islamic State of Iraq and the Levant
Mr.	Mister
NGO	Non-Governmental Organisation
NGOs	Non-Governmental Organisations
No.	Number
Nos	Numbers
p.	Page
para.	Paragraph
paras	Paragraphs
pp.	Pages
RSD	Refugee Status Determination
SAMS	The United States' Special Administrative Measures
SIAC	The Special Immigration Appeals Commission of the United Kingdom
TEC	Treaty establishing the European Community
TEU	The Treaty on European Union (2009)
TFEU	The Treaty on the Functioning of the European Union (2009)
UDHR	The Universal Declaration of Human Rights (1948)
UK	The United Kingdom of Great Britain and Northern Ireland
UN Charter	The Charter of the United Nations (1945)
UN	The United Nations
UNCLOS	The United Nations Convention on the Law of the Sea (1982)
UNGA	The United Nations General Assembly
UNHCR	The United Nations High Commissioner for Refugees
UNSC	The United Nations Security Council
US	The United States of America
VCLT	The Vienna Convention on the Law of Treaties (1969)
WWI	The First World War
WWII	The Second World War

1. INTRODUCTION

1.1. RESEARCH BACKGROUND

The freedom of movement of persons is an internationally recognised human right. Amongst many other human rights instruments,[2] the normative foundations of this right include the following: Article 13 of the 1948 Universal Declaration of Human Rights (UDHR),[3] Article 12 of the 1966 International Covenant on Civil and Political Rights (ICCPR),[4] Article 2 of Protocol No. 4 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[5] and Article 45 of the 2000 European Charter of Fundamental Rights (EU Charter).[6] However, this right is a derogable human right, as the above-mentioned legal sources allow some limitations or restrictions in situations of public emergency and under certain conditions by exercising a 'balancing act.'[7] This balancing act encompasses the tests of legitimacy (pursuing a legitimate aim), necessity, and proportionality, while taking into consideration the principles of legality, equality, and non-discrimination.[8]

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[2] More legal sources on the right to freedom of movement of persons are the following: Article 5 of the 1969 Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 15 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 10 of the 1989 United Nations Convention on the Rights of the Child (CRC), Article 3(2) of the Treaty on European Union (TEU), Article 21 of the Treaty on the Functioning of the European Union (TFEU), Article 12 of the 1981 African (Banjul) Charter on Human and Peoples' Rights (Banjul Charter), Article 22 of the 1969 American Convention on Human Rights (ACHR), and Article 20 of the Arab Charter on Human Rights.

[3] The 1948 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

[4] The 1966 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, U.N.T.S. Vol. 999, p. 171.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.

[6] Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Communities on 18 December 2000 (2000/C 364/01) and on 26 October 2012 (2012/c 326/02).

[7] Derogable rights are those human rights, which could be limited or restricted in emergencies. In this regard, see: Bernadette Rainey, Pamela McCormick, and Clare Ovey, *Jacobs, White, and Ovey: the European Convention on Human Rights* (8th edn, Oxford: Oxford University Press, 2020), pp. 114-123.

[8] Cees Flinterman, 'Derogation from the Rights and Freedoms in Time of Emergency', in Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Antwerp: Intersentia, 2018), pp. 1053-1075, pp. 1053-1068. Also, see: Samantha Besson, 'Human Rights in Relation: A Critical Reading of the ECtHR's Approach to Conflicts of Rights', in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: Oxford University Press, 2017), pp. 23-37. For information on derogation of human rights under other international human rights treaties besides the

Since early 2020, the Member States of the European Union (EU) have been restricting people's liberty of movement or the right to freedom of movement in their attempts to control the spread of the global pandemic of coronavirus disease (COVID-19). These restrictions have become the subject of serious political and legal debates as European governments seek to balance public health concerns against the obligation not to restrict the freedom of movement of individuals.[9] Since the end of the Cold War and the fall of the Berlin Wall in the early 1990s, this is the first time that such drastic measures have been imposed against the people's freedom of movement in Europe. Hence, it must be unprecedented for many European citizens to experience such restrictions.

While the COVID-19 pandemic has confined people to their homes, the focus of this doctoral dissertation is the movement of immigrants across EU external borders.[10] Events such as the so-called 'refugee crisis of 2015-2016'[11] together with terrorist attacks in various European countries since 2000, have led to the tightening of EU external border control. Therefore, the topic of my doctoral dissertation is part of the ongoing discussion on the tension between protecting the human rights of immigrants, on the one hand, as opposed to safeguarding the national security of host states, on the other.[12] My focus in this research is

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ECHR, see: Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Leiden: Martinus Nijhoff Publishers, 2012) pp. 241-253.

[9] European Commission, 'Temporary Reintroduction of Border Control', <ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en>. See also: Human Rights Watch, 'Human Rights Dimensions of COVID-19 Response', <www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#>. Also, see: The United Nations Secretary-General, 'COVID-19 and Human Rights: We are all in this Together', <www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf>. With regard to the constitutional and parliamentary debates in Finland on taking emergency measures on restricting freedom of movement, see: Päivi Johanna Neuvonen, 'The COVID-19 Policymaking under the Auspices of Parliamentary Constitutional Review: The Case of Finland and its Implications' (2020) 6(2) *European Policy Analysis*, pp. 226-237.

[10] The discussion on the implications of a health emergency like COVID-19 deserves its own independent research, which is beyond the scope of this work.

[11] The terminology is a subject of debate. Drago Župarić-Iljić and Marko Valenta, '"Refugee Crisis" in the Southeastern European Countries: The Rise and Fall of the Balkan Corridor', in Cecilia Menjívar, Marie Ruiz, and Immanuel Ness (eds), *The Oxford Handbook of Migration Crises* (New York: Oxford University Press, 2019), pp. 367-388. Also, see: Domenico Maddaloni and Grazia Moffa, 'Migration Flows and Migration Crisis in Southern Europe', in Cecilia Menjívar, Marie Ruiz, and Immanuel Ness (eds), *The Oxford Handbook of Migration Crises* (New York: Oxford University Press, 2019), pp. 603-618. See: The European Commission, 'Statistics on Migration to Europe', <ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#overall-figures-of-immigrants-in-european-society>.

[12] Valeria Bello, *International Migration and International Security: Why Prejudice Is a Global Security Threat* (New York; Oxford: Routledge, 2017), pp. 51-69. Also, see: Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals: Text and Materials* (Oxford: Oxford University Press, 2013), pp. 383-486. Also, see: Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order* (New York; Oxford: Routledge, 2011), pp. 11-48. Also, see: Edward Newman, 'Refugees, International Security, and Human Vulnerability: Introduction and Survey', in Edward Newman and Joanne Van

exclusively on limiting the right to seek asylum for reasons of national security and public safety. The security concerns of host states are included as valid grounds for restricting the freedom of movement contained within the legal sources mentioned above. It is also feasible to argue that such restrictions are necessary measures to protect the rights and freedoms of others, including the right to life (under Article 2 of the ECHR), as in the case of the threats of terrorist attacks.

Since the early 2000s, immigration to the EU has been increasingly discussed in public debate in terms of national security, the theorisation of which within the fields of social sciences is known as *the theory of securitisation* in general and *the securitisation of immigration*, specifically.[13] The securitisation of immigration in the EU perceives the governance of immigration as a case of management of *anxiety* and *unease*, which results in a specific form of governmentality based on narratives and routines.[14] This conceptualisation focuses on the analysis of public discourses on immigration, which I will explain in further details in the current chapter and in Chapter 3 of this dissertation.

Nevertheless, we need to keep in mind that this conceptualisation is inherently incapable of analysing the normative developments and the implications of the securitisation of immigration upon the enjoyment of the right to seek asylum. The reason for this limitation in analysis is that the theory of the securitisation of immigration only stays at the 'speech-act' level of portraying or conveying an issue as a matter of security.[15] Therefore, the study of the implications of this

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Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo; New York: United Nations University Press, 2003), pp. 3-30.

[13] Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171, pp. 161-164. Also, see: Anastassia Tsoukala, 'Defining the Terrorist Threat in the Post-September 11 Era', in Didier Bigo and Anastassia Tsoukala (eds), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* (Oxford; New York: Routledge, 2008), pp. 49-99, pp. 65-69. Also, see: Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317, p. 295.

[14] Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 Alternatives, pp. 63-92. Also, see: Didier Bigo and Elspeth Guild, 'Policing at a Distance: Schengen Visa Policies', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Oxford; New York: Routledge, 2016), pp. 233-263. Also, see: C.A.S.E. COLLECTIVE, 'Critical Approaches to Security in Europe: A Networked Manifesto' (2006) 37(4) *Security Dialogue*, pp. 443-487.

[15] Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 *Alternatives*, pp. 63-92. Also, see: Anastassia Tsoukala, 'Defining the Terrorist Threat in the Post-September 11 Era', in Didier Bigo and Anastassia Tsoukala (eds), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* (Oxford; New York: Routledge, 2008), pp. 49-99. Also, see: Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry

conceptualisation upon the right to seek asylum requires theoretical approaches beyond merely securitisation, especially considering the fact that this right is a fundamental right protected, *inter alia*, under Article 18 of the EU Charter of Fundamental Rights, according to which:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

The nature and the precise content of the right to seek asylum are discussed below in Chapter 2. For now, it is important to point out that asylum seekers, amongst all categories of immigrants, fall in an especially disadvantaged position if their right to access a fair and effective asylum procedure is denied.[16] In such cases, a proper assessment of their individual situation in terms of refugee status is denied. Tighter border control may easily bring negative implications upon the right to seek asylum. Positioning immigration as a matter of EU internal security or as the national security of individual EU Member States may justify imposing tighter control measures on the external borders of the EU and further expanding this control to territories physically located outside the EU.[17] This phenomenon, known as the externalisation of European border control, takes various forms such as agreements or deals with third countries (non-EU countries) on not allowing immigrants to embark on journeys for destinations in the EU,[18] or the interception of boats carrying immigrants on the high seas.[19]

Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171.

[16] *Ibid.*

[17] On the expansion of the EU surveillance of asylum seekers as sources of insecurity, see: Elspeth Guild, 'Conflicting Identities and Securitisation in Refugee Law: Lessons from the EU', in Susan Kneebone, Dallal Stevens, and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Oxford; New York: Routledge, 2014), pp. 151-173.

[18] Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Oxford; New York: Routledge, 2019). Also, see: Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law (Oxford: Oxford University Press, 2017), pp. 173-178.

[19] Marie-Laure Basilien-Gainche, 'Leave and Let Die: The EU Banopticon Approach to Migrants at Sea', in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Leiden; Boston: Brill, 2016), pp. 327-352. Also, see: Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017), pp. 188-199. Also, see: Jasmine Coppens, 'Interception of Migrant Boats at Sea', in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Leiden; Boston: Brill, 2016), pp. 200-221. For latest news on this practice, see: The Guardian, 'We were left in the sea': asylum seekers forced off

In addition to the externalisation of European border control, other measures are employed, in practice, to prevent asylum seekers from enjoying the right to seek asylum in the EU. In this regard, I could name: (1) limiting the legal channels for accessing the territory of the EU in the forms of denying humanitarian visas,[20] (2) using diplomatic assurances in torture or ill-treatment expulsion cases,[21] and; (3) the collective expulsion of immigrants.[22] While the number of legal routes available to asylum seekers for arriving in the EU remains limited and even reduces further with time, the human smugglers and those with related clandestine businesses get to benefit the most from this situation by putting the lives of people at risk.[23]

Although less than ten percent of the total number of immigrants in the EU are asylum seekers,[24] the impact of the ongoing securitisation discourse is the most serious upon this category. The reason is that asylum seekers, who lack any legal immigration status, would not be deemed eligible for the protection of law afforded to legal immigrants. However, asylum seekers could and should, in fact, be legally protected under various human rights frameworks. In this regard, I could name the availability of the following human rights standards to asylum seekers:

- The protection of the right to seek asylum as a recognised fundamental right in the EU and under the constitutions and national legislation of many EU Member States;
- The prohibition of *refoulement* as a customary norm of international law;
- The absolute and non-derogable prohibition of *refoulement* to torture and other forms of ill-treatment as a *jus cogens* norm, which is the crown of the legal protection available to asylum seekers;
- The prohibition of the collective expulsion of immigrants under both EU law and the law of the Council of Europe.

However, the securitisation of immigration in the EU can be seen to have had negative impacts on these legal norms and standards. Their scope and implementation have been limited to some degree with the support of the

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Lesbos, <www.theguardian.com/global-development/2021/mar/19/asylum-seekers-forced-off-lesbos-pushback-crisis-europe-borders>.

[20] The denial of humanitarian visas to the EU is the topic of Chapter 4 of this dissertation.

[21] The use of diplomatic assurances in torture-expulsion cases is the subject of Chapter 5.

[22] The collective expulsion of immigrants is the subject of analysis in Chapter 6 of this dissertation.

[23] Ruben Andersson, *Illegality, Inc.: Clandestine Migration and the Business of Bordering Europe* (Oakland: University of California Press, 2014).

[24] European Commission, 'Statistics on Migration to Europe', <ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#overall-figures-of-immigrants-in-european-society>.

European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). These are some of the negative impacts of the discourse surrounding the securitisation of immigration. Such impacts upon the enjoyment of human rights have been studied critically under a school of thought known as *critical security studies*. [25]

The concept of security is at the core of the right to seek asylum. This is because refugee status – as I will explain in details in Chapter 2 – fundamentally is linked to a person's individual safety and security. In other words, a refugee is someone whose individual security and physical safety is at risk in the respective country of origin. By contrast, national security, as a form of collective security, may be a legally valid reason for restricting immigration and the right to seek asylum. In an age of securitisation, it is suggested that there is a tension between the individual security needs of asylum seekers and refugees and the wider concerns about public security.[26]

1.2. RESEARCH QUESTION AND HYPOTHESIS

Based on the background information provided above, *the main research question* in this doctoral dissertation is what the implications of the securitisation of immigration in the EU upon the right to seek asylum are. Therefore, the main goal of this research is to analyse critically the implications of securitising immigration on the right to seek asylum in the EU. To be more precise, in this research, I will demonstrate, highlight, and analyse the negative impacts that this ongoing phenomenon has been imposing on the enjoyment of right to seek asylum. In order to provide possible answers to the main research question, I will first discuss and explain the nature and content of the right to seek asylum, on the one hand, and the theory of securitisation, on the other. After this, I will focus on various aspects of the right to seek asylum and the frameworks protecting its effectivity within the context of a highly securitised environment, especially with regard to immigration to the EU.

My *hypothesis* is that the securitisation of immigration at legislation and practice levels is having a negative or an eroding effect on the right to seek asylum as a fundamental right in the EU. This is not to say that securitisation

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[25] David Mutimer, 'Critical Security Studies: A Schismatic History', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 91-110. In this regard, also see: Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in Thierry Balzacq (ed.), *Securitisation Theory: How Security Problems Emerge and Dissolve* (London; New York: Routledge, 2011), pp. 1-30. Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge; Malden, Massachusetts: Polity Press, 2009), pp. 6-10.

[26] Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge; Malden, Massachusetts: Polity Press, 2009), pp. 6 and 7. In this regard, also see: Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Oxford; New York: Routledge, 2006), pp. 45-62.

would be the only factor explaining normative developments in the field. It is, however, a significant one. A key concern here is that the dominant security narratives of the EU, in practice, will render the right to seek asylum and Article 18 of the EU Charter less effective or even meaningless through denial of access to asylum protection procedures. It is even more worrying if such concerns are merely a *façade* to prevent 'unwanted' or 'undesirable' groups of immigrants from entering the EU.

By taking a critical approach to the concept of security throughout this research, I demonstrate that resulting from the securitisation of immigration, the right to seek asylum in the EU has become to some extent ineffective; hence, Article 18 of the EU Charter may be losing its real meaning and legal position as a fundamental right. In addition, I argue that if the existing practice of the European Courts (particularly the ECtHR under Article 3 and Article 4 of Protocol No. 4 of the ECHR) continues, the principle of *non-refoulement*, especially in the context of expulsion to torture and ill-treatments, will lose its high legal status, i.e. the *jus cogens* norm of international law.

1.3. RESEARCH SCOPE

In this section, I will sketch the conceptual and geographical limits of this research based on the key words of the main research question. Subsection 1.3.1 contains the definition of terms that are the subject of study in this dissertation. Then, in Subsection 1.3.2, I elaborate on the geographical scope of this research.

1.3.1. THE DELIMITATION OF THE RESEARCH SUBJECT MATTER

This dissertation addresses the link between migration and security. To narrow the focus even further, what I study here is the nexus between migration law and security. This research work is a part of the ongoing debates on protecting the human rights of immigrants, on the one hand, as opposed to safeguarding the national security of hosting states, on the other. However, the aim is precisely to discover the negative consequences or the adverse impacts of securitising immigration in the EU upon the right to seek asylum as a fundamental right.

Every day in the news, we hear about 'asylum,' 'asylum seekers,' 'refugees,' 'immigrants,' and associated vocabularies multiple times. However, we hardly contemplate what exactly these words mean and what the implications of these differences could be on the lives and rights of people. For this research (studying the implications of the securitisation of immigration), I have chosen only a specific and limited category of immigrants, namely ***asylum seekers***. This choice is a purposeful and completely deliberate one, because asylum seekers are in a state of limbo when it comes to their legal status in the host state and

for establishing an attachment to the protective legal mechanisms available to immigrants. Another reason to choose only the category of asylum seekers as the main subject matter of this study is to diagnose the effect of the securitisation of immigration on the right to seek asylum in the EU. Therefore, the scope of the subject of study in this research is limited to asylum seekers as one category of immigrants, namely that of forced immigrants.

Within the rights related to asylum seekers, I will focus only on ***the right to seek asylum***. Therefore, the other relevant rights to asylum such as the right to enjoy asylum, lies outside this study. What this research addresses is merely the right to seek asylum and its main composing elements including first, the right to enter the territory of host states for submitting asylum claims, and second, the prohibition of *refoulement*. As mentioned in the research question, my main concern is to analyse the possible implications of the securitisation of immigration in the EU, particularly on the right to ***seek*** asylum.

The point of departure in this dissertation is addressing the nature of the right to seek asylum. The main premise, upon which I build all the arguments, is that the nature of the right to seek asylum is a fundamental right. The reason is that Article 18 of the EU Charter guarantees the right to asylum with due respect for the rules of the 1951 Refugee Convention and its 1967 Protocol, and in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Throughout this research, depending on the context within which the right to seek asylum is analysed the terms may vary. The right to seek asylum under the 1948 UDHR is a basic human right, a right without which other human rights could not exist. Nevertheless, when addressing this right within the context of the national law of EU Member States, the right to asylum is a constitutional right for the reason that some EU Member States have included this right in the text of their constitutions. EU primary law, however, considers the right to seek asylum as a ***fundamental right***, because the EU Charter protects this right under Article 18.

Once settled that the right to seek asylum is a fundamental right in EU law, we should discover the essence or the inviolable elements existing at the very core of this right. These elements may not be restricted, limited, or balanced against even if the security concerns of the EU or its Member States are supposedly at stake. This dissertation focuses specifically on the essence or inviolable elements existing at the core of the right to seek asylum, which are, first, that asylum seekers should be allowed to enter the territory of EU to submit their claims for asylum. Secondly, asylum seekers should not be returned to places where their lives are at risk (the principle of *non-refoulement*). Therefore, the case law analysis undertaken in this research covers the jurisprudences of the European

Courts concerning the two essential elements of the right to seek asylum. When it comes to the first element of allowing asylum seekers to enter the territory of the EU for submitting their asylum claims, the issuance of humanitarian visas requires closer investigation. For the reason that the denial of a humanitarian visa is in direct violation of the first essential element of the right to seek asylum, one full chapter (Chapter 4) has been devoted to this subject.

Article 18 of the EU Charter has explicitly recognised the right to seek asylum as a fundamental right. However, in practice, the realisation of this right is the subject of secondary sources of EU law. In this regard, Article 25(1) of the EU Visa Code[27] has regulated the matter. However, portraying immigrants, especially those arriving from the Global South, as potential threats to the security of EU has led to restrictive *non-entrée* measures, policies, and practices, including those against the issuing of humanitarian visas. The most relevant case on Article 18 of the EU Charter and the issuance of humanitarian visas – to my knowledge – is the case of *X and X v. Belgium* (2017) from the Court of Justice of the European Union (CJEU).[28] A more detailed, critical analysis of this case, therefore, is indispensable to the subject of this dissertation to answer the main research question.

Nevertheless, I should remind here that the jurisprudence of the CJEU includes other cases challenging the alleged violation of Article 18 of the EU Charter. However, these cases do not directly concern accessing or entering the EU territory for seeking asylum. Rather, they deal with other asylum-related issues such as the right to an effective remedy in *refoulement* cases,[29] the suspensive effect of Article 18 in appeals against rejection decisions,[30] and the concept and meaning of a 'safe third country.'[31] Therefore, these cases substantially fall outside the scope of the subject matter of this research.

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[27] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (EU Visa Code), published in Official Journal of the European Union on 15 September 2009 (L 243/1).

[28] Case C-638/16 PPU, *X and X v. État belge* (Belgium), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 7 March 2017 (referred to as the case of '*X and X v. Belgium*').

[29] Case C-181/16, *Sadikou Gnandi v. État belge* (Belgium), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 19 June 2018. Also, see: Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (Hungary), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 14 May 2020 (referred to as '*FMS and Others v. Hungary*').

[30] Case C-181/16, *Sadikou Gnandi v. État belge* (Belgium), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 19 June 2018.

[31] Joined cases C-411/10 and C-493/10, Joined cases of *N.S. v. Secretary of State for the Home Department* (United Kingdom) and *M.E. et al. v. Refugee applications Commissioner et al.* (Ireland), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 21 December 2011 (referred to as '*N.S. v. UK and M.E. and Others v. Ireland*').

Considering immigrants as potential threats to the internal security of EU and the national security of its Member States has led to some *non-entrée* policies and outlaw practices. These policies and practices may include, but not limited to (1) denying humanitarian visas, (2) the use of diplomatic assurances in the cases of expulsion to torture and other forms of ill-treatment, and (3) the collective expulsion of immigrants. Such practices and policies allegedly violate the norms of both international and EU human rights law; therefore, they are carefully under scrutiny in this dissertation. The most prominent norm, in this regard, is the principle of *non-refoulement*, a customary rule of international law, which constitutes the second essential element of the right to seek asylum as a fundamental right. Therefore, the study of this principle and *non-entrée* policies and practices that have emerged against the principle of *non-refoulement* because of the securitisation of immigration in the EU, is another subject covered in this dissertation.

Article 3 of the European Convention on Human Rights (ECHR) and Article 19(1) of the EU Charter formulate the prohibition of *refoulement*. For two reasons, however, I will study the jurisprudence of merely the European Court of Human Rights (ECtHR). The first reason is that the prohibition of *refoulement*, according to the EU Charter, is a codification of the ECtHR's case law under Article 3 of the Convention. The CJEU in all cases related to Article 19(1) of the EU Charter has emphasised that all legislation in this regard must be interpreted and applied in harmony with the ECtHR's substantive and procedural standards.[32] Secondly, the alleged tension between immigration and security is most vivid in the use of diplomatic assurances in ill-treatment or torture-expulsion cases. The ECtHR by far has established the authoritative precedent in this regard. Since the 9/11 terrorist attacks, the EU Member States have been more than ever employing diplomatic assurances in ill-treatment and torture-expulsion cases, which have become the subject of adjudication by the ECtHR.

1.3.2. THE GEOGRAPHICAL SCOPE OF RESEARCH

With regard to the geographical scope of this research, as the title and research question both indicate, I study the European Union (EU). The EU is more than merely a geographical landscape; it is a political, economic, and social unit with its particular values, ideals, and identities.[33] Therefore, the laws, policies, and

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[32] Steven Greer, Janneke Gerards, and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (New York: Cambridge University Press, 2018), pp. 343 and 344.

[33] The European Union, 'Goals and values of the EU', <europa.eu/european-union/about-eu/eu-in-brief_en>.

practices related to the right to seek asylum within the EU are of direct relevance to this research. In this regard, EU law on asylum and the jurisprudence of EU Courts, i.e. the ECtHR and CJEU, on the right to seek asylum are primary subjects of study in this research. The critical case law analysis conducted in this dissertation include cases from the jurisprudence of the ECtHR, even though the territorial jurisdiction of this court covers a geographical area beyond the borders of the EU, meaning the Contracting States to the Council of Europe. The inclusion of ECtHR cases is because the European Convention and the case law produced within the jurisprudence of the court are an integral part of EU law. The EU Charter of Fundamental Rights in Article 52(3) has assigned that the scope and meaning of Charter rights, which correspond to the rights guaranteed by the ECHR, shall be the same as those laid down by the said Convention. This provision, however, shall not prevent EU law from providing protection that is more extensive.

The EU Charter is a broad catalogue of fundamental rights, which is based on the rights, guaranteed in other human rights instruments adopted under the frameworks of the United Nations and the Council of Europe. Hence, in this research, I will take into account relevant international human rights treaties and the interpretive practices of their monitoring bodies per need of the study. To provide an example, Article 18 of the EU Charter builds upon the 1951 Refugee Convention and its 1967 Protocol.[34] Therefore, the obligations formulated in the Refugee Convention are binding upon the EU Member States – even when the actions of States fall within the scope of the application of EU law. Therefore, even if the geographical focus of this research is the EU and its law, I will analyse the jurisprudences and practices of the ECtHR, the United Nations High Commissioner for Refugees (UNHCR), the UN Human Rights Committee (HRC), and the UN Committee against Torture (CAT Commit.) together with the interpretation of relevant provisions in respective legal instruments.

1.4. RESEARCH METHODOLOGY

The goal of any field of science, or any academic discipline, is ultimately to produce some *knowledge* about the subjects under study. An integral and, indeed, the most serious part of knowledge production process is the *research*

[34] The 1951 UN Convention Relating to the Status of Refugees, adopted by the UN General Assembly on 28 July 1951, United Nations Treaty Series Vol. 189, p. 137 (referred to as the '1951 Refugee Convention' or the '1951 Refugee Convention and its 1967 Protocol').

method.[35] If we agree that the research method is a collection of 'rules, procedures and practices for addressing and solving analytical problems,' we could claim that no research method is inherently 'better' than any other is.[36] After all, the determining factor for assigning the methods in a piece of research, or in a scientific investigation, and thereafter, for choosing our sources and materials, is the main research question.[37]

Based on the main research question posed in this doctoral dissertation, I apply an interdisciplinary legal analysis, combining research methods from both law and social sciences. The reason for this methodological choice is that the concept of security and the theory of securitisation is not, in itself, a creation of jurisprudence, but rather the social sciences (as explained above in Section 1.1). The research question addresses a problem with a multidisciplinary nature, which I would not be able to discuss solely in terms of a traditional approach to law, i.e. the doctrinal legal research method or the so-called 'black-letter law' or a 'dogmatic' approach to law.[38]

One common line of division in legal methodology is distinguishing between a doctrinal or dogmatic, on the one hand, as opposed to a non-doctrinal method,

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[35] Geoffrey Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67(2) *The Cambridge Law Journal*, pp. 288-321, pp. 289-292.

[36] Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, 'Human Rights Research Method', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-13. Also, see: Mathias M. Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education*, pp. 5-17.

[37] Wendy Schrama, 'How to Carry out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7(1) *Utrecht Law Review*, pp. 147-162, pp. 148 and 149. In this regard, also see: Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 1-18, pp. 12-14. Also, see: Jaap Hage, 'The Method of a Truly Normative Legal Science', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 19-44, pp. 22-24. On the importance of a well-defined and precise research question in directing the research and its methods, see: Jan Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 111-121, pp. 120 and 121. Also, see: Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 229-240, p. 236.

[38] Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 1-17, pp. 3 and 4. Also, see: Paul Chynoweth, 'Legal research', in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Oxford: John Wiley & Sons, 2008), pp. 28-38. Also, see: Tony Becher, 'Towards a Definition of Disciplinary Cultures' (1981) 6(2) *Studies in Higher Education*, pp. 109-122, p. 117. In addition, see: Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review*, pp. 130-138.

on the other.[39] With regard to the method of doctrinal legal research, Dobinson and Johns assert that with this method, the researcher is only concerned to answer the question of 'what the law is' in a given and particular subject area.[40] Similarly, Smits, in his definition of legal method, suggests that the doctrinal research 'aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving un-clarities and gaps in the existing law.'[41] Based on these two definitions, it would be accurate to claim that the principal aim of doctrinal legal research is to 'describe a body of law' and to demonstrate 'how the law applies.'[42]

To explain further, the doctrinal legal research method systematises, rectifies, and clarifies 'the law on any particular topic by a distinctive mode of analysis of authoritative texts that consist of primary and secondary sources.'[43] The methods or tools of enquiry and analysis in doctrinal legal research is hermeneutic or interpretive. This means that dogmatic legal scholars collect legal sources (mainly legislation and cases), analyse, and interpret them, while addressing apparent contradictions and gaps for the ultimate purpose of constructing or creating a coherent legal doctrine.[44] Additionally, doctrinal researchers may also attempt to demonstrate how the law has developed in terms of judicial reasoning and legislative enactment.[45] Such research,

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[39] Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 1-17, pp. 1-7. In this regard, also see: Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 18-47, p. 19.

[40] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 18-47, pp. 20 and 21.

[41] Jan M. Smits, 'What Is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research', in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (New York: Cambridge University Press, 2017), pp. 207-228, p. 210.

[42] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 18-47, p. 21. In this regard, also see: Paul Chynoweth, 'Legal research', in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Oxford: John Wiley & Sons, 2008), pp. 28-38.

[43] Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 1-17, p. 4.

[44] Hester Sanne Taekema and Wibren van der Burg, 'The Incorporation Problem in Interdisciplinary Legal Research' (2015) 8(2) *Erasmus Law Review*, pp. 39-42.

[45] Jan M. Smits, 'What Is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research', in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (New York: Cambridge University Press, 2017), pp. 207-228, pp. 219-227.

therefore, has been characterised as 'normative or purely theoretical.'[46] The reason for this particularly narrow scholarly function of doctrinal legal research is that this method builds upon a traditional assumption that the character of legal scholarship is derived only and *only* from the law itself.[47]

Notwithstanding the long tradition and practical importance of doctrinal legal research,[48] a positivistic or 'black-letter' approach to law is no longer the only or even the dominant paradigm of legal education, legal research, and legal scholarship.[49] In the early 1960s, some American legal scholars and educators who created the 'Law and Society Association,'[50] challenged the 'self-sufficiency' character of legal scholarship and criticised the knowledge produced merely through the doctrinal legal research method.[51] This criticism has shown itself in the form of legal scholars engaging actively in empirical research and initiating dialogues with scholars from different branches of social sciences to address the complex problems of societies.[52] The result of these intellectual dialogues has

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[46] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 18-47, pp. 20-22.

[47] Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 1-17, p. 4. In this regard, also see: Edward L. Rubin, 'The Practice and Discourse of Legal Scholarship' (1988) 86(8) *Michigan Law Review*, pp. 1835-1905, pp. 1859-1873. Also, see: Lydia A. Nkansah and Victor Chimbwanda, 'Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm' (2016) 3(1) *Asian Journal of Legal Education*, pp. 55-71, pp. 55 and 56.

[48] Terry Hutchinson, 'Doctrinal Research: Researching the Jury', in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Oxford; New York: Routledge, 2018), pp. 8-39. In this regard, also see: Paul Chynoweth, 'Legal research', in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Oxford: John Wiley & Sons, 2008), pp. 28-38, pp. 31-34.

[49] Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8. Naomi Creutzfeldt, 'Traditions of Studying the Social and the Legal: A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 9-34.

[50] Law and Society Association (LSA), 'Connecting socio-legal scholars from around the world', <www.lawandsociety.org/>.

[51] Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8, p. 3. In this regard, also see: Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin, 'Introduction', in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (New York: Cambridge University Press, 2017), pp. 1-27, pp. 1-3.

[52] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 18-47, pp. 22 and 23.

been the creation of a non-doctrinal method of legal research, better known as the 'socio-legal' approach to law or 'law-in-context.'[53]

The main input of the socio-legal approach is that future legal and political practitioners, policymakers, legislators, law researchers, and educators – in addition to doctrinal reasoning – need a more comprehensive thinking toolbox, which includes broader theoretical and methodological skills in order to enable them to understand better, how the complex modern World around them operates.[54] A socio-legal approach to legal studies and legal research aims to fill in the gaps between the 'law on paper' and the 'law in action.'[55] Due to its close engagement with society, non-doctrinal research has a strong history of involvement in civil and political activism, together with an enthusiastic advocacy for progressive societal changes such as vouching for civil rights movements and anti-war campaigns.[56] Accordingly, some critics have attacked the academic seriousness or the intellectual sharpness of socio-legal research precisely because of its deep involvement with social and political activism.[57] In response to this criticism, the mere fact that some lawyers or legal scholars involve in social activism and make a bridge between legal practitioners and the members of public does not, in itself, degrade either the lawyers' intellectual validity or the academic credibility of their research. In fact, nowadays, we could easily track the impacts of socio-legal research in guiding social and public policies through offering a new understanding of the ways that law interacts and

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53 Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8. In this regard, also see: Carrie Menkel-Meadow, 'Uses and Abuses of Socio-Legal Studies', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 35-57.

54 Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 1-17, pp. 5-7. In this regard, also see: Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8.

55 Naomi Creutzfeldt, 'Traditions of Studying the Social and the Legal: A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 9-34.

56 Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8.

57 Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin, 'Introduction', in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (New York: Cambridge University Press, 2017), pp. 1-27, pp. 1-3. In this regard, also see: Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8.

engages with its social environment, and eventually exposing the flaws and limitations of the law in practice.[58] In addition, since the 1970s, the critical and analytical character of socio-legal approach has provided suitable intellectual grounds for a new approach to legal studies – known better as the school of 'critical legal studies.'[59]

One of the areas of law, the comprehensive study of which does not easily fit into the box of legal dogmatism or doctrinal research, is the field of public international law and particularly its branch of international human rights law.[60] The reason for this particularity is that – as some scholars of international law have acknowledged – while the origins of the sources of international law differ significantly from the domestic sources of law, they also lack a clear-cut hierarchy amongst them.[61] International law consists of customary law, supplemented by rules and principles agreed upon in the treaties and signed by nation-states and other international actors such as organisations.[62] One could

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[58] Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, 'Socio-Legal Theory and Methods: Introduction', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 3-8. In this regard, also see: Naomi Creutzfeldt, 'Traditions of Studying the Social and the Legal: A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 9-34, pp. 20-32. In this regard, also see: Reza Banakar and Max Travers, 'Law, Sociology and Method', in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Oxford; Portland: Hart Publishing, 2005), pp. 17-37.

[59] Dennis M. Davis and Karl Klare, 'Critical Legal Realism in a Nutshell', in Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2019) , pp. 27-43, pp. 27 and 28.

[60] Rossana Deplano, 'Introduction', in Rossana Deplano, Giulia Gentile, and Luigi Lonardo (eds), *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2019), pp. 1-17. Also, see: Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 1-17, p. 7. Also, see: Damian A. Gonzalez-Salzberg and Loveday Hodson, 'Introduction: Human Rights Research beyond the Doctrinal Approach', in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Oxford; New York: Routledge, 2020), pp. 1-12. Also, see: Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, 'Human Rights Research Method', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-13.

[61] Samantha Besson and Jean D'Aspremont, 'The Sources of International Law: An Introduction', in Samantha Besson, Jean D'Aspremont, and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (New York: Oxford University Press, 2017), pp. 1-39. In this regard, also see: Mario Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales of Values', in Samantha Besson, Jean D'Aspremont, and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (New York: Oxford University Press, 2017), pp. 640-657. Also, see: Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *Modern Law Review*, pp. 1-30. Moreover, see: Martti Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law*, pp. 566-582.

[62] Erika De Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law', in Samantha Besson, Jean

often refer to the decisions of international and national courts to ascertain the content of such international norms.[63] Therefore, the international legal system is characterised as being de-centralised and consensual, which, in turn, has profound consequences for conducting research in this field.[64] The combination of these characteristics calls for approaches that are scientifically different in many ways from the traditional doctrinal methods employed in national or domestic legal research.[65] This is why methods beyond the purely doctrinal approach are needed for conducting research on human rights law as a branch of public international law.

As Andreassen and his colleagues have stated, the departure point in research on topics related to human rights law is the international legal framework of human rights protection.[66] They have also observed that this starting point draws some backlashes by limiting the scope of research to promoting human rights and not criticising the system. This is not to say that human rights research should not aim for the promotion of human rights. However, by taking a more critical approach to the 'institutional' and 'political' foundations of human rights, the research would be able to offer more effective tools for

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D'Aspremont, and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (New York: Oxford University Press, 2017), pp. 625-639, pp. 625-630.

[63] Erika De Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law', in Samantha Besson, Jean D'Aspremont, and Sévrine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (New York: Oxford University Press, 2017), pp. 625-639, pp. 625-630.

[64] Rossana Deplano, 'Introduction', in Rossana Deplano, Giulia Gentile, and Luigi Lonardo (eds), *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2019), pp. 1-17.

[65] Marija Đorđeska, 'General Principles of Law Recognized by Civilized Nations: Method, Inductive-Empirical Analysis and (More) 'Scientific' Results', in Rossana Deplano, Giulia Gentile, and Luigi Lonardo (eds), *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2019), pp. 18-44. In this regard, also see: Sarina Landefeld, 'The Evolution of Norms and Concepts in International Law: A Social Constructivist Approach', in Rossana Deplano, Giulia Gentile, and Luigi Lonardo (eds), *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2019), pp. 45-63. Also, see: Malcolm Langford, 'Interdisciplinarity and Multimethod Research', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 161-191.

[66] Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, 'Human Rights Research Method', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-13. In this regard, also see: Martin Scheinin, 'The Art and Science of Interpretation in Human Rights Law', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 17-37. Also, see: Siobhán McInerney-Lankford, 'Legal Methodologies and Human Rights Research: Challenges and Opportunities', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 38-67.

promoting human rights in a given situation. After all, human rights are not only the subjects of legal obligations; simultaneously, they are 'moral norms' and 'values' to which a community has obliged itself.[67] Therefore, addressing human rights violations, and how to stop them, could highly benefit from the inputs of political and historical contexts, within which the violation is happening. In addition, the observations offered by social, cultural, anthropological, and economic analyses could offer some pragmatic ways on how to promote human right norms in a given situation.[68] As a result, the interdisciplinary nature of human rights calls for applying mixed methods in addressing and analysing research problems in the field of human rights law.[69]

Conducting research on the right to seek asylum, as a subject studied within international human rights law, follows the same logic as conducting research in the field of public international law. What we said above about the special characteristics of studying and researching human rights law applies to all topics falling under human rights law – including the right to seek asylum. Keeping in mind the special character of international law and its sources, a purely doctrinal method – to a certain extent – could be useful in studying the right to seek asylum. This research method is suitable to describe the right itself, its nature and contents, together with its normative development through historical and philosophical debates. This theoretical and normative approach alone, however, would allow a very isolated and limited understanding of the right to seek asylum, especially when its relation with security is under investigation.

Furthermore, producing knowledge in migration studies demands particularly more scrutiny on the choice of research methods, because as Castles and his

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[67] Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, 'Human Rights Research Method', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-13.

[68] Damian A. Gonzalez-Salzberg and Loveday Hodson, 'Introduction: Human Rights Research beyond the Doctrinal Approach', in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Oxford; New York: Routledge, 2020), pp. 1-12. In this regard, also see: Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, 'Human Rights Research Method', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-13.

[69] Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, 'Human Rights Research Method', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-13. In this regard, also see: Malcolm Langford, 'Interdisciplinarity and Multimethod Research', in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 161-191.

collaborators have formulated, '[m]igration is hardly ever a simple individual action.' The cross-border movement of human populations is 'a collective action, arising out of social, economic and political changes and affecting the whole society in both origin and destination areas.'[70] The combination of this complex character of human migration together with the development of human rights protection mechanisms for the benefit of immigrants – in many ways – is bound to political, societal, and cultural changes, which could not be understood in isolation as a merely normative phenomenon. Therefore, the scientific field of migration studies engages a wider range of theories and research methods from various disciplines such as sociology, anthropology, political science, history, economics, geography, demography, psychology, cultural studies, law, and archaeology, amongst other fields of humanities and social sciences.[71] Considering the complexity and multifaceted character of migration, as a social phenomenon itself, and the inherently interdisciplinary character of migration studies, conducting research on the legal aspects of migration should also have some touches of interdisciplinarity.[72] The reason for this methodological choice is that the interdisciplinary research method has the scientific and intellectual capacity to identify possible gaps and shortcomings in different disciplines under study, and to bridge the analytic and methodological deficiencies, while relying on their respective strengths.[73]

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[70] Hein de Haas, Stephen Castles, and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (6th edn, New York: Macmillan International Higher Education, 2020), p. 42.

[71] Caroline B. Brettell and James Frank Hollifield, 'Introduction: Migration Theory: Talking Across Disciplines', in Caroline B. Brettell and James Frank Hollifield (eds), *Migration Theory: Talking Across Disciplines* (3rd edn, New York; Oxford: Routledge, 2015), pp. 1-36, pp. 3-11. Also, see: Hein de Haas, Stephen Castles, and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (6th edn, New York: Macmillan International Higher Education, 2020), pp. 42-45. Also, see: Mathias M. Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education*, pp. 5-17.

[72] For more information in this regard, see: Paul Roberts, 'Interdisciplinarity in Legal Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 90-133. It is worth mentioning here that according to Menkel-Meadow (the contemporary legal scholar), by Christopher Columbus Langdell revolutionising legal education in 1870 (which she calls the 'Big Bang' moment in legal education), all knowledge production in the field of law must be multidisciplinary. By multidisciplinary (or as some say, interdisciplinary) she means that '[…] a good legal education must include the "before", "during", and "after" causes and effects of law and legal institutions on those whom the law seeks to influence and control.' In this regard and its counterarguments, see: Carrie Menkel-Meadow, 'Taking Law and _____ Really Seriously: Before, During and After "The Law"' (2007) 60(2) *Vanderbilt Law Review*, pp. 555-595, pp. 560-568.

[73] Veronica Raffo, Chandra Lekha Sriram, Peter Spiro, and Thomas Biersteker, 'Introduction: International law and International Politics – Old Divides, New Developments', in Thomas J. Biersteker, Peter J. Spiro, Chandra Lekha Sriram, and Veronica I. Raffo (eds), *International Law and International Relations: Bridging Theory and Practice* (Oxford; New York: Routledge, 2007), pp. 1-23, p. 3. Also, see: Paul Roberts, 'Interdisciplinarity in Legal Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 90-133. Also, see: Mathias M. Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the

Eventually, what assigns the research method of this doctoral dissertation and the choices of theories, sources, and materials is the main research question.[74] If the research question addressed in this dissertation were the internal functionality of a legal system and its legal norms or rules, then, a doctrinal legal research method would suffice.[75] However, as I investigate the external effects of a legal norm or a legal system, the doctrinal method alone would not suffice. Studying the external dimensions of a legal norm is not merely about the definition, consistency, or coherency of the legal norm internally compared to other norms in a legal system.[76] On the contrary, the question here addresses the multidimensional external *functionality* and the *effectiveness* of EU asylum law in action and within the context of a certain society (the EU), with all its historical, political, economic, social, and cultural peculiarities.[77] The key component of the research question in this dissertation is the theory of securitisation – a theory that was originally developed within the sub-disciplines of social sciences. Therefore, a natural, if not even necessary, secondary method arises from social sciences, which would give a strong socio-legal character to this research. Such a characterisation, however, would be too broad, since using a socio-legal research method covers a wide range of scholarship and theories

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Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education*, pp. 5-17. Also, see: Hester Sanne Taekema and Wibren van der Burg, 'The Incorporation Problem in Interdisciplinary Legal Research' (2015) 8(2) *Erasmus Law Review*, pp. 39-42. Moreover, see: Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review*, pp. 130-138.

74 Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 1-18, pp. 12-14. In this regard, also see: Jaap Hage, 'The Method of a Truly Normative Legal Science', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 19-44, pp. 22-24. On the importance of a well-defined and precise research question in directing the research and its methods, see: Jan Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 111-121, pp. 120 and 121. Also, see: Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law', in Mark Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011), pp. 229-240, p. 236. Also, see: Wendy Schrama, 'How to Carry out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7(1) *Utrecht Law Review*, pp. 147-162, pp. 148 and 149.

75 Wendy Schrama, 'How to Carry out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7(1) *Utrecht Law Review*, pp. 147-162, pp. 148 and 149.

76 Paul Roberts, 'Interdisciplinarity in Legal Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 90-133.

77 *Ibid*. Also, see: Wendy Schrama, 'How to Carry out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7(1) *Utrecht Law Review*, pp. 147-162, pp. 148 and 149.

including law and economics, law and gender, law and politics, law and science, etc.[78]

As mentioned above in Section 1.1, the theory of the securitisation of immigration is inherently incapable of addressing the implications and consequences of this process on the rights of immigrants.[79] Hence, we would need to go beyond this theory to be able to investigate the gap. The school of 'critical security studies' does that.[80] One of the main criticisms of this school against the theory of the securitisation of immigration is that the latter puts national security or the collective security of society, as opposed to or inherently against the security of individuals, especially when those individuals just happen to be immigrants. Therefore, according to the securitisation of immigration, whenever the rights and security of asylum seekers is to be balanced against collective security or national security, the latter prevails, as asylum seekers are not part of the collective (in this case, the EU). Critical migration and security studies analyse the prevalent security concerns of the collective over the rights and freedoms of individual, within the de- and post-colonial literature, as the result of the legacy of European imperialism and colonial powers.[81]

Another criticism against the securitisation of immigration is that according to this theory, the security of EU is divided into the two categories of 'internal

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[78] Margaret Davies, 'Doing Critical-Socio-Legal Theory', in Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Oxford; New York: Routledge, 2020), pp. 83-96. In this regard, also see: Paul Roberts, 'Interdisciplinarity in Legal Research', in Mike McConville and Wing Hong Chui (eds), Research Methods for Law (2nd edn, Edinburgh: Edinburgh University Press, 2017), pp. 90-133

[79] The theory of securitisation, known as the Copenhagen School, has been recently the subject of criticisms by some political scientists. In this regard, see, for example: Alison Howell and Melanie Richter-Montpetit, 'Is Securitization Theory Racist? Civilizationism, Methodological Whiteness, and Antiblack Thought in the Copenhagen School' (2020) 51(1) *Security Dialogue*, pp. 3-22.

[80] Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge; Malden, Massachusetts: Polity Press, 2009), pp. 6-10.

[81] Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (Cambridge, UK; Medford, MA: Polity Press, 2021). In this regard, also see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. Also, see: Sherally Munshi, 'Immigration and the Imperial', in Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (eds), *The Oxford Handbook of Law and Humanities* (New York: Oxford University Press, 2020), pp. 497-516. Also, see: Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228. Also, see: Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017). Also, see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441. Also, see: Bhupinder S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8(2) *Melbourne Journal of International Law*, pp. 499-515.

security' *versus* 'external security.'[82] This division is the foundation of the current EU legal system of immigration and asylum. Articles 1 and 2 of the 2016 Schengen Borders Code[83] divide the EU borders into two types of 'internal' and 'external' borders, by imposing the greater emphasis on external border control for the purpose of securing the freedom of movement of persons within the EU and for creating an 'area of freedom, security, and justice.'[84] The implication of this division is that once immigrants are considered as threats to the internal security of EU, the employment of any measure in controlling the external Schengen borders would be justifiable, no matter if these measures fail to comply with the human rights of asylum seekers.

It is important to highlight here that the theory of securitisation offers no insight into the legal or normative implications of this process such as the possible deterioration of the most basic and fundamental human rights of immigrants or asylum seekers. In trying to provide an answer to the main research question in this dissertation by benefiting from the socio-legal method, I employ a critical or counter approach to securitisation offered by critical security studies. This critical approach challenges the basic assumptions of the theory of securitisation as understood by the Copenhagen School, and point out other deficiencies, some of which may be normative in nature or at least have normative implications. In contrast to the theory of securitisation, the critical school of security studies invites us to move far beyond the process of 'speech-act' in securitisation and to pay a close attention to the negative impacts of this theory on the lives and rights of its subjects.[85] This is precisely what is under study in this doctoral dissertation. Instead of addressing whether immigrants are, in fact, or are not a matter of national security, I scrutinise the normative implications of asking these kinds of questions or even trying to answer them. The critical security studies, hence, could offer an intellectual basis for developing a more meaningful and effective right to seek asylum.

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[82] Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge; Malden, Massachusetts: Polity Press, 2009), pp. 6-10.
[83] The Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJL 77, 23 March 2016, pp. 1-52 (referred to as 'the 2016 Schengen Borders Code').
[84] For an overall discussion on the creation of EU as an area of 'freedom, security, and justice', see: Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in Neil Walker (ed.), *Europe's Area of Freedom, Security, and Justice* (New York: Oxford University Press, 2004), pp. 3-37. In this regard, also see: Rens van Munster, *Securitizing Immigration: The Politics of Risk in the EU* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2009), pp. 65-97.
[85] Mark B. Salter and Can E. Mutlu, 'Methods in Critical Security Studies', in Alexandra Gheciu and William Curti Wohlforth (eds), *The Oxford Handbook of International Security* (New York: Oxford University Press, 2018), pp. 167-178.

Based on this explanation, it is necessary to narrow down the analytical tool I employ in this thesis, which is 'critical discourse analysis,' an analytical tool available to both critical legal and critical security studies.[86] The critical discourse analysis is highly sensitive to detecting the ways, through which the dynamics of social power enacts, reproduces, and resists abuses, dominance, and inequalities. These ways may take various forms of verbal and non-verbal 'speech-acts.' In other words, the driving force behind this method of analysis is offering intellectual tools to the researcher and to the audience of the research to understand, expose, and ultimately resist against social inequalities.[87] The reason for this particular choice of method and tool in this research is that securitisation – as a constructivist theory – builds primarily on the discursive analysis of a variety of narratives or 'speech-acts' about security.[88] In the case of my doctoral dissertation, the primary idea underlying the main research question is the public and official narratives of *fear*, *anxiety*, and *emergency* that form and thereafter portray immigration as an existential threat to the internal security of EU in general and the national security of its Member States, particularly.[89]

Using critical discourse analysis, embedded within both critical legal and security studies, helps me show that the recent normative deterioration of the right to seek asylum, as an exceptional measure in time of emergency, is the inevitable result of the sociologically and politically constructed securitisation

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[86] Laura Alba-Juez, *Perspectives on Discourse Analysis: Theory and Practice* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2009), pp. 235-263. Also, see: Isabela Fairclough and Norman Fairclough, *Political Discourse Analysis: A Method for Advanced Students* (Oxford; New York: Routledge, 2012), pp. 78-116.

[87] Laura Alba-Juez, *Perspectives on Discourse Analysis: Theory and Practice* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2009), pp. 235-263. Also, see: Teun A. van Dijk, *Discourse and Power* (Basingstoke, Hampshire; New York: Macmillan International Higher Education, 2008), pp. 85-101.

[88] Thilo Marauhn and Marie-Christin Stenzel, 'Power, Security, and Public International Law – an Intricate Relationship', in Regina Kreide and Andreas Langenohl (eds), *Conceptualizing Power in Dynamics of Securitization: Beyond State and International System* (Baden-Baden: Nomos Verlag, 2019), pp. 265-289. Also, see: Andreas Langenohl, 'Dynamics of Power in Securitization: Towards a Relational Understanding', in Regina Kreide and Andreas Langenohl (eds), *Conceptualizing Power in Dynamics of Securitization: Beyond State and International System* (Baden-Baden: Nomos Verlag, 2019), pp. 25-66. Also, see: Thierry Balzacq, 'Enquiries into Methods: A New Framework for Securitization Analysis', in Thierry Balzacq (ed.), *Understanding Securitisation Theory: How Security Problems Emerge and Dissolve* (New York; Oxford: Routledge, 2011), pp. 31-53. Also, see: Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (Cambridge; New York: Cambridge University Press, 2009), pp. 191-221.

[89] Regina Kreide, 'The Power of Border Politics: On Migration in and outside Europe', in Regina Kreide and Andreas Langenohl (eds), *Conceptualizing Power in Dynamics of Securitization: Beyond State and International System* (Baden-Baden: Nomos Verlag, 2019), pp. 67-90. In this regard, also see: Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (Cambridge; New York: Cambridge University Press, 2009), pp. 226-255. Also, see: Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 *Alternatives*, pp. 63-92.

of immigration in the EU.[90] Other factors may have contributed to this development. However, the critical discourse analysis of relevant sources in EU law and practice draws some possible conclusions about the tangled relationship between the securitisation of immigration and the right to seek asylum, on the one hand, and the negative impact of the former on the latter, on the other.

1.5. RESEARCH DESIGN AND THE USE OF SOURCES AND THEORIES

This section elaborates on how I intend to provide answers to the research question of this doctoral dissertation. In the following pages, I will sketch a brief outline of what each individual chapter of this research comprises. Meanwhile, I will also give an overview of the theories, sources, and materials used to provide possible answers to the research question.

In Chapter 2, in order to understand the nature of the right to seek asylum as a fundamental human right, it is pertinent to study the historical background behind the creation of this right. For this purpose, I will apply a doctrinal legal research method, alongside the historical and philosophical approaches to the subject. This chapter elaborates on how asylum, as a traditional practice, has transformed to become a normative and legal institution through time, reaching the status of a fundamental right in the EU. For the purpose of this legal analysis, the first key method is the historical study and philosophical investigation on the formation of the right to seek asylum within different phases of history, starting from early human life on Earth until today. This is the subject of Section 2.2 of Chapter 2. It should be noted that the historical reading presented in this part is not necessarily in a strict chronological order. The narrative jumps back and forth throughout history, depending on the development of the concept and practice of asylum seeking and thereafter its transformation from a traditional practice existing in the World into a fundamental right in the EU.

The research sources and materials used in Chapter 2 are the historical literature and academic texts. Subsection 2.2.1 describes asylum seeking as a traditional practice recognised in different cultures and within religious ideologies. Thereafter, the historical sources in Subsection 2.2.2 narrate how asylum seeking, as a religious and cultural tradition, evolved into a legal institution under the control of nation-states. This part of the research demonstrates that the formation of nation-states in Europe imposed the concept of security upon

[90] For more information on applying discourse analysis and its derivatives such as critical discourse as analytical tools within socio-legal research, see: Bettina Lange, 'Researching Discourse and Behaviour as Elements of Law in Action', in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Oxford; Portland: Hart Publishing, 2005), pp. 159-175.

asylum seeking. This discussion brings a Eurocentric perspective to the matter; however, this approach illustrates how the modern legal system of refugee protection – based on individual rights and the assessment of alleged persecution claims, indeed, is inherently at odds with the security agenda of the EU as a collective entity.

After explaining the historical development of the practice of asylum seeking into the current right to seek asylum, in Section 2.3, I apply the 'theory of rights' to identify and analyse the conceptual and doctrinal components of this right as a fundamental right. The intellectual product of Hohfeld and Alexy, i.e. the theory of rights, provides a doctrinal analysis tool to understand the nature of the right to seek asylum as a fundamental right. The significance of this analysis is uncovering the essence of this right, without which its realisation is factually and legally impossible. These essential elements, which are inviolable, i.e. no derogation is allowed against them, are the right to access the asylum procedure and the prohibition of *refoulement*. The conceptual and doctrinal analysis of the composing elements of the right to seek asylum under this section, together with Chapter 3, prepare the premises of arguments in the remaining chapters of this research.

In Chapter 3, I locate the securitisation of immigration within the theory of securitisation, as formulated by political scientists under the discipline of International Relations (IR) within the field of security studies. In Section 3.2, by referring to the literature and academic sources available in security studies, I identify the IR theory of securitisation to be a by-product of the post-Cold War era, in which any societal matter could be, in theory, considered a threat to the security of states. One of these societal phenomena is immigration, which, especially in the post 9/11 attacks and after the 2015-2016 terrorist attacks in various European cities, has been recognised as an existential threat to the internal security of EU in general and the national security of its individual Member States, specifically. This is the subject of study under Subsection 3.2.2 under Chapter 3 of this dissertation.

In Section 3.3, I analyse the tangled relationship between protecting the rights of asylum seekers, as opposed to safeguarding the national security of host states on a general level. First, in Subsection 3.3.1, I will dispel some popular misconceptions about this relationship by paying a particular attention to the tension between respecting the right to seek asylum as a fundamental human right, while countering terrorism. In Subsection 3.3.2, by introducing the critical school of security studies to this research, I reveal the deficiency and incapability of the theory of securitisation in analysing the normative implications of applying this theory in security analysis. In this subsection, the school of critical security studies brings this new outlook and analytical dimension to my research

that, instead of focusing on the process of securitisation itself, we should rather move beyond the 'speech-act' process in order to be able to analyse the implications of this process on the human rights discourse. Therefore, by the end of Chapter 3, I have prepared the conceptual and theoretical scenes necessary for evaluating the implications of the securitisation of immigration on the right to seek asylum in the subsequent chapters of this dissertation and offering answers to the main research question.

In Chapter 4, the main subject of study is Article 18 of the 2000 EU Charter of Fundamental Rights as the main legal provision of EU law on the right to seek asylum. For the reason that the CJEU is the guardian of the EU Charter, its jurisprudence with regard to Article 18 is of utmost relevance to this study. The goal of this chapter is to show that the EU as a transnational legal entity and its Member States, individually, are undermining the position of the right to seek asylum as a fundamental right by using security concerns as an excuse for preventing asylum seekers from entering the EU in order to submit asylum applications. To support this claim, Section 4.2 first locates the unique position of the CJEU in safeguarding the fundamental rights stipulated under the EU Charter.

Then, in Section 4.3, by employing the method of critical discourse analysis as a tool available to critical legal analysis, I criticise EU asylum law. Through a close, careful, and critical textual analysis of relevant EU legislation on the matter, I expose the inconsistencies of EU law in protecting the right to seek asylum as a fundamental right in the EU. In other words, by critically scrutinising the EU Treaties and secondary legislation within the Common European Asylum System (CEAS), I unmask a dominant shadow of securitisation affecting the law and policies that govern asylum seeking in the EU. To elaborate further on this claim, I scrutinise how, in reality, the right to seek asylum is impossible to truly implement, which unavoidably leads to this right being ineffective and therefore meaningless in practice. Even though Article 18 of the EU Charter explicitly guarantees the right to seek asylum as a fundamental right and Article 25(1) of the EU Visa Code vouches for that, the EU does not provide pragmatic ways to facilitate the arrival of asylum seekers to fulfil the right to seek asylum.[91]

At the end of Chapter 4, Subsection 4.3.2 also employs the method of critical discourse analysis in scrutinising the EU practices regarding the right to seek asylum, specifically within the jurisprudence of the CJEU. Article 18 of the EU Charter is the stipulation of the right to seek asylum as a fundamental right.

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[91] Erik Fribergh and Morten Kjaerum, *Handbook on European law relating to Asylum, Borders and Immigration* (Luxembourg: Publications Office of the European Union, 2016), pp. 35-37.

However, by critically reading its reasoning in the case of *X and X v. Belgium* (2017),[92] the CJEU has removed the burden for violating the right to seek asylum from the shoulders of Member States of the EU, instead locating it within the political will and discretionary power of EU Member States. This critical case analysis, by showing the extent of the hypocrisy of authorities deciding on EU law, provides an answer to the main research question of this dissertation. The result of the embedded securitisation of immigration in both EU law and decisions of the CJEU make the right to seek asylum meaningless even though this right is, in normative terms and legally speaking, a fundamental right.

Henceforth, in the final part of Chapter 4, I further argue that asylum decision-making is about balancing the interests of individual security against those of collective security. If we discuss this balancing act with Ronald Dworkin's theory of 'legal interpretivism,' as formulated in his book entitled 'Taking Rights Seriously,'[93] there is a clash between individual human rights and freedoms against the collective-interest policies. On the one hand, from the point of the view of individual, there is the right of an individual searching for personal security through requesting asylum, which is a matter of law. In fact, it is a matter of constitutional law, as the right to seek asylum is a fundamental right. On the other hand, from the perspective of host or receiving states, by taking a collective security point of view, the acts or procedures of asylum seeking is merely a matter of policy.

The reason for the clash between protecting the human rights of asylum seekers, as opposed to safeguarding the national security of states is that from the standing viewpoint of states, collective security is far more important and weightier than the rights, freedoms, and security of individuals. Consequently, instead of being a fundamental right, the right to seek asylum has become nothing more than a policy-based decision-making apparatus. The right to seek asylum, at the end of the day, reduces to a matter of policy, which states themselves get to decide whether to uphold or not. The literature on the colonial origins of asylum law and the current legal system of refugee protection clearly reflect this mindset.

In Chapter 5, I further address the main research question of this dissertation on the implications of the securitisation of immigration on the right to seek asylum, especially when the second element of its essence – meaning the principle of *non-refoulement* – falls under attack. In Section 5.2, by applying the doctrinal legal research method, I analyse the legal status of the principle of *non-*

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[92] Case C-638/16 PPU, *X and X v. État belge* (Belgium), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 7 March 2017 (referred to as '*X and X v. Belgium*').
[93] Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013).

refoulement as a customary norm of international law. Since this principle is the very foundation of the right to seek asylum, it would be impossible to realise this right without the principle of *non-refoulement* remaining intact.

Thereafter, in Section 5.3, I present how the principle of *non-refoulement*, combined with the absolute nature of the prohibition of torture and other inhuman or degrading treatment or punishment, has elevated the prohibition of *refoulement* to torture and other forms of ill-treatment to a peremptory norm of customary international law – better known as a *jus cogens* norm. Considering the unique absolute and non-derogable position of the principle of *non-refoulement* to torture and other forms of ill-treatment, in Section 5.4, through a critical discourse analysis of the jurisprudence of the ECtHR under Article 3 of the Convention, I provide further answers to the main research question. Through these case law analyses, I demonstrate that the political pressure to combat terrorism has facilitated Article 3 expulsions through legitimising the use of diplomatic assurances. As another answer to the main research question, I conclude that if the absolute and non-derogable prohibition of *refoulement* to torture and other ill-treatment were to persist, the position of this principle would degrade from a *jus cogens* norm to an empty and meaningless provision. Under this scenario, there is no principle left supporting the right to seek asylum; hence, this right would also lose its normative character of being a fundamental right. By referring back to Dworkin, if we wanted to take a right seriously,[94] in practice, we would need to keep to the founding principles of law and the legal system, in which those laws have been adopted. In the case of taking the right to seek asylum seriously, primarily, we need to keep to the founding principle of this right and its essential core, meaning the principle of *non-refoulement*, otherwise the very existence of this right is in jeopardy.

In Chapter 6, first, I present a summary of the findings of this dissertation and identify the gap in existing knowledge that this research fills. Then, as final words, I address the practice of the 'collective expulsion of aliens' as another example of practices that the securitisation of immigration has created. There is a good reason for an explicit prohibition against this practice under Article 4 of Protocol No. 4 of the ECHR. The collective expulsion of aliens is in direct violation of the right to seek asylum. In other words, this practice results in preventing asylum seekers from gaining access to the territory of EU in order to submit asylum applications. Recently, the most important case in this regard is the ECtHR case of *N.D. and N.T. v. Spain* (2020).

The critical discourse analysis of the arguments offered by the respondent Government (Spain) demonstrates that protecting the collective security of EU,

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[94] *Ibid.*

as a 'meta right,' is against the rationale behind refugee protection, which depends on the individual assessment of subjective persecution. By this, I mean that Europe has put its need for collective security against individual security and the protection of those in need of asylum, mainly coming from the Global South. As a result, safeguarding the national security of EU Member States or the internal security of the EU, in practice, has been negatively affecting the prohibition on the collective expulsion of immigrants.

Henceforth, not only the enjoyment of the right to seek asylum and its derivative rights (such as the right to an effective remedy) by groups of asylum seekers again loses its real meaning and becomes ineffective, but also the securitisation of immigration in the law, polices, and practices of EU is making a certain group of people 'illegal.'[95] Under this scenario, the very legal and social existence and the protection of some people fall outside the realm of the 'Law's Empire.'[96] After all, depending on the law alone and the language of rights, as such, does not suffice in realising the right to seek asylum. In addition to the inherent incapability and inability of law to solve the issue of illegality, this approach limits us to the myopia of 'legalistic dogma.'[97] The limitations of thinking solely from a legal standpoint leads to ignoring the political, social, and cultural contexts, within which human rights in general, and the right to seek asylum, specifically, have found meaning.[98]

In conclusion, instead of studying the right to seek asylum from a purely legalistic approach, we should analyse the 'political processes,' which could give this right a real meaning. By way of explanation, human rights are not only matters of legal dogmatic discourse. The political, social, cultural, and economic contexts, within which these rights are formed and dismantled, need consideration to restore the essence of the right to seek asylum in the EU. This right is so fundamental in the realisation of other human rights of asylum seekers, so that to me, it resonates with what Hannah Arendt called, 'the right to have rights.'[99]

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[95] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge; New York: Cambridge University Press, 2008).
[96] I have borrowed the phrase 'Law's Empire' from the title of one of Dworkin's books: Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing Ltd, 1998).
[97] Richard Ashby Wilson, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law', in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge; New York: Cambridge University Press, 2007), pp. 342-369, pp. 360-363.
[98] *Ibid*, pp. 350-369. Also, see: Jean Grugel and Nicola Piper, *Critical Perspectives on Global Governance: Rights and Regulation in Governing Regimes* (New York: Routledge, 2007), pp. 18-21.
[99] Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), pp. 267-302.

2. UNDERSTANDING THE NATURE OF THE RIGHT TO SEEK ASYLUM AS A FUNDAMENTAL RIGHT

2.1. INTRODUCTION

In order to understand the nature of the right to seek asylum, it is pertinent to grasp the background story from which this right has emerged. The etymology of the term 'asylum' suggests that this word is a Latin term, originated from the Greek word 'asylon.'[100] In the English language, asylon literally translates to 'freedom from seizure.'[101] To its very core, asylum is a protection given to a person in a certain place.[102] In common use, the term asylum is frequently mistaken with the word refugee. Asylum is a more general term, which includes all refugees; whereas, a refugee is an asylum seeker whose refugee application has met all the inclusion criteria under Article 1(A)(2) of the 1951 Refugee Convention and its 1967 Protocol.[103]

Asylum seeking in international law occupies something of a highly disputed and contradictory legal space, swaying between the principle of state sovereignty and an urgent need for the humanitarian protection of individuals.[104] In this chapter, I will first study the historical background behind the formation and development of the concept of asylum and the practice of asylum seeking in the World (Section 2.2). I divide this historical analysis into two stages of before and after the creation of nation-states. Although this categorisation implies a chronological historical study of asylum, this section follows a diachronic logic, i.e. sometimes going backwards and forwards along the historical timeline.

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[100] Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 423 and 424.

[101] Atle Grahl-Madsen, 'Asylum, Territorial', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 280-286, p. 280. In this regard, also see: Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, p. 33.

[102] Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 2-5. In this regard, also see: Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, p. 33.

[103] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge; New York: Cambridge University Press, 2005), p. 78. In this regard, also see: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford; New York: Oxford University Press, 2007), pp. 35-41.

[104] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford; New York: Oxford University Press, 2007), p. 1.

Meanwhile, in the same section, I will analyse the philosophical debates, which have formed the intellectual foundations of the acceptance and development of the right to seek asylum in the EU as a fundamental right. Based on these theoretical arguments, the receiving EU Member States are responsible for the realisation of the right to seek asylum.

Since this chapter covers the philosophical and intellectual history of the right to seek asylum in the EU, the mainstream research materials available on the topic explore the Eurocentric approach to asylum as part of a wider Western imperial project. Being aware of this fact, in the midst of this historical and philosophical analysis, I critically weigh the European version of asylum against the recent and currently growing body of de- and post-colonial literature in the field of critical migration studies.[105] I will examine this body of literature in further details in the discussion chapter of this dissertation, meaning Chapter 6.

After studying the historical background and philosophical debates on the formation of the right to seek asylum as a fundamental right in the EU, in Section 2.3, I will address the conceptual elements of this right. Keeping this short introduction in mind, the questions I address in this chapter are the following: how did the right to seek asylum come into existence? What are the historical explanations that justify the necessity of upgrading the legal status of this right to a fundamental right in the EU? What are the legal implications of considering the right to seek asylum as a fundamental and constitutional human right? The historical and philosophical analyses of this chapter set the scene to answer the main research question in Chapters 4, 5, and 6.

[105] Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. In this regard, also see: Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017). Also, see: Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228. In this regard, also see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

2.2. THE HISTORICAL BACKGROUND ON THE CREATION OF THE RIGHT TO SEEK ASYLUM AS A FUNDAMENTAL RIGHT

2.2.1. THE CONCEPT AND PRACTICE OF ASYLUM BEFORE NATION-STATES (TERRITORIAL ASYLUM)

For unfolding the historical debates on the formation of the right to seek asylum, it is worth mentioning that the relationship between immigrants and nation-states is not a 'chicken-and-egg' dilemma. In fact, we know that people have been migrating since a much longer time before the establishment of the nation-state system, meaning the formation of sovereign powers and their territorial borders.[106] The same narrative applies to the practice of asylum seeking and the existence of asylum seekers in the World. Some historical studies on the subject of human migration have shown that the origin of the term 'asylum' and the practice of 'asylum seeking' dates right back to the early times of human life on this planet.[107] This historical evidence indicates that it is, indeed, in our nature and a part of survival mechanism to fear what threatens our lives. Thereafter, in time of danger, we either fight back or if unable to do so, escape and seek shelter in safer places.[108] Therefore, when needed, humans are bound – by the rule of nature – to move about in order to find a sanctuary to remain alive and safe.[109]

However, by the development of ancient civilisations, the practice of escaping dangers and seeking asylum transformed to a religious-based social institution, also known as 'sanctuary,' which was linked with the power of divinity and holy spaces.[110] Because this kind of asylum was associated with a sacred place and granted to fugitives once they had entered that space, it is known as 'territorial

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[106] Sherally Munshi, 'Immigration and the Imperial', in Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (eds), *The Oxford Handbook of Law and Humanities* (New York: Oxford University Press, 2020), pp. 497-516, pp. 497 and 498. In this regard, also see: Ranabir Samaddar, *A Postcolonial Enquiry into Europe's Debt and Migration Crisis* (Singapore: Springer, 2016), pp. 87-94.

[107] Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, pp. 33 and 34. In this regard, also see: Michael H. Fisher, *Migration: A World History* (New York: Oxford University Press, 2014), pp. 1-27. Also, see: S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 5.

[108] Thomas John de'Mazzinghi, *Sanctuaries* (Stafford: Halden & Son, 1887), pp. 4 and 5.

[109] *Ibid.* Also, see: Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, p. 33.

[110] Henri Wallon, *Du Droit d'Asyle* (Paris: The Sorbonne University Press, 1837), pp. 1-3. In this regard, also see: Thomas John de'Mazzinghi, *Sanctuaries* (Stafford: Halden & Son, 1887), pp. 1-7. Also see: Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, pp. 34 and 35.

asylum.'[111] Due to the respect for holy places, the pursuers deemed the sanctuaries inviolable.[112] This reverence and sanctity was based on the belief that violating the sacred space would anger the god(s) or it would bring misery and bad luck to the violator.[113] Therefore, in ancient times, the inviolability of divinity and holy spaces were reasons to grant asylum to persons who were escaping certain forms of punishment or cruel treatments.[114]

Within the historical context of the Abrahamic religions (Judaism, Christianity, and Islam), the concept of territorial asylum was also vastly practiced by the virtue of the divinity of religious places and administered by religious leaders.[115] In an early era of criminal law, in which the Biblical principle of *Lex Talionis* (necessitating for revenge and vengeance or 'an eye for an eye and a tooth for a tooth') dominated, the priest or the head of a tribe had the power to impose retaliatory punishments on the offender on behalf of the community or the whole tribe.[116] Due to the religious character of the principle of *Lex Talionis*, any offence against individuals was deemed an offence against the God, too. Hence, the priest or the Imam, on behalf of the God or as the God's representative on Earth, had the power to decide whether the offender deserved asylum once they entered a holy place.[117]

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[111] Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, p. 34. In this regard, also see: Atle Grahl-Madsen, 'Asylum, Territorial', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 280-286, p. 281.

[112] Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 1-9.

[113] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 5.

[114] *Ibid*, p. 6. In this regard, also see: Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 1-9. Also, see: Emma Dench, *Romulus' Asylum: Roman Identities from the Age of Alexander to the Age of Hadrian* (Oxford; New York: Oxford University Press, 2005), pp. 1-35. Also, see: Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, p. 34.

[115] Karen Musalo, Jennifer Moore, and Richard A. Boswell, *Refugee Law and Policy: A Comparative and International Approach* (3rd edn, Durham, North Carolina: Carolina Academic Press, 2007), pp. 3-12. In this regard, also see: Thomas John de'Mazzinghi, *Sanctuaries* (Stafford: Halden & Son, 1887), pp. 2 and 6-10. Also, see: S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), pp. 7, 8, and 10-13.

[116] James F. Davis, *Lex Talionis in Early Judaism and the Exhortation of Jesus in Matthew 5.38-42* (London: Bloomsbury Publishing, 2005), p. 10. In this regard, also see: Richard H. Hiers, *Justice and Compassion in Biblical Law* (New York; London: Bloomsbury Publishing, 2009), pp. 146-151. Also see: Matthew Henry Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and its Consequences* (Oxford: Oxford University Press, 2011), pp. 77 and 78. Also see: Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality, and Religion* (New York: Oxford University Press, 2012), pp. 77 and 78. Also see: Maher S. Mahmassani, *Islam in Retrospect: Recovering the Message* (Northampton, Massachusetts: Interlink Publishing, 2014), pp. 232, 234, and 453-455.

[117] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 6. In this regard, also see: James F. Davis, *Lex Talionis in Early Judaism and the Exhortation of Jesus in*

In ancient Greece, although no formal right to seek asylum existed as such, in certain Greek city-states, some temples offered asylum to criminals escaping punishment and to slaves escaping their masters.[118] This practice emerged from the idea that the absolute power of the law needed mitigation by the interference of the fear of divinity. Some Greek city-states removed any limitation on asylum until almost anyone could seek asylum in certain Greek temples (even foreigners with any religion or criminals escaping the justice of their countries).[119] Some historical analysts believe that this limitless possibility to seek asylum in some ancient Greek city-states encouraged some to abuse the institution of asylum, leading to the promotion of crimes and public disorder.[120] Some studies show that the Greek's generosity in offering asylum brought an opportunity for the Romans to use the practice of asylum as a political tool against Greeks. This resulted in the Romans obtaining domination over some of the city-states in ancient Greece.[121] Once established in Greece, the Romans imposed heavy restrictions on asylum to prevent any possible abuse. In other words, the Roman law stood above any divinity or religious beliefs, with no mercy shown to those breaking the laws of the Roman Empire.[122]

The collapse of the Ancient Roman Empire in the late third and early fourth centuries, and because of the expansion of the power of Christianity in Europe, the church became the place of refuge for the weak and the clergy held the power to grant asylum.[123] This gave a personalised character to the institution of asylum as opposed to the pre-Roman territorial asylum, which was merely dependent on the fugitive accessing holy places.[124]

Matthew 5.38-42 (London: Bloomsbury Publishing, 2005), pp. 17-20. Also see: Maher S. Mahmassani, *Islam in Retrospect: Recovering the Message* (Northampton, Massachusetts: Interlink Publishing, 2014), p. 300.

[118] Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 1-9.

[119] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 9. Also, see: Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 1 and 2.

[120] Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), pp. 397 and 398.

[121] Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58.

[122] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 10. In this regard, also see: Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC, 2019), pp. 18-20.

[123] Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC, 2019), p. 20.

[124] John Charles Cox, *Sanctuaries and Sanctuary Seekers of Mediaeval England* (London: G. Allen & Sons, 1911), pp. 2-5. Also, see: S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 10. Also, see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 19-22.

Supported by the recognition of Christianity as the official religion of the Roman Empire, the Constantine Edict of Toleration, passed in 313 A.D., gave permission to all churches in Europe to grant asylum to fugitives.[125] In the years following the passing of this law, different metropolitan bishops adopted the canon law, which granted a right to intercede in granting protection to asylum seekers.[126] In 461 A.D., Pope Leo I approved the canon law, which granted an exclusive right to the church for the examination of asylum claims and hence, gave full power to bishops to take whatever action they deemed appropriate in asylum cases.[127]

With this vast ecclesiastical power over the institution of asylum in Europe, the church condemned and the bishops excommunicated all those who opposed the institution of asylum and those who sought to impede the practice of asylum seeking.[128] Thus, during the early Middle Ages, the concept of asylum and the practice of seeking asylum possessed such an absolute nature that by the late 600s A.D., almost anyone who had committed any crime, could ask for asylum.[129] In addition, the places of asylum expanded to include not only churches, but also convents, monasteries, cemeteries, the residences of bishops, and even hospitals.[130] By this virtue, the more personal characteristic of asylum, which was exclusive to bishops, was replaced by a territorial character of asylum, something similar to what had already existed in the pre- and early Christian eras.

Nevertheless, during the entire Middle Ages, the emperors were not pleased with the limitless power of the church on granting asylum to anyone that the

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[125] Hiroshi Oda, 'Ethnography of Relationships among Church Sanctuary Actors in Germany', in Randy Lippert and Sean Rehaag (eds), *Sanctuary Practices in International Perspectives: Migration, Citizenship, and Social Movements* (Oxford; New York: Routledge, 2013), pp. 148-161, p. 157.
[126] *Ibid.* Also, see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 29 and 30.
[127] Hiroshi Oda, 'Ethnography of Relationships among Church Sanctuary Actors in Germany', in Randy Lippert and Sean Rehaag (eds), *Sanctuary Practices in International Perspectives: Migration, Citizenship, and Social Movements* (Oxford; New York: Routledge, 2013), pp. 148-161, p. 157. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 29 and 30.
[128] John Charles Cox, *Sanctuaries and Sanctuary Seekers of Mediaeval England* (London: G. Allen & Sons, 1911), pp. 5 and 6. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 20 and 21.
[129] John Charles Cox, *Sanctuaries and Sanctuary Seekers of Mediaeval England* (London: G. Allen & Sons, 1911), p. 7. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 30-33.
[130] John Charles Cox, *Sanctuaries and Sanctuary Seekers of Mediaeval England* (London: G. Allen & Sons, 1911), p. 7. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 30-33. Also, see: Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts; London: Harvard University Press, 1983), p. 215.

bishops desired. Therefore, a clash between the will of emperors and that of bishops emerged. For example, in 535 A.D., Justinian the Great, while reluctantly verifying the Edicts of Asylum passed by his predecessors, exempted murderers, adulterers, and rapists from asylum.[131] The battle of power between the emperor and the church over the institution of asylum continued until the eleventh and twelfth centuries, when the canon law and the ecclesiastical law of asylum went under a drastic reform.[132] These reforms not only ended excluding certain types of criminal offences from asylum, but they even limited the places of asylum to only churches, chapels, and the residences of bishops.[133]

2.2.2. THE CONCEPT AND PRACTICE OF ASYLUM AFTER THE CREATION OF NATION-STATES (POLITICAL ASYLUM)

2.2.2.1. Asylum prior to WWI

By the rise of the Reformation and the advancement of Protestant power in Europe around the sixteenth century, the position of the church in handling criminal justice matters came noticeably under scrutiny.[134] The newly formed civil authority claimed full power over serving justice and decided to secularise the institution of asylum – making it similar to all other legal and societal institutions.[135] Therefore, by the end of the Middle Ages and by the formation of nation-states in Europe, at the end of the fifteenth and early sixteenth centuries,[136] the institution of asylum departed from the territorial and divine character of church asylum and moved towards a secular concept.[137] As a result,

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[131] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 11. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 28 and 29.

[132] John Charles Cox, *Sanctuaries and Sanctuary Seekers of Mediaeval England* (London: G. Allen & Sons, 1911), pp. 11-14. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), p. 34.

[133] At this time, certain crimes were excluded permanently from the right to seek asylum. These crimes included converting to Judaism, assassination in the church or a cemetery by a traitor or for a price, violation of the right of asylum itself, forging church documents, and engaging in duels. In this regard, see: S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 12.

[134] Heikki Pihlajamäki, '*Executor divinarum et suarum legum*: Criminal Law and the Lutheran Reformation', in Virpi Mäkinen (ed.), *Lutheran Reformation And the Law* (Leiden: Brill, 2006), pp. 171-204.

[135] John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2004), pp. 33-50, 53-85, and 199-255. In this regard, also see: Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts; London: Harvard University Press, 1983), pp. 272-276.

[136] On the topic of creation of States in International Law, the principle of state sovereignty, and consequently, the equality of state sovereignty, see: James Richard Crawford, *The Creation of States in International Law* (2nd edn, New York: Oxford University Press, 2007), pp. 3-37.

[137] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 50 and 51. In this regard, also see: Harold J. Berman, *Law and Revolution: The Formation of the*

the practice of granting asylum was tightly restricted to the kingdoms. Therefore, the jurists selected by the kings became in full control of asylum as an institution created by man with no divine character.[138] European kings, one after another, started to erode and dismantle the institution of asylum within the territories under their ruling. For example, King Louis XII of France, King Philip II of Spain, and King George I of Great Britain abolished the institution of church asylum in 1515, 1570, and 1722, respectively.[139]

In spite of the restrictive environment of the seventeenth and eighteenth centuries against the practice of asylum, the seventeenth century jurist and natural lawyer, Hugo Grotius – known as the father of modern international law – advocated for a 'natural' and 'inviolable' right of asylum.[140] In 1621, as a political activist convicted of high treason, Grotius had to flee his home country, Holland, and lived in Paris under the protection of King Louis XIII until 1631.[141] It was during his time in exile that he published his famous book on international law, entitled, '*De jure belli ac pacis*.'[142] In this book, Grotius opined that, '[accepting asylums] is not contrary to friendship [between states], for over exiles the state has no right.'[143] In this work, Grotius continued, '[…] granting of asylum to exiles is not only natural, but also advantageous,' because 'such protection are designed only for those, who are the victims of unmerited persecution.'[144]

The right to seek asylum might seem to be a 'natural right' in Grotius' legal philosophy; however, he did not consider it an absolute right. He contended that, '[The right to seek asylum] is not for those who have committed crimes injurious to mankind and destructive to society.'[145] Accordingly, Grotius

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Western Legal Tradition (Cambridge, Massachusetts; London: Harvard University Press, 1983), pp. 1-45.

[138] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 56-60.

[139] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 13.

[140] Grotius used the phrase 'the rights of suppliants' as what we know today as 'the rights of asylum seekers'. In this regard see: Hugo Grotius, '*De Jure Belli ac Pacis*', in Stephen C. Neff (ed.), *Hugo Grotius on the Law of War and Peace: Student Edition* (New York: Cambridge University Press, 2012), p. 295.

[141] Britannica, 'Hugo Grotius: Dutch Statesman and Scholar', <www.britannica.com/biography/Hugo-Grotius#ref43942>.

[142] The title of the book '*De jure belli ac pacis*', which was published originally in 1625, is translated to 'On the Law of War and Peace'. In this regard, see: Hugo Grotius, '*De Jure Belli ac Pacis*', in Stephen C. Neff (ed.), *Hugo Grotius on the Law of War and Peace: Student Edition* (New York: Cambridge University Press, 2012).

[143] Hugo Grotius, '*De Jure Belli ac Pacis*', in Stephen C. Neff (ed.), *Hugo Grotius on the Law of War and Peace: Student Edition* (New York: Cambridge University Press, 2012), p. 440.

[144] Hugo Grotius, *On the Law of War and Peace*, translated by Archibald Colin Campbell (Altenmünster: Jazzybee Verlag Jürgen Beck, 2018), p. 201.

[145] Hugo Grotius, '*De Jure Belli ac Pacis*', in Stephen C. Neff (ed.), *Hugo Grotius on the Law of War and Peace: Student Edition* (New York: Cambridge University Press, 2012), p. 294. In this regard, also see:

recognised some limitations to the right to seek asylum against war slaves and deliberate murderers escaping a 'justly deserved penalty.' In Grotius' words, 'deliberate murderers, or those, who had disturbed the peaceful order of the state, found no protection even from the altar of God.' Perhaps, this is one of the first historical documents, in which the security considerations of nation-state and the safety of host society have limited the right to seek asylum. In the following quotation, we will read the grounds, based on which Grotius believed that some people should be excluded from the right to seek asylum:

> [W]hen such men, prompted by malice, or rapacity have plunged into evils; they have no right to talk of misfortune or to wear the name of suppliants [meaning asylums]. For that is a privilege granted by the laws of nature to the innocent, who are beaten down by the hard and oppressive strokes of ill fortune. But refuge of compassion is withheld, where every line of a life has been marked with cruelty and injustice.[146]

As we can see in this quotation, the outlook of Grotius towards the right to seek asylum is based on the necessity of human mobility. This attitude, however, has acknowledged and integrated an inherent tension between the interests of sovereign power, on the one hand, and the necessity of the movement of asylum seekers, on the other.[147]

Even though Grotius had found sanctuary under the protection of King Louis XIII of France, the French Protestant Reformists – known as 'Huguenots' – became the subject of persecution by the King's successor. In 1685, King Louis XIV adopted the 'Edict of Fontainebleau,'[148] revoking the former 'Edict of Nantes.'[149] According to the latter document, Protestants were tolerated in the Kingdom; however, the Edict of Fontainebleau abolished the right to freedom of religion and announced Protestantism illegal.[150] In fact, the word 'refugee,' referring to 'Protestant Huguenots,' for the very first time in history appeared in

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Hugo Grotius, *On the Law of War and Peace*, translated by Archibald Colin Campbell (Altenmünster: Jazzybee Verlag Jürgen Beck, 2018), p. 201.

[146] Hugo Grotius, *On the Law of War and Peace*, translated by Archibald Colin Campbell (Altenmünster: Jazzybee Verlag Jürgen Beck, 2018), p. 201.

[147] Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (Port Melbourne: Cambridge University Press, 2018), p. 65.

[148] 'The Edict of Fontainebleau', issued by King Louis XIV of France on 22 October 1685, in this regard, see: <huguenotsweb.free.fr/english/edict_1685.htm>.

[149] 'The Edict of Nantes,' signed by King Henry IV of France in April 1598, in this regard, see: <www.huguenot-museum-germany.com/huguenots/edicts/01-edict-nantes-1598-english.pdf>.

[150] 'The Edict of Nantes,' signed by King Henry IV of France in April 1598, in this regard, see: <www.huguenot-museum-germany.com/huguenots/edicts/01-edict-nantes-1598-english.pdf>. In this regard, also see: Jackson Joseph Spielvogel, *Western Civilization: A Brief History* (9th edn, Boston: Cengage Learning, 2017), pp. 364 and 365.

the 1685 Edict of Fontainebleau.[151] The term 'refugee' comes from its French root, '*réfugié*,'[152] originally referring to 'Protestant Huguenots,' who were persecuted by King Louis XIV of France.[153] This term, at the time of creation, exclusively referred to 'Huguenots,' but with the passing of time and especially since the early twentieth century, it has expanded its meaning to cover all those fleeing because of religious beliefs and political convictions.[154]

In response to the Edict of Fontainebleau, Duke Frederick William of Prussia signed the 'Edict of Potsdam' in the same year (meaning in 1685), according to which the French Huguenots were welcomed in Prussia.[155] Frederick William, the Elector of Brandenburg and the Duke of Prussia (from 1640 to 1688) was a staunch Calvinist and an enthusiastic promoter of the Protestant Reformation.[156] William's Edict of Potsdam, welcoming over 20,000 Huguenots to Prussia, was not based on the belief in a natural right to seek asylum or liberty of movement, but it stemmed mainly from his political opinion and religious sentiment. In fact, he trained and used the majority of the French Huguenot asylum seekers to rebuild the Prussian army and to restore the territories that the Thirty Years' War (1618-1648) had damaged before.[157]

Similar to Grotius, Christian Wolff, the German philosopher of the seventeenth and eighteenth centuries, who like Grotius was subjected to live in exile, subscribed to a 'natural right to free movement' and a 'right to seek asylum' in other lands.[158] However, what substantially differed in his opinion compared to Grotius' was that this right – as a rule of nature and in an absolute term – was applicable only within 'primitive societies.' Thence, in a civilised society, Wolff

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[151] Wolf Gunther Plaut, *Asylum: A Moral Dilemma* (Westport: Greenwood Publishing Group, 1995), p. 12.

[152] According to Merriam-Webster Dictionary, the French term 'réfugié' comes from the Latin word '*refugium*', a noun that meant 'the act of taking refuge' or 'a place of refuge or asylum'. '*Refugium*' itself came from the verb '*refugere*', meaning 'to run away' or 'to escape'. In this regard, see: Merriam-Webster Dictionary, 'The Origin of Refugee', <www.merriam-webster.com/words-at-play/origin-and-meaning-of-refugee>.

[153] In this regard, see: Merriam-Webster Dictionary, 'The Origin of Refugee', <www.merriam-webster.com/words-at-play/origin-and-meaning-of-refugee>. Also, see: Britannica, 'Refugee', <www.britannica.com/topic/refugee>.

[154] Wolf Gunther Plaut, *Asylum: A Moral Dilemma* (Westport: Greenwood Publishing Group, 1995), p. 12.

[155] 'The Edict of Potsdam', issued by Frederick William (Duke of Prussia), 29 October 1685, <www.huguenot-museum-germany.com/huguenots/edicts/04-a-edict-potsdam-1685.pdf>. In this regard, also see; Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia 1600-1947* (New York: Penguin Books, 2007), p. 166.

[156] Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia 1600-1947* (New York: Penguin Books, 2007), pp. 67, 68, and 149.

[157] *Ibid*, 166 and 167.

[158] Christian Freiherr von Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), translated by Joseph Horace Drake as *Law of Nations Treated According to a Scientific Method* (vol. 2, Oxford: The Clarendon Press, 1934), pp. 179.

asserted that sovereign power decided whether an outsider be allowed to enter the kingdom.[159] While Grotius had hinted to a tension between the right to seek asylum and the interests of the host nation-state, Wolff explicitly outweighed the decision of state over a natural right to seek asylum.[160]

Building his legacy on the scholarships of Grotius and Wolff, the international lawyer of the eighteenth century Emer de Vattel[161] rendered that, '[…] in an abstract perfect world, the right to seek asylum is necessarily absolute; nevertheless, as we live in an imperfect, relative world, the right to seek asylum cannot be a perfect, absolute right.'[162] According to de Vattel, when outsiders pose a danger to the nation or may cause serious problems, the nation-state has the right to refuse the admission of foreigners.[163] The difference between de Vattel and his predecessors is that while Grotius believed in a 'natural right to seek asylum' and de Vattel applied a theory of 'balancing act,' Wolff gave more weight to the interests of the nation-state. The bottom line in de Vattel's theory is that the right to seek asylum is an 'imperfect right,' the realisation of which depends on the discretion and decision of the nation-state authorities.[164]

At the end of the eighteenth century, the abolition of the institution of asylum by the kingdoms and newly formed European nation-states made it necessary to enter into *bilateral extradition treaties* for regulating and facilitating the return of fugitives and criminals. Bilateral extradition treaties initially were created as part of a diplomatic practice between European States and their counterparts in Europe and elsewhere in the World. The formation of these treaties was based heavily on the newly emerged principle of state sovereignty, the equality of the sovereignty of states, and the principle of non-interference. However, by the development of commercial transactions beyond state borders, a common interest grew amongst European States in tracking down the criminals who were constantly moving from one sovereign state to another and those considered threats to the commercial benefits of states.[165] As of today, the

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[159] *Ibid*, pp. 149 and 150.
[160] *Ibid*, pp. 150-152.
[161] Britannica, 'Emmerich de Vattel: Swiss Jurist', <www.britannica.com/biography/Emmerich-de-Vattel>.
[162] Emer de Vattel, *Le Droit des gens: Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (1758), translated by Thomas Nugent as The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns (Indianapolis: Liberty Fund, Inc., 2008), Book I, Chapter XIX, § 229.
[163] *Ibid*, § 230.
[164] *Ibid*, § 227-230.
[165] George Cornewall Lewis, On Foreign Jurisdiction and the Extradition of Criminals (London: John W. Parker and Son, 1859), pp. 2-7 and 35-38. In this regard, also see: Julia Jansson, Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition (Oxford; New York: Routledge, 2020), pp. 54 and 55.

concerns of states with regard to safeguarding their interests have developed to a general principle in international law and international relations, known as the 'protective principle.' Accordingly, states, based on the principle of state sovereignty and the equality of sovereignty, have the right to protect themselves from the acts of individuals or groups abroad, which might undermine their sovereignty and independence.[166]

Overall, some international lawyers assert that the practice of signing bilateral and multilateral extradition treaties is a product of the European nation-states' multifaceted commercial and societal interactions, based on the principles of reciprocity and comity, and as a matter of courtesy and good will between sovereigns.[167] Therefore, there is no obligation to extradite as such in international law; that is why a treaty should regulate the matter.[168] However, others have a different rationale. They believe that according to the general principle of *aut dedere aut judicare* in criminal law, states should extradite criminals; otherwise, they have to apply their own territorial jurisdiction in addressing the criminal case and prosecuting the alleged crime suspects.[169] For example, regarding the core international crimes such as genocide, crimes against humanity, and war crimes, the states' obligation to extradite or to prosecute based on the general principle of *aut dedere aut judicare* has reached the level of a customary norm of international law.[170] No matter which of the two above-mentioned positions we accept, the term 'extradition' is a 'bilateral or multilateral process, through which a person, who is a suspect in an alleged crime or has been convicted of committing a crime, would be handed over to the

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[166] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford: Oxford University Press, 2015), p. 144.

[167] Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions* (Leiden; Boston: Martinus Nijhoff Publishers, 2006), p. 24. In this regard, also see: Mahmoud Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, New York: Oxford University Press, 2014), p. 2. Also see: Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford: Oxford University Press, 2015), p. 144.

[168] Stephan Wittich, 'Immanuel Kant and Jurisdiction in International Law', in Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (New York: Oxford University Press, 2019), pp. 81-96, p. 89. Also, see: Dino Kritsiotis, 'The Establishment, Change, and Expansion of Jurisdiction through Treaties', in in Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (New York: Oxford University Press, 2019), pp. 251-299. In this regard, also see: Rebecca M.M. Wallace and Fraser A.W. Janeczko, 'The Concept of Asylum in International Law', in Mary Crock (ed.), *Refugees and Rights* (Oxford; New York: Routledge, 2016), pp. 33-58, p. 36.

[169] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute* (New York: Oxford University Press, 2018), pp. 235-241.

[170] Raphaël van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9(5) *Journal of International Criminal Justice*, pp. 1089-1116.

authorities of the requesting state.'[171] On 25 August 1850, France and Spain signed one of the very first bilateral extradition treaties in Europe.[172] According to Article 9 of this treaty, church refugees could only be extradited if the returnees would be safe from punishment by death. This is perhaps one of the very first examples of using assurances against death penalty in the cases of returning refugees.

The mainstream narrative of history originating from a strictly European perspective suggests that the treaties of the Peace of Westphalia, signed in 1648, created the modern sovereign nation-states and diplomatic relations in the World.[173] The outcome of this Eurocentric approach is to accept that refugees and asylum seekers are the 'inevitable consequence of the modern system of nation-states' and the result of a 'breakdown in the state-citizenship relationship.'[174] However, a critical reading of history shows that it would be almost impossible to put an exact date on the transformation of the territorial and church asylum into the institution of political asylum.[175] Regardless of this historical controversy, by the creation of nation-states in Europe in the mid-seventeenth century, there was a consensus amongst the newly independent kingdoms that under the principle of *aut dedere aut judicare*, ordinary crimes should not go without prosecution and punishment. Therefore, there is an obligation to hand over the alleged criminals to the justice system.[176] The necessity of criminal prosecution was already emphasised by natural law jurists and political philosophers of that time. For example, Jean Bodin, a lawyer of the sixteenth and seventeenth centuries, emphasised that it was in the interest of all

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[171] Mahmoud Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, New York: Oxford University Press, 2014), p. 2.

[172] Christopher L. Blakesley, 'The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History' (1981) 4(1) *Boston College International and Comparative Law Review*, pp. 39-60, p. 52.

[173] Derek Croxton, *Westphalia: The Last Christian Peace* (New York: Palgrave Macmillan, 2013), pp. 3-5, 101-103, 133, 134, 360, and 364. In this regard, also see: James Richard Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford: Oxford University Press, 2019), pp. 4 and 7-9. For critics against this common perception, see: Kaius Tuori, 'The Beginnings of State Jurisdiction in International Law until 1648', in Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (New York: Oxford University Press, 2019), pp. 25-39.

[174] Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228. In this regard, also see: Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge; New York: Cambridge University Press, 2008), pp. 1-19.

[175] Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228.

[176] Mahmoud Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, New York: Oxford University Press, 2014), pp. 7 and 8.

that crimes be suppressed, no matter where they were committed.[177] In this regard, Bodin asserted that it was in favour of 'distributive justice' as part of 'substantive justice' to make sure that no crime goes unpunished.[178]

Another example is the assertions by Cesare Beccaria, the eighteenth-century Italian jurist and philosopher – also known as the father of criminal law and criminal justice.[179] He vigorously defended the concept of 'justice' and argued that granting asylum for criminals, who have committed ordinary and common crimes, is against justice. According to Beccaria, '[i]n the whole extent of a political state, there should be no place, which is independent of the laws.'[180] He continued that, '[t]he power of the law should follow every subject, as the shadow follows the body,'[181] but the 'protection of those, who were oppressed by arbitrary powers or tyranny, is indeed in the direction of justice.' Furthermore, Beccaria emphasised that it was not only a 'right' for those, who were oppressed by tyrannies because of their religious and political beliefs, to be granted asylum, but also that the states had a 'duty' to grant them asylum. In his words:

> To increase the number of sanctuaries, is to erect so many little sovereignties; for, when the laws have no power, new bodies will be formed in opposition to the public good, and a spirit established contrary to that of the state. History informs us that from the use of sanctuaries have arisen the greatest revolutions in kingdoms and in opinions.[182]

In this regard, however, Beccaria, while reminding us of the 'social contract' theory of Hobbes, reserved the power to decide about the fate of criminals only to the hands of states through their legislative and executive arms:

> Only laws can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. If every individual were bound to society, society is equally bound to him by a contract, which, from its nature, equally binds both parties. The sovereign, who represents the society itself, can only make general laws to bind the members; but it belongs not to him, but to judge, whether any individual

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[177] The Stanford Encyclopaedia of Philosophy, 'Jean Bodin', <plato.stanford.edu/entries/bodin/>.
[178] Jean Bodin, *Les Six livres de la République* (1576), Translated by M.J. Tooley 'The Six Books of the Commonwealth' (Oxford: Basil Blackwell, 1955), p. 105.
[179] Britannica, 'Cesare Beccaria: Italian Criminologist', <www.britannica.com/biography/Cesare-Beccaria>.
[180] Beccaria defined the concept of justice as '[a] bond, which is necessary to keep the interest of individuals united; without which, men would return to the original state of barbarity'. Cesare Beccaria, 'Dei delitti e delle pene (1764)', in Richard Bellamy (ed.) and translated by Richard Davies, *An Essay on Crimes and Punishments and Other Writings* (Cambridge: Cambridge University Press, 1995), pp. 12, 67, and 68.
[181] Cesare Beccaria, '*Dei delitti e delle pene* (1764)', in Richard Bellamy (ed.) and translated by Richard Davies, *An Essay on Crimes and Punishments and Other Writings* (Cambridge: Cambridge University Press, 1995), pp. 12, 67, and 68.
[182] *Ibid*, pp. 67 and 68.

> has violated the social compact, or incurred the punishment in consequence. For, in this case, there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused, who denies it. It is necessary then that there should be a third person to decide this contest; that is to say, a judge, or magistrate, from whose determination there should be no appeal; and this determination should consist of a simple affirmation or negation of fact[s]. No magistrate [or judge] then (as he is one of the society) can inflict with justice on any other member of the same society, punishment that is not ordained by the laws.[183]

As Beccaria has formulated on the importance of 'just' criminal prosecutions, the legal institution of extradition and signing treaties for exchanging alleged criminals became more important than the practice and the legal institution of territorial asylum. Extradition, very much, depends on bilateral agreements, based on the principle of reciprocity. As mentioned above, there is no consensus in international law on the obligation to extradite; extradition depends on reciprocity and the decision of individual sovereign states. Consequently, the concept of asylum and the practice of asylum seeking as a natural right of individuals, lost its position to the right of states 'to grant permission to fugitives to remain within their territories.'[184] Hence, by the end of the eighteenth and early nineteenth centuries, no territorial asylum, nor asylum for those who had committed ordinary crimes, existed in Europe; instead, a new form of asylum, named 'political asylum' appeared.[185]

The main trigger for the creation of political asylum was the French Revolution of 1789. During and after the French Revolution, many poets, writers, philosophers, intellectuals, and even jurists became the subject of persecution for opposing the dominant religious and political beliefs of the time.[186] Having the Americas as a new haven, His Majesty's Colonies in America gave asylum to those fleeing persecution in Europe.[187] Therefore, a general tendency towards

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[183] *Ibid*, p. 13.

[184] S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 18. In this regard, also see: Julia Jansson, *Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition* (Oxford; New York: Routledge, 2020), pp. 54 and 55.

[185] Julia Jansson, Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition (Oxford; New York: Routledge, 2020), pp. 54 and 55.

[186] These intellectuals were not limited to French aristocratic refugees, but they also came from many other European countries. In this regard, see: Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of International Refugee Law', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 34-46, p. 36.

[187] This legislation is the Plantation Act 1740 or the British Naturalization Act 1740. The official title of this Act passed by the British Parliament (13 Geo. 2 c.7) is 'Act for Naturalizing Foreign Protestants and Others'. According to this Act, foreigners escaping religious and political oppression '… shall settle in any of His Majesty's Colonies in America'. For a full account on asylum and naturalisation legal documents in Colonial Period, see: Michael C. LeMay, Elliott Robert Barkan, and Michael Robert Lemay

protecting those fleeing religious and political oppression created the notion and practice of political asylum as a legal institution within Europe and all around European colonies.[188] The French Revolution of 1789 brought the idea of freedom of thoughts, opinion, expression, and religion under the spotlight. Accordingly, the nation had the right, not only to form an uprising against the government, but also there was a moral duty based on humanity to protect the revolutionists.[189] Therefore, around this time in history the intellectual foundations for including the right to seek asylum as a fundamental and constitutional right was established, which resulted in including this right in the text of the French post-Revolutionary Constitution of 1791.[190] During the century following the French Revolution (meaning the nineteenth century), many declarations, pieces of legislation, and several treaties distinguished between 'political crimes' and 'common crimes' as two essentially different categories of crimes, especially with regard to the extradition and expulsion of foreigners.[191] In 1849, for instance, Lord Palmerston (the Foreign Secretary of the United Kingdom at that time) endorsed political asylum and supported the Turkish Government (the Ottoman Empire) by not returning five thousand revolutionary Austrian and Russian asylum seekers to Austria and Russia, respectively, who had helped with the Hungarian Revolution of 1848.[192]

Nevertheless, the de- and post-colonial reading of migration law shows that the concept of security within the context of migration law as a legal regime is the by-product of modernity and the urgent need of the newly formed European

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(eds), *U.S. Immigration and Naturalization Laws and Issues: A Documentary History* (Westport: Greenwood Publishing Group, 1999).

[188] However, we should keep in mind that the laws of granting asylum did not necessarily in the entire European colonies grant a full naturalisation protection to asylum seekers. In this regard, see: Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of International Refugee Law', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 34-46, p. 35. In this regard, also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 77-79.

[189] Wolf Gunther Plaut, *Asylum: A Moral Dilemma* (Westport: Greenwood Publishing Group, 1995), p. 32. In this regard, also see: Jared Manasek, 'The Imperial Refugee: Refugees and Refugee Creation in the Ottoman Empire and Europe', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (New York: Bloomsbury Publishing, 2019), pp. 67-84, pp. 70 and 71.

[190] In this regard, see the update provision of the French Constitution on the right to seek asylum: Article 53 (1) of the French Constitution of the Republic, 04 October 1958.

[191] Christopher L. Blakesley, 'The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History' (1981) 4(1) *Boston College International and Comparative Law Review*, pp. 39-60, p. 51.

[192] Correspondence Respecting Refugees from Hungary within the Turkish Dominions: Presented to Both Houses of Parliament by Command of Her Majesty (London: Harrison and Son, 1851).

nation-states in controlling the movements of people.[193] The instabilities that resulted from the 1789 French Revolution and thereafter, the Napoleonic Wars (1803-1815) made it necessary for European empires to control the movement of people in order to ensure that political adversaries gained no access to their territories or threatened the security of their ruling monarchs. Hence, a system of 'border checks' and 'Aliens Acts' was established for the very purpose of controlling the movement of populations during the late eighteenth and early nineteenth centuries.[194] In this regard, for example, the Aliens Acts of 1793 and 1798 of the United Kingdom (UK) obliged all people entering the territory of the UK to register upon arrival.[195] According to these acts, shipmasters had an obligation to report every detail about all the foreigners on board to the British authorities. The 1793 Aliens Act of the UK, in fact, was the first ever legislation in the modern World dealing with asylum seekers and refugees. The whole purpose for creating this piece of legislation and similar acts was to detect French revolutionaries and those who were possible adversaries to the British monarchy by infiltrating their revolutionary ideas into British society.[196]

In addition to the enactment of legislation for controlling the movement of populations across the European empires during the nineteenth century, the institution of the expulsion of aliens came to the attention of international lawyers. In 1892, the *Institut de Droit International* adopted a proposal for international rules on the admission and expulsion of aliens.[197] According to Article 15 of this document, the measures of expulsion and extradition are independent from each other and the refusal of extradition does not imply reunification of the right to expel. However, Article 16 of this proposal states that, 'a returnee, who has sought asylum from criminal prosecution, must not be returned to the requesting state, unless the conditions for extradition are obeyed by the requesting state'. Based on this brief historical reading, we could

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[193] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 79 and 80. Also, see: Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), pp. 1-49.

[194] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 79 and 80.

[195] Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), p. 14. In this regard, also see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

[196] Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), p. 14. In this regard, also see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

[197] L'expulsé réfugié sur un territoire pour se soustraire à des poursuites au pénal, ne peut être livré, par voie détournée, à l'Etat poursuivant, sans que les conditions posées en matière d'extradition aient été dûment observes, L'Institut de Droit International, Session de Genève, 1892.

deduce that the concept of security is nothing new to the practice of asylum seeking and the field of migration and refugee law. In other words, it is reasonable to claim that the terrorist attacks of 9/11, the 2015/16 so-called 'refugee crisis in Europe,' together with the terrorist incidents of that time, did not bring the security agenda of states to the law on migration and asylum. However, in fact, the creation of nation-states had already done so. To conclude, the World political players of the nineteenth century, which were mainly the colonial and imperial European States, gradually accepted the exclusion of political asylums from extradition treaties and expulsion practices. This consensus reached such a high level that it formed a customary rule of international law – known as the principle of *non-refoulement*.[198]

2.2.2.2. Asylum during the interwar period

As stated above, by the end of the nineteenth century, a new category of asylum seekers, i.e. 'political asylum,' was recognised in practice and in the laws amongst nations. By this type of asylum, the international community of that time came to the consensus that political asylums should be exempt from extradition treaties and expulsion to places where they might be in danger.[199] The same way that the format of sovereignty changed from monarchies to republics, asylum not only was a right of the sovereign to grant, but also a duty.[200] Therefore, the subject of extradition treaties was limited to those who had committed general crimes; hence, the nature of asylum, instead of being territorial, became political.[201]

As mentioned in Subsection 2.2.1, the institution of asylum is much older than the legal institution of refugee and the legal regime of refugee protection. At the beginning of the twentieth century, the legal system relating to refugees was in its phase of conception.[202] The current international regime of refugee protection is the outcome of the catastrophic events during the First World War

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[198] Hélène Lambert, Francesco Messineo, and Paul Tiedemann, 'Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?' (2008) 27(3) *Refugee Survey Quarterly*, pp. 16-32, p. 26.

[199] Atle Grahl-Madsen, 'Asylum, Territorial', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 280-286, p. 282. In this regard, also see: María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27(1) *International Journal of Refugee Law*, pp. 3-28, pp. 3 and 4.

[200] María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27(1) *International Journal of Refugee Law*, pp. 3-28, p. 11.

[201] *Ibid*, p. 23.

[202] Robert Kolb, 'The Protection of the Individual in Times of War and Peace', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), pp. 317-337, pp. 327 and 328.

(WWI), as well as the affairs of the interwar period (1914-1939).[203] With the explosion of mass displacements due to WWI in Europe and the four years that followed the end of the war, the Armenians and the Greeks were the victims of genocide and indiscriminate massacres by the Ottoman Empire.[204] Simultaneously, the 1917 Russian Revolution forced those who opposed the Bolsheviks to flee Russia.[205] What distinguishes this refugee movement from the displacements prior to WWI is the significantly large number of people affected. Historians have recorded that approximately one million Armenians, one and a half million Greeks, one and a half million Russians, and over one and a half million Europeans (other than Greeks) lost their homes and became displaced and/or stateless.[206] Therefore, the issue of refugees and displaced people attracted the attention of many, including statespersons and policy-makers all around Europe.[207]

The chaotic environment of Europe during the two decades of WWI and the interwar period created an overwhelming fear of 'espionage' and 'enemy aliens' as urgent threats to many European governments.[208] This state of emergency led to an increasing trend in legislation for the purpose of controlling and limiting migration and population movements across the national borders. For example, the French Government issued multiple decrees during the years of WWI, according to which all aliens residing in France had to lodge a report to the local police departments immediately and apply for residence permits.[209] Other European countries and even the United States (US) followed the same trend. In many ways, this was the peak of bringing the security concerns of states into the realm of immigration and asylum.[210] However, looking at the

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[203] Lucy Mayblin, Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking (London: Rowman & Littlefield International Ltd, 2017), pp. 15-21. In this regard, also see: Emma Haddad, The Refugee in International Society: Between Sovereigns (Cambridge; New York: Cambridge University Press, 2008), pp. 74-96.

[204] Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), p. 32. In this regard, also see: Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge; New York: Cambridge University Press, 2008), pp. 100-103.

[205] Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), p. 32. In this regard, also see: Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), p. 15.

[206] Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), p. 32.

[207] Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995, pp. 13 and 14.

[208] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), p. 92.

[209] John Horne, 'Immigrant Workers in France during World War I' (1985) 14(1) *French Historical Studies*, pp. 57-88, pp. 79, 81, and 83.

[210] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), pp. 92 and 93.

contemporary immigration policies and legislation limiting access to territories, we could comprehend that the state of emergency during WWI and throughout the interwar period has become the dominant norm of our current time as well.

By the end of WWI, over seven million people, including prisoners of war, refugees, and other categories of displaced persons were wandering all around Europe in an absolute desperate need for a new home.[211] Amongst these people were not only Europeans, who were displaced by the war, but also anti-Bolshevik Russians,[212] Armenians,[213] and the Greeks,[214] who were left homeless as the result of civil wars and the ethnic cleansing performed by the Ottoman Empire and the Turkish revolutionaries (the Turkish National Movement). The homes of these people had been destroyed and the existing states were not willing to welcome them. This is when refugees and displaced people became a 'problem of our time;'[215] therefore, there was an urgent need to find a solution.

As discussed in Subsection 2.2.1, asylum seekers and the practice of seeking asylum have always existed throughout human history without these people perceived as a 'problem.' However, asylum seekers were portrayed as 'problems' with the creation of modern nation-states and from the perspective of European imperial governments. Even the use of the term 'asylum' slowly gave its place to the word 'refugee,' which has a very limited and narrow connotation based on what the European nation-states decided to define. In fact, states for the very purpose of their own convenience and security, started to establish restrictive

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[211] Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995, pp. 13-21.

[212] For accounts on the persecution of Russians, because of the Russian Revolution and Russian Civil War, see: Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), pp. 37-41. In this regard, also see: Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), pp. 32-40. Also, see: Peter Gatrell, *The Making of the Modern Refugee* (Oxford: Oxford University Press, 2013), pp. 17-25.

[213] For accounts on the persecution of Armenians (a genocide by the Ottoman Empire), see: Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), pp. 42-45. In this regards, also see: Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995, pp. 41-48. In this regard, also see: Peter Gatrell, *The Making of the Modern Refugee* (Oxford: Oxford University Press, 2013), pp. 17-25.

[214] For accounts on the persecution of Greeks by the Turkish Government, see: Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), pp. 41-48.

[215] 'Refugees: A Problem of Our Time' is part of the title of a two-volume book written by the German-American political scientist *émigré* Louise Wilhelmine Holborn. In this regard, see: Louise Wilhelmine Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-1972* (Vol. 1, Metuchen, New Jersey: The Scarecrow Press, Inc., 1975). Also see: Louise Wilhelmine Holborn, *Refugees, a Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-1972* (Vol. 2, Metuchen, New Jersey: The Scarecrow Press, Inc., 1975).

rules and legal measures at domestic and international levels in order to control the cross-border movements of people.[216]

In response to the 'problem' of refugees during the interwar period, several humanitarian initiatives and actions were formed in an organic manner by numerous grassroots movements or private relief organisations such as the American Relief Administration, the American Friends Service Committee, the Nansen Relief Organization, and the International Committee of the Red Cross.[217] Nevertheless, the magnitude of the misery of displaced people proved that there was a need for a unifying force beyond individual relief organisations. The main issue was that in addition to living in absolute conditions of poverty, these people became stateless because of the creation and development of nationality and restrictive citizenship law and consequently, the fact that no government was willing to accept and recognise them.[218] The problems that governments had with refugees and displaced people did not alleviate in the aftermath of WWI. In fact, it became even worse. That is why three decades later, the philosopher and political theorist Hannah Arendt, who was a stateless person for almost twenty years,[219] righteously described the situation of refugees as:

> Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth.[220]

Keeping the chaos of the interwar period in mind, in 1921, the Council of the League of Nations[221] appointed Fridtjof Nansen as the first 'High Commissioner

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[216] Zara Steiner, 'Refugees: The Timeless Problem', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 21-31, p. 21. In this regard, also see: Paul W. Schroeder, *The Transformation of European Politics, 1763-1848* (Oxford: Clarendon Press, 1994), pp. 113-116. Also, see: Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228.

[217] Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), p. 35. In this regard, also see: Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83(843) *International Review of the Red Cross*, pp. 727-738, pp. 727-729.

[218] Atle Grahl-Madsen, 'The Emergent International Law relating to Refugees: Past – Present – Future', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 180-244, p. 181.

[219] Giovanna Borradori, Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida (Chicago: University of Chicago Press, 2003), pp. 5-7.

[220] Hannah Arendt, *The Origins of Totalitarianism* (New York: Houghton Mifflin Harcourt, 1976), p. 267.

[221] The League of Nations was formed as the result of the negotiations of Paris Peace Conference held at Versailles in 1919 and 1920. This international organisation was the first worldwide inter-governmental organisation with the primary mission of maintaining the world peace and security. Whether the League of Nations succeeded in its mission or not is another story, not fitting within the capacity of this research. However, in this regard, see: Qizhi He, 'The Crucial Role of the United Nations in Maintaining

on Refugees' with the mandate of coordinating all the above-mentioned relief organisations.[222] Amongst many other professions, Fridtjof Wedel-Jarlsberg Nansen (1861-1930) was a Norwegian scientist, explorer, diplomat, and philanthropist.[223] Before his appointment as the High Commissioner for Refugees by the League of Nations in 1921, he had already travelled extensively to war-torn Russia and had provided humanitarian assistance such as food, clothing, and vaccination to Russian asylum seekers through his private Relief Organisation.[224] Besides the famine, hunger, and miserable life conditions of the displaced people, Nansen diagnosed the main problem: 'statelessness.' The main challenge that Nansen faced was the ongoing hostile and unsolvable political environment of the time. He needed the financial, material, logistic, and political support of the US and its allies, while the West was less than eager to give anything that might recognise the Soviet Union or benefit its Communist party.

On the other side of the coin, the Soviet officials did not want to allow those who had fled the Soviet Union for opposing the Revolution or the Bolshevik party to return to Russia, because they were perceived as threats to the Communist Government.[225] Nansen negotiated with the two opposing super powers of the time and created the 'Nansen Passport.'[226] This social-political innovation, which brought Nansen the 1922 Noble Peace Prize, provided the refugees with a legal status that was internationally recognised.[227] As a result, the stateless people possessed identification and travel documents, with which they could travel, as over fifty states in the World were obliged to accept these people in their territories.

International Peace and Security', in Christian Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective* (The Hague: Martinus Nijhoff Publishers, 1995), pp. 77-90, pp. 77 and 78.

[222] Atle Grahl-Madsen, 'Fridtjof Nansen', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 1-6, p. 4. In this regard, also see: Gary Wiener, *Refugees throughout History: Searching for Safety* (New York: Greenhaven Publishing LLC., 2019), pp. 35 and 36.

[223] Atle Grahl-Madsen, 'Fridtjof Nansen', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 1-6, p. 1.

[224] *Ibid*, p. 4.

[225] Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (New York: Oxford University Press, 2015), pp. 50-59.

[226] Atle Grahl-Madsen, 'Fridtjof Nansen', in Peter MacAlister-Smith and Guðmundur S. Alfreðsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy* (The Hague: Martinus Nijhoff Publishers, 2001), pp. 1-6.

[227] Irwin Abrams, The Words of Peace: Selections from the Speeches of the Nobel Prize Winners of the Twentieth Century (3rd edn, New York: Newmarket Press, 2000), p. 128.

2.2.2.3. Asylum during WWII and in the post-war era

The efforts of Nansen in finding a solution to the 'problem of refugees' did not end with his death in 1930. To continue his work, the League of Nations adopted a document to define those deemed eligible for Nansen identification and travel certificates and the refugee protection mechanisms subsequent to this recognition. In 1933, the League of Nations adopted the Convention relating to the International Status of Refugees (the 1933 Refugee Convention).[228] This document is the first international legal instrument on the protection of refugees and it has set the basis for future legislation, amongst which most importantly, the 1951 Refugee Convention.[229] For the very first time in the history of refugee law, Article 3 of the 1933 Refugee Convention used the term '*refoulement*' and set it against the national security of states:

> Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.[230]

As the 1933 Refugee Convention covered only refugees from Russia and Armenia, there remained the need for a legal instrument to protect other groups of refugees. Henceforth, in 1938, the League of Nations adopted the Convention Concerning the Status of Refugees Coming from Germany (the 1938 Refugee Convention).[231] What both the 1933 and 1938 Conventions have in common is that none of them used the term 'asylum' nor mentioned the 'right to seek asylum;' instead, they both used the word 'refugee.' In fact, the main goal of these conventions was to give a clear-cut legal definition of 'who a refugee is' for the purpose of controlling the mass movement of people, while applying the conventions.[232]

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[228] Convention relating to the International Status of Refugees, League of Nations, Treaty Series Vol. CLIX No. 3663, 28 October 1933.
[229] Louise Wilhelmine Holborn, 'The Legal Status of Political Refugees: 1920-1938' (1938) 32(4) *The American Journal of International Law*, pp. 680-703, p. 690. In this regard, also see: Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83(843) International Review of the Red Cross, pp. 727-738, pp. 729 and 730. Also see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), p. 102.
[230] Article 3 of the 1933 Refugee Convention.
[231] Convention Concerning the Status of Refugees Coming from Germany, League of Nations Treaty Series, Vol. CXCII, No. 4461, 10 February 1938.
[232] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge 2018), p. 102. In this regard, also see: Louise Wilhelmine Holborn, 'The Legal Status of Political Refugees: 1920-1938' (1938) 32(4) *The American Journal of International Law*, pp. 680-703, p. 690.

In 1938, the Assembly of the League of Nations was preparing to close its Office of the High Commissioner for Refugees (the same Office held previously by Nansen). The reason for this closure was that the members of the Assembly assumed that the refugee problem of the World was something temporary and would be resolved at the latest by early 1939. However, the expulsion and the mass exodus of Jews from persecution under the Nazi Third Reich proved that assumption wrong.[233] The Second World War (WWII) left over thirty million refugees and displaced people in the World.[234]

By the end of WWII, the League of Nations – with all its failures and hopes – collapsed and gave its place to the United Nations (UN). From the perspective of international human rights law, the post-war period is the era of the UN. In 1946, the UN Economic and Social Council established the Commission on Human Rights with the Charter responsibility of 'promoting universal respect and observance of human rights and fundamental freedoms for all without discrimination of any kind.'[235] The UN Human Rights Commission under the leadership of Eleanor Roosevelt created the 1948 Universal Declaration on Human Rights (1948 UDHR).[236] The 1948 UDHR is the legal ground for establishing the field of international human rights law as a sub-branch of public international law. Therefore, it is reasonable to claim that the current legal system of protecting refugees both internationally and regionally is the fruit of the UN system of human rights protection.

As mentioned above, none of the refugee conventions created by the League of Nations had used the term 'asylum' nor mentioned the right to seek asylum. The 1948 UDHR is the first international legal document explicitly specifying in one of its thirty articles the 'right to seek asylum.' According to the first paragraph of Article 14 of the 1948 UDHR, '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'[237] However, in the second paragraph of this Article, the 1948 UDHR considers two categories of exceptions against this right. According to Article 14(2) of the 1948 UDHR, the right to seek and to enjoy asylum '[…] may not be invoked in the case of prosecutions genuinely

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[233] Zara Steiner, 'Refugees: The Timeless Problem', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 21-31, p. 26.
[234] *Ibid*, p. 27.
[235] William Anthony Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (New York: Cambridge University Press, 2013), p. 20.
[236] The Universal Declaration of Human Rights; adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.
[237] Article 14(1) of the 1948 UDHR.

arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'[238]

All the NGOs that had the chance to submit proposals to the UN Human Rights Commission during the preparatory work of the 1948 UDHR recognised the right to seek asylum. For example, the International Bill of Rights Proposal submitted by the American Federation of Labor, in its paragraph 6 under title IV on 'Basic Human Rights,' read, '[t]he right of asylum is to be guaranteed by all nations. No human being, who is a refugee from any political regime he disapproves, is to be forced to return to territory under the sovereignty of that regime.'[239] Similarly, the International Refugee Organisation – an intergovernmental organisation which later was substituted by the Office of the United Nations High Commissioner for Refugees (UNHCR) – submitted its Constitution, which explicitly had recognised and reaffirmed the '[…] right of asylum for political dissidents and victims of racial persecution.'[240]

On the other side of the coin, most government delegations had great difficulty accepting some of the proposed rights such as the right to move between countries, the right to seek asylum, and the right to a nationality. Their main argument was that their national constitutions did not recognise nor contain any of those rights.[241] However, the de- and post-colonial reading of refugee law uncovers that the representatives of states rejected the proposals on granting the right to seek asylum because this right was not in line with the interests of the imperial powers in the colonies under their control, in particular the human rights violations widespread in the territories under their colonial rules.[242] Therefore, the acceptance and implementation of these rights required nation-states to compromise on part of their sovereignty in favour of the individuals' rights and this was something that governments were not easily willing to accept. In fact, the right to asylum was a real test for any list of universal human rights, since this right is directly in conflict with the principle of state sovereignty as the foundation of the modern system of nation-states, maintaining their

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[238] Article 14(2) of the 1948 UDHR.
[239] William Anthony Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (New York: Cambridge University Press, 2013), p. 76.
[240] *Ibid*, pp. 111 and 112.
[241] Morsink labels these rights as 'special international (human) rights'. In this regard, see: Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 72 and 73.
[242] Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), pp. 113-146. In this regard, also see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. In addition, see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

colonial possessions and continuing to violate human rights in those territories. Including the right to seek asylum in the Bill of Rights made the government delegates at the Committee very uncomfortable, because the acceptance of this right no longer allowed the governments to hide behind the shield of supremacy of 'positive national laws.'[243]

Nevertheless, not all the Government delegates were against the inclusion of the right to seek asylum as a universally protected human right. In fact, most of the former colonial or decolonised states were very much hoping to establish a universal legal system of refugee protection.[244] In the third session of the third Committee of the UN General Assembly, for instance, Karim Azkoul, the Lebanese representative, called the right to asylum a 'part of the birth right of man' and one of those rights that was 'inherent in the human person.'[245] In response, however, during the same session, René Samuel Cassin, the French delegate, asserted that including the right to seek asylum was 'a conception of an essentially international character; therefore, it was necessary to specify who was to ensure the enjoyment of that right.'[246] Accordingly, John Humphrey, the Directive of the Division of Human Rights, representing the UN Secretary General, suggested the following text: 'No alien who had been legally admitted to the territory of a State may be expelled therefrom except in pursuant of a

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[243] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999, p. 73. In this regard, also see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228. Also, see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

[244] Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), pp. 113-145. In this regard, also see: Glen Peterson, 'Colonialism, Sovereignty and the History of the International Refugee Regime', in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919-1959: A Forty Years' Crisis?* (London; New York: Bloomsbury Publishing, 2019), pp. 213-228. In this regard, also see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. In this regard, also see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

[245] Johannes Morsink, Inherent Human Rights: Philosophical Roots of the Universal Declaration (Philadelphia: University of Pennsylvania Press, 2012), p. 28. In this regard, also see: Lucy Mayblin, Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking (London: Rowman & Littlefield International Ltd, 2017), pp. 113-146. Also, see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. Moreover, see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) Journal of Historical Sociology, pp. 423-441.

[246] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 73.

judicial decision or recommendation as a punishment for offences laid down by law as warranting expulsion.' The representatives of the Governments of the UK, France, Italy, the US, and Australia, however, disagreed with Humphrey's suggestion and thought this provision, would, in fact, grant greater protection to aliens than any existing constitutions. Under these political pressures, Humphrey, the representative of the UN Secretary General, henceforth, modified his text: 'Every State shall have the right to grant asylum to political refugees.'[247]

The NGOs and international humanitarian organisations present at the Committee strongly rejected the proposal of the UN Secretary General.[248] The ground for their objection was that the Declaration should formulate from a human rights perspective rather than from the rights of states, because without considering a right to asylum, the right to life and the rights to freedom of thought and expression under the Declaration would be meaningless.[249] Based on this argument, the suggestion from this group was to rephrase the article on asylum as a 'right to seek' and a 'right to be granted asylum.' No surprise that the representatives of the states vigorously opposed the phrase the 'right to be granted asylum' and proposed that a 'right to enjoy asylum' should replace it. To cut this long story short, the lastly mentioned proposal received the approval of the vast majority of votes (thirty to one, with twelve abstentions) and the explanation behind the first paragraph of Article 14 of the 1948 UDHR in the text of its *travaux préparatoires* is what the British delegate Mrs. Corbet expressed:

> Replacing the phrase to "be granted asylum" by phrase "to enjoy asylum" makes it clear that [the] intention [of the drafters] was not to grant a person fleeing persecution the right to enter any and every country, but to ensure for him the enjoyment of the right to asylum once that right had been granted him.[250]

In addition, the strong lobbyists from the Soviet Union present in the Committee pushed for excluding war criminals such as the supporters of the Hitler Regime from the subject matter of the provision on the right to asylum; a proposal which

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[247] *Ibid*, pp. 75 and 76.
[248] These actors included the World Jewish Congress, the International Refugee Organisation, the American Federation for Labor, and the International Union of Women's Catholic Organisations. In this regard, see: Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 76. In this regard, also see: William Anthony Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (New York: Cambridge University Press, 2013), p. 1196.
[249] Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2012), p. 170.
[250] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 78.

received the approval of all participants.[251] Thus, a second paragraph was added to Article 14, stipulating that the right to seek and the right to enjoy asylum should not include criminals, whose acts are contrary to the principles and aims of the UN. In the post-war era, the debate over the right to asylum – whether a right of an individual to seek or the right of states to grant – was silenced in the legal and political arenas. Instead, what became the main concern of the national, regional, and international actors was establishing a legal framework on refugee protection. This led to the creation of the 1951 Refugee Convention and later its 1967 Protocol removing the geographical and temporal limitations of the Convention.

The above-mentioned discussions were happening during the peak of the mass displacement of people following the end of WWII, especially during the 1948 Arab-Israeli war and the mass displacement of Arab refugees in Palestine. To that end, the opposing states reasoned that if the international organisations were to recognise more privileges than that of the will of states, the host countries would have difficulty in accommodating the demands for aliens.[252] The preparatory discussions on the 1951 Refugee Convention unveiled the colonial concerns of some Western European powers. The representative of Italy, for example, attested that, 'if the western countries were obliged to admit the victims of national movements such as those that had recently occurred in India and the Middle East, they would be faced with very serious problems, and would be quite unable to meet the commitment.'[253]

In addition to the historical discussions on the formation of the right to seek asylum, according to Skran, the theory that might possibly be able to best explain the formation of the current international legal regime of refugee protection is a 'functionalist theory.' Based on this theory, the pursuit of the self-interest of states due to the market failure and economic depression of the thirties and forties pushed the main actors of the World – meaning the Western European States – to demand and agree on a regime to deal with the issue of

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[251] William Anthony Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (New York: Cambridge University Press, 2013), p. 1197.

[252] Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626. In this regard, also see: Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (London: Rowman & Littlefield International Ltd, 2017), pp. 113-146. Moreover, see: Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441.

[253] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, UN Doc. No. A/CONF.2/SR.19. In this regard, also see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626.

refugees. While Western European States, by placing emphasis on the principle of sovereignty, were not willing to compromise on the control over their territories, they needed the labour force of refugees to help rebuild their national economies and infrastructure that had been shattered by war. Therefore, completely out of self-interest, they agreed to the formation of an international regime of refugee protection, which could facilitate the movement and settlement of displaced people. This legal system of refugee protection played the role of a medium as a communication tool amongst the states in setting some standards of behaviour, in order to reduce the uncertainty about the situation to an optimal level.[254]

Therefore, it is logical to claim that the interests of states – termed as 'national security' – found a place once again at the very heart of the international legal regime of refugee protection. A functionalist theory of the creation of the international refugee regime very well illustrates that the national interests of states were the bedrock of this establishment. These interests included various aspects from the existentialist interests of the newly founded nation-states in the post-imperial era to the economic interests of major Western European powers. For example, both France and Britain had a direct interest in Russian refugees, who were fighting against Communism, up to the point that France and Britain financially supported the anti-Communist or anti-Bolshevik activists such as the White Army both inside and outside Russia.[255] This is besides the economic benefits that many Western countries experienced from the settlement programmes of the League of Nations under the Nansen scheme, which in the period following WWI considerably solved the market and labour deficiencies of the Allies.[256]

On the brighter side, the emergence of an international regime of refugee protection could partly be explained through the lenses of 'idealists.' This approach goes back to the establishment of the League of Nations and thereafter the creation of the United Nations (UN).[257] The UN system of human rights

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[254] Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), pp. 88-94.
[255] *Ibid*, pp. 89 and 90.
[256] Alexander Betts, Louise Bloom, Josiah David Kaplan, and Naohiko Omata, *Refugee Economies: Forced Displacement and Development* (New York: Oxford University Press, 2017), pp. 15 and 16. For an extensive account on the economic benefits of the refugee settlement schemes of the League of Nations for the Allies powers in the aftermath of WWI, see: Anne Orde, *British Policy and European Reconstruction after the First World War* (Cambridge: Cambridge University Press, 2002), pp. 284-315.
[257] Tamar L. Gutner, *International Organizations in World Politics* (Washington DC: SAGE Publications, Inc., 2017), pp. 36 and 37. In this regard, also see: Thomas G. Weiss, 'Reinvigorating the "Second" United Nations: People Matter', in Bob Reinalda (ed.), *Routledge Handbook of International Organization* (Oxford; New York: Routledge, 2013), pp. 299-311, p. 303.

protection is the fruit of the efforts of idealists leading to the creation of the UN Human Rights Commission.[258] The idealists together with some NGOs and humanitarian international organisations pushed for a pacifist agenda by including human rights, disarmament, development, and the establishment of peace and security mechanisms in their work. In 1946, The Commission on Human Rights was established as the main UN legislative body to promote and protect human rights. The Commission provided overall policy guidelines, studied human rights problems of the time, developed and codified new international norms, and monitored the observance of human rights around the World. The Commission also provided a forum for states, civil society (through non-governmental organizations), and international organizations to voice their concerns about human rights issues. In 1947, when the Commission on Human Rights met for the first time, its sole function was to draft the Universal Declaration of Human Rights. That task was accomplished within a year and the Declaration was adopted by the General Assembly on 10 December 1948.[259] The successor of the UN Human Rights Commission is now the UN Human Rights Council. The formation of the UN-based system of refugee protection together with the UN-mandated Refugee Agency (UNHCR) to some commentators is the result of the endeavours of this group by focusing on the principle of humanitarianism.[260]

Navigating between the formalist and idealist approaches, the constituting elements of refugee protection regime – similar to any other legal regimes – are four elements of principles, norms, rules, and procedures. The main principles constituting the foundation of the current international legal regime of refugee protection are the two principles of state sovereignty and humanitarianism, which are in a constant battle against each other. The norms, which govern the legal regime of refugee protection, are those related to asylum, the assistance of refugees, and burden sharing.[261] Meanwhile, the current legal system of refugee

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[258] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, New York: Cornell University Press, 2013), pp. 24-28.

[259] The United Nations Human Rights Council (UNHRC), 'About the Commission', <www.ohchr.org/EN/HRBodies/CHR/Pages/Background.aspx>. Also, see: Factsheet on the UN Commission on Human Rights, <www.ohchr.org/Documents/Publications/FactSheet27en.pdf>.

[260] The UN General Assembly, 'Refugees and Stateless Persons: Report of the Secretary-General', 26 October 1949, UN Doc. A/C.3/527. In this regard, also see: Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 37-73, pp. 47-49. Also, see: Paul Weis, *The Refugee Convention 1951: The Travaux Préparatoires Analysed* (Cambridge International Documents Series, Series Number 7, 1990), pp. 10-12.

[261] Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), pp. 65-78.

protection functions through some rules on the definition of the term 'refugee,' *non-refoulement*,[262] and rules on how to treat refugees. Lastly, there are certain decision-making procedures, which all independent states are in charge of, while implementing the 1951 Refugee Convention and other relevant international legal instruments.[263]

What we could comprehend from this analysis is that asylum is a norm within the modern legal system of refugee protection regime. As discussed in the previous subsection, the concept of asylum and the practice of asylum seeking have a very long history. However, in the post-war era, the 1948 UDHR has legally established the norms and standards for the international protection of human rights of asylum seekers by recognising the right to seek and enjoy asylum as a human right under its Article 14. These standards include a mechanism to allow individuals to search for safety and security of the person. In the continuation of this dissertation, I will use the phrase 'collective security' or 'meta-security,' as opposed to 'individual safety and security,' which the right to seek asylum guarantees.

However, it is important to mention here that the meaning of the phrase 'collective security' is different from the 'collective security system,' which was used by the League of Nations and thereafter by the 1945 UN Charter within the UN Security Council system in the period following the end of WWII.[264] In fact, both the League of Nations and UN were founded on the principle of 'collective security to prevent inter-state wars,' in spite of the failure of both in this regard.[265] For instance, Chapter VII of the 1945 UN Charter under the title of 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' grants power to the UNSC to interfere in matters which would threaten World peace and security. The same chapter allows the UNSC to employ sanctions (either military or non-military), in order to restore World peace and international security. Therefore, we should keep in mind throughout this dissertation that the use of the phrase 'collective security,' which is in tension with the individual's security through the fulfilment of the right to seek asylum, has a different meaning from what the League of Nations or the UN Charter meant by the 'collective security system.'[266]

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[262] The prohibition of *refoulement* was at the beginning a general principle of international law, but slowly it has enhanced its position to a customary rule of international law.
[263] Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), pp. 65-78.
[264] James Richard Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford: Oxford University Press, 2019), pp. 719-740.
[265] David Armstrong, Lorna Lloyd, and John Redmond, *International Organisation in World Politics* (3rd edn, New York: Palgrave Macmillan, 2004), pp. 18-21.
[266] James Richard Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford: Oxford University Press, 2019), pp. 719-740.

The term 'collective security' in this research as the guarantor of the national security of host states, is the opposite of the personal and individual security of asylum seekers. The right to seek asylum is the guarantor of personal security, since the right to life and other basic human rights are all dependent on the realisation of the right to seek asylum without which the enjoyment of other human rights is not feasible. Nevertheless, over time and with the rise of various non-state actors in cross-border conflicts and the growth of international 'terrorism,' the idea of collective security became more nation-wide. This new environment of protecting national security as a collective security has blurred the position of the right to seek asylum as a basic human right and the customary rule on the prohibition of *refoulement*. Based on this explanation, in the following parts of this chapter, I will first analyse the nature of the right to seek asylum, and then, juxtapose this individual right with the collective right to national security. The practical implication of these two concepts meeting each other at the same intersection raises a very difficult question: whose right to security should we take more seriously, the individual's or the collective's?

2.3. ADDRESSING THE CONCEPTUAL AND DOCTRINAL ASPECTS OF THE RIGHT TO SEEK ASYLUM

2.3.1. THE ANALYSIS OF THE COMPOSING CONCEPTUAL ELEMENTS OF THE RIGHT TO SEEK ASYLUM AS A FUNDAMENTAL RIGHT

The 1948 UDHR may have been the first legal instrument recognising the right to seek asylum as a human right; however, it certainly is not the last one. Half a century later, the EU legislated its own bill of human rights, i.e. the 2000 EU Charter of Fundamental Rights (EU Charter),[267] which included the right to seek asylum. The Charter is legally binding on all individual EU Member States. Once it entered into force in 2009, the Lisbon Treaty[268] granted the Charter the same legal position as the two main EU Treaties,[269] meaning a primary source of EU law.[270] Article 18 of the EU Charter explicitly recognises the right to seek asylum and asserts that this right should be guaranteed according to the 1951 Refugee

[267] The Charter of Fundamental Rights of the European Union (referred to as 'the EU Charter'), published in the Official Journal of the European Union on 26 October 2012 (2012/c 326/02).
[268] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon), signed on 13 December 2007, entered into force on 1 December 2009, published in Volume 51 of the Official Journal of the European Union on 9 May 2008 (2008/C 115/01).
[269] The two main founding treaties of the European Union are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).
[270] Article 6(1) of the Treaty on European Union (TEU).

Convention and its 1967 Protocol. In addition, for the implementation of this right, the EU and its Member States should follow the rules of the Treaty on European Union (TEU)[271] and the Treaty on the Functioning of the European Union (TFEU).[272]

At the national level, the constitutions of many EU Member States have recognised the right to seek asylum as a constitutional right. In this regard, the following provisions could be named: Article 43 of the Czech and Slovak Federal Republic, Section 13(4) of the Constitution of the Kingdom of Spain, Article 48 of the Constitution of the Republic of Slovenia, Article 53 of the Constitution of the Slovak Republic, Article 18(2) of the Constitution of Romania, Article 33 of the Constitution of the Portuguese Republic, Article 56(1) of the Constitution of the Republic of Poland, Article 10 of the Constitution of the Italian Republic, Article XIV(3) of the Fundamental Law of Hungary, Article 16(a) of the Basic Law for the Federal Republic of Germany, § 4 of the preamble to the French Constitution of 27 October 1946, Article 33 of the Constitution of the Republic of Croatia, and Article 26(2) of the Constitution of the Republic of Bulgaria.

Those EU Member States, which have not included the right to seek asylum within their constitutions, have instead referred to this right or to the principle of *non-refoulement* in their national legislation, while covering immigration and refugee issues. In this regard, for example, we could refer to Part 11 of the United Kingdom's Immigration, Asylum, and Nationality Act of 2006, Article 8(1) of the 2001 Refugees Act of the Laws of Malta, Article 1.1. of the Republic of Lithuania's Law on the Legal Status of Aliens, Section 2 of the Asylum Law of Latvia, Section 9 of the Constitution of Finland on Freedom of Movement, the Aliens (Consolidation) Act of Denmark, and the Estonian Act on Granting International Protection to Aliens.

As briefly mentioned above, the current international legal framework for the protection of human rights is a creation of the UN system. Article 55 of the 1945 Charter of the UN is the legal basis for this creation. The third part of this article establishes the third pillar of the UN, based on which the peace and security of the World could be promoted. This pillar is the 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' This provision created a universal human rights obligation for all UN Member States, which manifested itself in the 1948 UDHR. Even though the 1948 UDHR is a Declaration and, legally speaking, classified as a non-binding instrument, its provisions have

[271] Treaty on European Union (TEU), entry into force on 1 December 2009, published in the Official Journal of the European Union on 26 October 2012 (C 326/13).
[272] Treaty on the Functioning of the European Union (TFEU), entry into force on 1 December 2009, published in the Official Journal of the European Union on 26 October 2012 (C 326/49).

found the status of customary norms of international law. The reasons for this claim is that first, the wide acceptance of this document and the subsequent legislation show that the provisions of the 1948 UDHR have the elements of customary norms of international law, i.e. the 'persistent practice' and '*opinio juris*.'[273] One indicator for this wide acceptance is that since the end of WWII, the 1948 UDHR has been the main source of legislation for many post-colonial and former communist constitutions. Secondly, the mainstream UN human rights conventions have their legal basis in the provisions of the 1948 UDHR. Thirdly and lastly, the 1948 UDHR, in itself, is a declaration of the customary rules of international law, which had already been widely accepted at the time of its adoption.[274]

Therefore, this positionality of the right to seek asylum at the three levels of human right protection regimes – international (the 1948 UDHR), regional (the EU Charter), and national (as stated above) – proves the nature of this right to be a basic, fundamental, and constitutional human right, depending on the context in which this right is addressed. Hence, we could easily argue against the opinion of some of the drafters of the 1948 UDHR that the right to asylum is the right of states to grant, not the right of the individual to effectively seek and enjoy. As illustrated previously, during the preparatory negotiations of the 1948 UDHR, between the representatives of participating states a controversy existed around the question of whether asylum is a right of individual to seek, demand, and receive or the right of the host state to grant. During the preparatory discussions on Article 14 of the 1948 UDHR, the representatives of the majority of Western European States insisted on the right to asylum to be the right of states to grant. This view is understandable by accepting the principle of state sovereignty as the founding principle of the current international legal system – a post-colonial system governed by World powers. However, what we should not forget is that according to Skran, not only the principle of state sovereignty, but also the principle of humanitarianism have constructed the modern legal regime of refugee protection.[275]

Therefore, in order to have a well-functioning system of refugee protection in the World, the two principles of state sovereignty and humanitarianism must work together in harmony. In situations where states prevail sovereignty over the principle of humanitarianism, the legal regime of refugee protection would

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[273] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, New York: Oxford University Press, 2019), pp. 21-25. See also: Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge; New York: Cambridge University Press, 2017), pp. 62-66.
[274] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96) 25 *Georgia Journal of International and Comparative Law*, pp. 287-397.
[275] Claudena M. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995), pp. 66-68.

collapse. History gives testimony to this failure: for example, during the interwar period (the 1920s and 1930s) until the time Nansen achieved the best possible balance between these two principles. Nevertheless, by the growth of the role of individuals and international organisations in international law in the aftermath of WWII, the principle of state sovereignty needed to mould and adapt itself to the fast changes of the World, the most important component of which being the increasing role of individuals and their human rights in international law.

At this stage of debate, we should keep to the wording of Article 14 of the UDHR. The final consensus in the drafting of this provision was '*the right to seek and to enjoy asylum*.' Defining the right to seek asylum as *the right of individuals to seek* makes more sense not only within the context of the 1948 UDHR, but also its subsequent human rights instruments. This is a harmonic method of interpreting human rights norms based on the 'presumption against normative conflict.'[276] According to the rules on the interpretation of treaties (Article 31 of the 1969 Vienna Convention on the Law of Treaties),[277] the right to seek asylum should be interpreted in harmony with related rights such as the right to freedom of movement.

Thus, if the right to freedom of movement allows the individual, whose life and basic freedoms are at risk, to leave the country of origin, the right to seek asylum should include the right of that individual to access to asylum application procedures.[278] The reason for this claim is that the right to seek asylum is a natural and inevitable result of the right to freedom of movement, including the freedom in leaving one's own country, as expressed under Article 13 of the 1948 UDHR. The right to freedom of movement, including the right to leave one's own country, is a norm of customary international law articulated under Article 2 of Protocol No. 4 of the ECHR and Article 12(2) of the 1966 ICCPR, amongst many other human rights instruments.

However, once an asylum seeker submits an application to the country of asylum, because of the principle of state sovereignty, it is within the discretion and willingness of the host state to decide on granting asylum (or international protection). In the case of a positive decision, the individual has a right to enjoy asylum in the country of destination. Therefore, the realisation of Article 14(1) of UDHR, meaning the right to seek and to enjoy asylum through the process of asylum seeking, has three phases of action as presented below in Table 1.

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[276] Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39(19) *Michigan Journal of International Law*, pp. 19-116.
[277] Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, U.N.T.S. Vol. 1155, p. 331 (referred to as the '1969 VCLT').
[278] Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39(19) *Michigan Journal of International Law*, pp. 19-116, pp. 21-23.

Table 1. Three phases of asylum seeking in practice

The stages of seeking asylum	Name of the stage	The specifications of the stage
1. Phase 1	Pre-asylum seeking phase	The individual feels the need and an urgency to leave the country of origin and finds a way to do so (sometimes even through human smugglers).
2. Phase 2	Asylum seeking phase	The individual obtains access to the asylum assessment procedures through entering the territory of host state and by expressing an intent to seek asylum.
3. Phase 3	Post-asylum seeking phase, two scenarios are imaginable at this phase:	**3.1. Positive asylum decision:** once granted asylum, the individual enjoys the rights aimed at those eligible for international protection (this is enjoyment phase of the right to enjoy asylum).
		3.2. Negative asylum decision: In this case, an appeal procedure against the negative decision could be initiated or the state could consider return procedures by following the due diligence duties and due process of law.

The composing conceptual elements of the right to seek asylum cover phases 1, 2, and 3.2 in the cases of negative asylum decisions. Since in stage 3.1 the individual is recognised as a refugee or as a beneficiary of other types of international protection (the subsidiary, complementary, or humanitarian protections), they enjoy all the procedural and substantial human rights emerging from this new migratory status.

2.3.2. THE ANALYSIS OF THE LEGAL AND DOCTRINAL ASPECTS OF THE RIGHT TO SEEK ASYLUM AS A FUNDAMENTAL RIGHT

2.3.2.1. Analysing the doctrinal elements of the right to seek asylum through the theory of rights

Base on the above-mentioned elaboration on the composing conceptual elements of the right to seek asylum, the legal or the doctrinal elements of this right include the following parts:

1. The right of the individual to leave one's own country;
2. The right of the individual to enter the territory of or to be admitted to the country of asylum;

3. The right of the individual to have access to a fair asylum procedure with respect for due process of law;
4. The right of the individual to reside temporarily in the country of asylum during the process of asylum application;
5. The right of the individual not to be expelled or not to be extradited from the country of asylum (the principle of *non-refoulement*); and
6. The right of individual to be protected against unlawful prosecution, punishment or otherwise any legally unfounded deprivation of personal liberty, while residing in the country of asylum.[279]

To better understand the composing doctrinal elements of the right to seek asylum, I shall first give a definition of the term 'rights' and then I will elaborate on its various doctrinal aspects. The term 'right' in common use is defined as the 'entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states.'[280] Based on this definition, rights are a 'claim' or an 'entitlement' to something, or are 'protected options to act [or not to act].'[281] Keeping this definition in mind, now I apply the analytical 'theory of rights' to elaborate on the composing doctrinal elements of the right to seek asylum. The main reason for this choice of theory is that the theory of rights, developed by legal philosophers Hohfeld and Alexy,[282] has the analytical capacity to dissect the composing doctrinal elements of fundamental rights and to discover the inviolable essence at the very core of these rights.[283]

Wesley Newcomb Hohfeld, the legal philosopher of the nineteenth and twentieth centuries, in his analytical framework of the rights created the theory of 'legal relations.'[284] In this theory, Hohfeld distinguished between the concept of 'rights' – which he also called 'claims' – and the concept of 'privileges.'[285] To have a 'right' or a 'claim,' according to Hohfeld, is to be 'in relation' with another

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[279] Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke Journal of Comparative and International Law*, pp. 1-34, pp. 3-8.
[280] The Stanford Encyclopaedia of Philosophy, 'Rights', <plato.stanford.edu/entries/rights/>.
[281] Frances Myrna Kamm, 'Rights', in Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (New York: Oxford University Press, 2004), pp. 477-516, p. 477.
[282] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal*, pp. 710-770. Also, see: Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2010).
[283] The history of analytical jurisprudence as part of analytical philosophy goes back to the eighteenth century and to the legacy of Jeremy Bentham. However, the most influential philosopher for this theory was H.L.A. Hart. In this regard, see: Edgar Bodenheimer, 'Modern Analytical Jurisprudence and the Limits of Its Usefulness' (1956) 104 *University of Pennsylvania Law Review*, pp. 1080-1086.
[284] Madeline Morris, 'Structure of Entitlements' (1993) 78 *Cornell Law Review*, pp. 822-898, p. 825.
[285] George W. Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006), pp. 1-19.

party – either natural or legal person such as another human being or a state or a cooperation, etc. with regard to a certain 'thing' or a certain 'action.'[286] Hence, there are three distinct factors involved in every right-claim situation: the right holder, the duty bearer, and the object of the right (or the content of the claim).[287] The claim-right scenario could be negative (to non-interference) or positive (to some contribution). This type of right is 'directional,' which means that the object of right or the content of the claim is directed against someone (the duty bearer) and entails that the latter have a 'correlative' and 'directional' duty towards the right holder.[288]

To have a 'privilege,' on the other hand, does not create a corresponding relation. Now, I shall explain the Hohfeldian legal relation in the context of a familiar scenario. Today, you become a member of your city's library. Similar to all other members, you can use the library space and access the facilities that they offer. Your privilege to use the library space and its facilities means that other library members do not have any corresponding responsibility or duty towards you. The reason is that you all are equal members to each other, when it comes to accessing and using the library space and its facilities. Therefore, you do not have any corresponding relation in the sense of right with other library members, as you all have an equal privilege to use the library. However, the library owner or the library operator (like the librarian) has a duty to allow you inside the library and to facilitate your access and the use of library space and other facilities available (of course during opening hours). Therefore, the librarian, with no good reason, cannot prevent you from entering the library or using the facilities. Hence, here, we can say that in relation to the librarian, you have a 'right,' but in relation to other library users, you just have a 'privilege.'

In the library scenario, whoever shows up earlier in the morning at the library would get to use a specific space, a particular corner, or a facility in the library. If you need that specific space or facility, you have to wait for the first person to leave, and then only you could use it. Alternatively, you could politely ask the person if they would be willing to allow you to access that particular space or facility. Nevertheless, you should keep in mind that the person has absolutely no obligation to give up that space or facility to you (unless there is a time limit for

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[286] Matthew H. Kramer, 'Rights without Trimmings', in Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (New York: Oxford University Press, 1998), pp. 7-111, pp. 9 and 10.
[287] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal*, pp. 710-770.
[288] Frances Myrna Kamm, 'Rights', in Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (New York: Oxford University Press, 2004), pp. 477-516, p. 478.

every user), because you both have an 'equal privilege' to use the space, so the applicable rule in this scenario is 'first come, first served.' To visualise the difference between rights (or claims) and privileges, Table 2 demonstrates this distinction through positioning rights and privileges against their correlatives:[289]

Table 2. The Hohfeldian theory of legal relations (or jural correlatives) distinguishing between rights and privileges

Jural Correlatives	Right <=> Duty
	Privilege <=> No right

Table 2 shows that there is a corresponding relationship between the right holder and the duty bearer. However, this relationship is not necessarily reciprocal in nature; it could be a one-way type of relationship. In other words, the right holder is only the beneficiary in this relationship without having a corresponding duty towards the addressee. By referring to Hohfeld's theory of legal relations, Robert Alexy, the contemporary jurist and legal philosopher, has formulated rights by a general statement: '**X** has a right to **G**, as against **Y**'.[290] Alexy's formulation of rights encompasses the three following variables, which are the same as the three elements mentioned above in the Hohfeldian theory of legal relations or jural correlatives:

1. **First is X,** which is the ***subject*** of the right, known as the ***right holder*** or the ***beneficiary*** of the right.
2. **Second is Y,** which is the ***addressee*** of the right, known as the ***duty bearer***.
3. **Third is G,** which is the ***object*** of the right, known as the ***subject matter*** of the right.[291]

By keeping in mind the definition of rights and the distinction that Hohfeld made between rights and privileges, together with the formulation of elements of rights by Alexy, I shall break down the composing doctrinal elements of the right to seek asylum and present them in Table 3. The purpose of dissecting the composing doctrinal elements of the right to seek asylum is to demonstrate that the nature of this right is a fundamental right, and not merely a privilege. Considering this positioning, the host state is in the duty bearer and the asylum

[289] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal*, pp. 710-770.
[290] Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2010), p. 120.
[291] *Ibid*, pp. 120-122.

seeker remains as the right holder or the beneficiary of various composing doctrinal elements of this while implementing the right to seek asylum in practice.

As mentioned above, the right to seek asylum is a right of the individual who is in need of asylum and protection against persecution. Therefore, the individual who is seeking asylum is the 'benefactor' of this right and the state on the territory of which the asylum seeker is located is the 'duty bearer.' Only if the host state respects, protects, and fulfils all the above-mentioned human rights, we could truly claim that the right to seek asylum has been realised and that the right to seek asylum is a real fundamental right with an effective meaning.

Table 3. Dissecting the constituting doctrinal elements of the right to seek asylum

Variables / **Elements**	**X (right holder)**	**Y (duty bearer)**	**G (object of the right)**
1. Leaving one's country of origin	Asylum seeker	State of origin (negative obligation)	The right to leave one's own country based on the right to freedom of movement
2. Entering the country of asylum	Asylum seeker	State of asylum (negative obligation)	The right to enter another country for the purpose of seeking asylum (cf. illegal entrance not being a hindrance to this right as in Article 31(1) of the Refugee Convention)
3. Having access to a fair asylum procedure	Asylum seeker	State of asylum (positive obligation)	The right of the individual to have access to a fair asylum procedure with respect for due process of law (Articles 6 and 13 of the ECHR)
4. Residing temporarily in the country of asylum	Asylum seeker	State of asylum (positive and negative obligations)	The right to reside temporarily in the country of asylum (cf. Article 31(2) of the Refugee Convention)
5. The prohibition of expulsion or return	Asylum seeker	State of asylum (negative obligation)	The right not to be expelled or returned (principle of *non-refoulement*, Article 3 of CAT, Article 4 of Protocol No. 4 and Article 3 of ECHR, and Article 6 of ICCPR)
6. Personal liberty and security	Asylum seeker	State of asylum (negative obligation)	The right to liberty and security of person (Article 3 of UDHR, Article 9 of ICCPR, and Article 5 of ECHR)

Now that we have a clear picture of the composing doctrinal elements of the right to seek asylum, and its nature as a fundamental right, it is time to address

the implementation of this right in practice. When it comes to implementing the right to seek asylum in practice, it is important to test the fulfilment of this right against the principle of non-discrimination. Thereafter, I shall analyse the legal permissible grounds for limiting the right to seek asylum in practice, especially by considering the fact that this right is a fundamental right.

2.3.2.2. Implementing the right to seek asylum within the context of the principle of non-discrimination

The right to seek asylum as a basic and fundamental human right belongs to the larger family of human rights. One of the very basic conditions for fulfilling the enjoyment of all human rights is a full compliance with the principle of non-discrimination as a foundation of the rule of law. Therefore, in the course of implementing the right to seek asylum, this principle must constantly be taken into account. As a customary norm of international law, the principle of equality and non-discrimination has its legal roots in the major international and regional human rights instruments. The most important legal document in international law, meaning the 1945 UN Charter, besides emphasising the equality of rights between men and women in its preamble, in Articles 1(3), 13(1)(b), 55(c), and 76(c), places emphasis on the principle of non-discrimination (using the word 'distinction') in all matters of human rights.

While the grounds of discrimination or distinction under the 1945 UN Charter is limited to the four grounds of 'race,' 'sex,' 'language,' and 'religion,' the core human rights instruments created after the UN Charter have expanded the grounds of discrimination to a non-exhaustive and open list, including any possible future grounds. In this regard, we could name Article 2 of the 1948 UDHR, Article 26 of the 1966 ICCPR, Article 14 of the ECHR, Article 21 of the 2000 EU Charter of Fundamental Rights, Article 2 of the Banjul Charter, and Articles 1, 17(2), 24, and 27(1) of the American Convention on Human Rights.

Article 26 of the 1966 ICCPR sets an independent and comprehensive prohibition of discrimination on any imaginable grounds. Therefore, it is accurate to claim that under international human rights law, it does not matter whether those who are within the territory or subject to the jurisdiction of a State are citizens, permanent residents, or are present on some other basis or in an irregular situation. This international human rights law instrument applies to 'all individuals,' falling within its scope, irrespective of whether they are citizens or noncitizens or whether they are lawfully or unlawfully present on the Member

State's territory or otherwise within its jurisdiction.[292] The prohibition of discrimination under Article 14 of the ECHR, however, is a dependent provision, alleged violation of which relies on prior infringement of the Convention's other substantive human rights. In contrast, Protocol No. 12 of the ECHR has introduced a general equality clause, which prohibits any kind of discrimination with no need to have a link to other provisions of the Convention.[293]

The issue of equality of rights and non-discrimination is of such high importance in international human rights law that an international convention is entirely dedicated to the topic. The International Convention on the Elimination of All Forms of Racial Discrimination (the '1969 ICERD'), adopted in 1969, is the greatest achievement of the UN human rights system in setting standards and practical mechanisms in eliminating racial discrimination of any forms and in promoting racial and ethnic equality in the jurisdictions under the control of the States Parties.

Within the European system of human rights protection, multiple legal documents have addressed the prohibition of discrimination. Beside the ECHR, as mentioned above, we could refer to the Council of Europe's Framework Convention for the Protection of National Minorities. In addition, the European Commission against Racism and Intolerance (ECRI), which is a human rights body of the Council of Europe, monitors closely the issues of racism, xenophobia, antisemitism, intolerance, and racial discrimination in the Member States.[294] Within secondary sources of EU law, several directives target different aspects of discrimination and its prohibition. In addition to the prohibition of discrimination of any kind in the context of employment, the European Council Directive of 2000/43/EC lays down an action framework for combating discrimination on the grounds of racial or ethnic origin by putting into effect in the Member States the principle of equal treatment.[295]

Within the American system of human rights protection, also the issue of non-discrimination is the subject matter of a full convention. In this regard, the Inter-American Convention against Racism, Racial Discrimination and related

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[292] The CCPR General Comment No. 15: The Position of Aliens under the Covenant, adopted at the Twenty-seventh session of the Human Rights Committee on 11 April 1986. In this regards, also see: United Nations Human Rights Office of the High Commissioner, 'The Rights of Non-citizens', <www.ohchr.org/documents/publications/noncitizensen.pdf>.

[293] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, New York: Oxford University Press, 2017), pp. 631-636 and 659-661.

[294] The Council of Europe, 'The European Commission against Racism and Intolerance (ECRI)', <www.coe.int/en/web/european-commission-against-racism-and-intolerance>.

[295] Article 1 of the European Council Directive of 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Forms of Intolerance, adopted in 2013, is the key legal tool 'in protecting and promoting the rights of victims of historic wrongs in the Americas and tackling discrimination in all its forms.'[296]

The implementation of the principle of non-discrimination in the context of the right to seek asylum raises the question on how this principle would apply in respect to asylum seekers, especially taking into account the exacerbated vulnerable position of asylum seekers due to their irregular migratory status as undocumented non-citizens. This question is a small part of a bigger dilemma on how to apply the principle of non-discrimination in the context of immigration in general. This is an extremely challenging situation from a human rights protection perspective, since the legitimate grounds for discrimination and their justifications vary tremendously from one country of asylum to another. The instances of discrimination on the ground of asylum seekers' migratory status, mainly due to being undocumented non-citizens, are plenty. For example, a recent systematic study on the practice of the UN Committee on the Rights of the Child demonstrates that the children of asylum seekers or asylum-seeking children are discriminated constantly due to their own or their parents' migratory status, even within the context of applying the principle of the best interests of the child.[297]

The majorities of immigration law have recognised legitimate discriminatory grounds for accessing sovereign territories based on migratory status against the so-called 'illegal immigrants.'[298] In addition to some states entitling themselves to distinct asylum seekers from other categories of immigrants in the sense of accessing their territory or even detaining them,[299] others allegedly discriminate between asylum seekers on several grounds.[300] These grounds may include the asylum seeker's country of origin, the means of arrival (boat *vs.* airplane), the

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[296] The United Nations Human Rights Office of the High Commissioner, 'The UN human rights experts welcome OAS adoption of key racism and discrimination conventions', <newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13446&LangID=E>.

[297] Milka Sormunen, 'A Focus on Domestic Structures: Best Interests of the Child in the Concluding Observations of the UN Committee on the Rights of the Child' (2020) 38(2) *Nordic Journal of Human Rights*, pp. 100-121, pp. 105 and 108.

[298] Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Oxford; Portland: Hart Publishing, 2014), pp. 92-98.

[299] In this regard, see, for example the case of *Čonka v. Belgium*. The ECtHR found a violation of Articles 5(1), 5(4), and Article 4 of Protocol No. 4 of the Convention for deceitfully inviting the asylum seekers of Romani origin to the police station to assess their asylum claim. Instead, however, they were arrested, detained, and collectively deported from Belgium. In this regard, see: *Čonka v. Belgium*, Application No. 51564/99, European Court of Human Rights, Final Chamber Judgement (05 May 2002).

[300] Kieran Oberman, 'Refugee Discrimination – The Good, the Bad, and the Pragmatic' (2020) 37(5) *Journal of Applied Philosophy*, pp. 695-712. In this regard, also see: Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Oxford; Portland: Hart Publishing, 2014), pp. 92-98.

route of journey (land, air, or water), nationality, the last country of residence, *sur place* refugee, financial status, health, disability, age, religion, sex, gender, colour, race, ethnicity, etc.

In order to address the applicability of the principle of non-discrimination within the context of the right to seek asylum, the universal standards set in the ICERD could be a good starting point. These regulations together with the Convention's supervisory body, i.e. the Committee on the Elimination of Racial Discrimination, constitute a solid legal ground for implementing the provisions of this Convention in all contexts, including the realisation of the right to seek asylum. The Committee's practice and its supervisory and monitoring mechanisms include the examination of both individual and inter-state complaints, concluding observation of periodic country reports, and preventive measures in the forms of early-warning and urgent procedures.[301] The Committee on the Elimination of Racial Discrimination in its concluding observations on country reports has repeatedly reinforced to Member States that in all matters related to refugees and asylum seekers, the international human rights rules and standards are applicable without any discriminatory regards for the nationality or the migratory status of individuals.[302]

In addition to the work of the Committee on the Elimination of Racial Discrimination, the European Commission against Racism and Intolerance (ECRI), in its several country reports and policy recommendations, has explicitly reiterated that the asylum eligibility procedures should be without consideration of any discriminatory grounds, especially national or ethnic origins. Moreover, the ECRI reports emphasise that asylum seekers should receive sufficient life conditions during the examination of their cases, because leaving them in devastating life conditions would subject asylum seekers further to prejudice, stereotypes, and hostilities by other members of the host society. In this regard, the ECRI also emphasises that since the right to seek asylum is a recognised human right both internationally and at the level of regional human rights protection systems (European, Americas, and the African systems), the lack of legal identity, travel, or residency documents should not be a ground for discriminating against asylum seekers. Therefore, the lack of legal immigration status should not prevent asylum seekers from entering the territory of the state

[301] The United Nations Human Rights Office of the High Commissioner, 'The Committee on the Elimination of Racial Discrimination (CERD): Monitoring racial equality and non-discrimination', <www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx>.
[302] The Report of the Committee on the Elimination of Racial Discrimination, General Assembly Official Records Sixty-seventh session, 13 February – 9 March 2012, Supplement No. 18 (A/67/18).

and lodging an asylum claim supported with some safeguards such as legal assistance or the services of a translator and/or interpreter.[303]

With regard to discriminating against asylum seekers from enjoying the right to seek asylum due to their lack of legal identity or travel documents, the 1951 Refugee Convention has set a clear international standard in its Article 31 known as the 'non-penalisation clause.'[304] According to this provision, refugees coming directly from a country where their life or freedom is threatened should not be punished because of their illegal entry or presence, as long as they are coming directly from that country, present themselves immediately to the authorities, and show good cause for their illegal entry or presence. Therefore, crossing a border without authorisation to seek asylum is not a crime as such; hence, no asylum seeker should be discriminated against because of unauthorised arrival.[305] However, state practices show that many forms of discriminatory measures – such as mandatory detentions and the interception of immigrant boats – are often deployed against asylum seekers arriving with no prior authorisation.[306]

2.3.2.3. The permissible grounds for limiting the right to seek asylum in practice

While non-discrimination clause applies to the right to seek asylum as a customary rule of international law, we should keep in mind that not all limitations against fulfilling this right are automatically discriminatory in nature. Under certain exceptional circumstances, the enjoyment of the result of the right to seek asylum shall be legally restricted.[307] Within the international legal system of refugee protection, the permissible limitation tests against

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[303] The European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 16 on Safeguarding Irregularly-Present Migrants from Discrimination, adopted on 16 March 2016, Council of Europe Doc No. CRI(2016)16.

[304] James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge: Cambridge University Press, 2021), pp. 511-519. In this regard, also see: Cathryn Costello and Yulia Ioffe, 'Non-Penalization and Non-Criminalization of Refugees and Other Migrants for Illegal Entry and Stay', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford; New York: Oxford University Press, 2021), pp. 917-932.

[305] Frances Nicholson and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians N° 27* (Geneva: Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, 2017), pp. 61, 94, 95, 123, 259, and 263.

[306] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (New York: Cambridge University Press, 2018), pp. 165 and 166.

[307] James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge: Cambridge University Press, 2021), pp. 399-423. In this regard, also see: Geoff Gilbert, 'Terrorism and International Refugee Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 423-435.

refugee protection are two under the 1951 Refugee Convention. The **first** limitation is under Article 1(F) of the 1951 Refugee Convention known amongst practitioners as the 'exclusion clause,' and the **second** one is Article 33(2) of the same Convention as an exception to the prohibition of *refoulement*.

While the two above-mentioned articles impose limitations on the enjoyment of refugee status, we should remember that in practice the threshold and nature of the limitation imposed by Articles 1(F) and 33(2) is different. Article 1(F) aims at facilitating the extradition of convicted or suspected criminals with a high threshold of assessment. On the contrary, Article 33(2) has a very low threshold for excluding whomever there are reasonable grounds against to be a danger to the security of the host state.[308] Another difference between these two provisions is that in the case of Article 1(F) of the 1951 Refugee Convention, once convicted of a serious crime or being an alleged suspect in an investigation of such crime, the Refugee Convention ceases to apply to the person. However, there is a need for practicing a balancing act between the interests of the state and the risk the person imposes when it comes to the application of Article 33(2) of the Refugee Convention.[309]

Before analysing these legal grounds for permissible limitation of this right, I shall bring back the example of the library given above in understanding how in practice the right to seek asylum may be limited. As pictured above, in Subsection 2.3.2.1, you have a right to use the library space and its facilities, when it comes in relation to the librarian. However, imagine that one day an electricity emergency happens in the earlier hours of morning in the library. According to the electrician, there is a danger of electric shock and probably an electrically induced fire. Therefore, the librarian, based on the instructions of the electrician, does not allow any member of the library to enter the building. In this situation, your right to access and use the library has been limited and put on hold by the duty bearer, with the justification of protecting your own health and safety of others. This is a reasonable justification behind limiting your right to access and use the library.

We could apply the same metaphor to the right to seek asylum. When it comes to the enjoyment of the right to seek asylum, it is within the discretion of the host state, as the duty bearer, to decide about the asylum cases. In order to upgrade the legal status of an asylum seeker to the category of 'refugee,' the state must assess and decide the case based on the facts presented, the information

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[308] James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge: Cambridge University Press, 2021), pp. 418-423.
[309] James C. Hathaway, 'Refugees and Asylum', in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge; New York: Cambridge University Press, 2012), pp. 177-204, p. 190.

available from the country of origin (known as the 'country of origin information' or the 'COI'), and the existing applicable laws. Refugee law practitioners know this procedure of decision-making as 'refugee status determination' (RSD). It is during this procedure that the host state addresses and assesses the asylum claim of all applicants individually. During the RSD procedure, the asylum seeker benefits from the most basic and fundamental human rights stipulated above as the composing legal or doctrinal elements of the right to seek asylum, namely the prohibition of *refoulement* and the prohibition of arbitrary deprivation of personal liberty and security. In order to understand the stages of the right to seek asylum and enjoy it after the refugee status is granted, Figure 1 illustrates the three phases of seeking asylum.

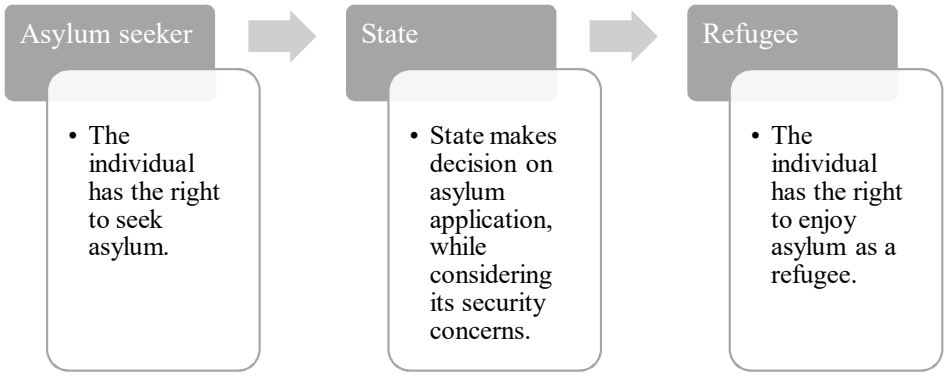

Figure 1. The illustration of three stages of seeking asylum.

As shown in this figure, the right to seek asylum precedes the stage of the state's decision-making. Therefore, addressing permissible limitation grounds against the right to seek asylum happens during the RSD procedure. It is during this individual assessment of the applicant's case that the host state may consider exceptions to the enjoyment of this right.

The permissible legal grounds, based on which an asylum seeker cannot benefit from refugee status or refugee protection, are stipulated under Article 14(2) of the 1948 UDHR, Articles 1(F), 9, 32(2), and 33(2) of the 1951 Refugee Convention. Based on these articles, the exempting grounds are that the asylum seekers are those, against whom there are reasonable grounds for regarding them as a danger to the security of the country in which they are. Other permissible grounds are that the asylum seeker is under an active criminal investigation, convicted of serious non-political crimes, or has committed prohibited acts contrary to the purposes and principles of the UN. Based on these permissible limitation grounds, we could claim that, even though being fundamental in nature, the right to seek asylum is, therefore, not an absolute human right. This means that, under certain circumstances (such as in time of

war or other exceptional situations) and for some legally stipulated and legitimate reasons, the state could deprive asylum seekers from obtaining refugee status. In this situation, the asylum seeker is *de facto* a refugee, but not *de jure*.

Nevertheless, depriving individuals from enjoying the right to seek asylum or failing to obtain refugee status (enjoying the asylum) is the subject of individual case-by-case assessment. In other words, no security concern or state interest could be provoked to prevent individuals from entering the territory of the state and accessing the asylum decision-making procedure. This is to say that national security could never be as such an excuse to deprive an individual from seeking asylum – meaning from lodging an asylum application. This is due to the nature of the right to seek asylum being a fundamental right as explicitly stipulated under Article 18 of the EU Charter.

Understanding the nature of the right to seek asylum as a fundamental human right implies that there is an 'essence' or 'inviolable core' at the heart of this right, which may not be limited or balanced against, even if security concerns of states are supposedly at stake.[310] The permissible grounds for limitation – as stipulated above – are provoked only to reject a refugee application and therefore, not to grant the individual a refugee status. To comprehend and further discuss the essential or inviolable cores of the right to seek asylum as a fundamental right, we should apply Article 18 of the EU Charter in the light of the Charter's horizontal articles such as Article 52 on the scope of the application and interpretation of rights and principles. According to the first paragraph of Article 52 of the EU Charter, any legitimate interference with fundamental rights must 'respect the essence of those rights.' Hence, also those fundamental rights that as such are subject to legally permissible limitations (and not only absolute or non-derogable rights such as the prohibition against torture or slavery) should be understood to include one or more essential elements that crystallise a broader principle into a rule or an essential core that allows no limitations or exercise of 'balancing act.'[311] The identification of such essential

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[310] Tuomas Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter' (2016) 12(2) *European Constitutional Law Review*, pp. 318-329. In this regard, also see: Martin Scheinin, 'Terrorism and the Pull of 'Balancing' in the Name of Security', in Martin Scheinin (ed.), *Law and Security - Facing the Dilemmas* (Florence: European University Institute, 2009), pp. 55-63.

[311] Tuomas Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter' (2016) 12(2) *European Constitutional Law Review*, pp. 318-329. Also, see: Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism', in Menno T. Kamminga (ed.), *Challenges in International Human Rights Law* (Vol. 3, London: Routledge,

elements and the exact definition of their scope of application, indeed, is a matter of interpretation.[312]

The European Court of Justice (ECJ), within its jurisprudence in interpreting the scope of how the Charter is applied, has set a precedent in recognising the essence of rights. The ECJ, in the case of *Maximillian Schrems v. Data Protection Commissioner and Digital Rights Ireland Ltd* (hereinafter referred to as '*Schrems v. Ireland*'),[313] by elaborating on the inviolable core of the rights under Articles 7 and 47 of the Charter has made the idea of the essence of fundamental rights real. This clarification of the highest judicial body of the EU enriches our understanding of the structure of fundamental rights under the Charter.[314] According to the ECJ in the case of *Schrems v. Ireland*, in the context of data protection, the essence of the right to respect private life under Article 7 of the EU Charter is that 'public authorities cannot have an indiscriminate blanket access to the content of electronic communications.'[315] Applying Article 47 to data protection cases, the essence of the right to an effective remedy and to a fair trial is that legislative measures should be available to 'provide for any possibility for an individual to pursue legal remedies in order to have access to personal data or to obtain the rectification or erasure of such data.'[316] The significance of this ruling is that, in practice, by applying the test of the essence of fundamental rights, the core of the right to privacy, the right to an effective remedy, or other human rights under the Charter could not be restricted or balanced even if important security concerns such as terrorism are allegedly at stake.

As opposed to Article 52(1) of the EU Charter, no provision in the ECHR refers to the essence of rights. However, the case law of the ECtHR includes many

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2014), pp. 155-206. Also see: Martin Scheinin, 'Terrorism and the Pull of 'Balancing' in the Name of Security', in Martin Scheinin (ed.), *Law and Security - Facing the Dilemmas* (Florence: European University Institute, 2009), pp. 55-63.

[312] Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism', in Menno T. Kamminga (ed.), *Challenges in International Human Rights Law* (Vol. 3, London: Routledge, 2014), pp. 155-206. Also, see: Martin Scheinin, 'Terrorism and the Pull of 'Balancing' in the Name of Security', in Martin Scheinin (ed.), *Law and Security - Facing the Dilemmas* (Florence: European University Institute, 2009), pp. 55-63.

[313] Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner and Digital Rights Ireland Ltd*, European Court of Justice (ECJ), Judgment of the Grand Chamber of the Court, Judgment of 6 October 2015 (referred to as '*Schrems v. Ireland*'), paras 94 and 95.

[314] Tuomas Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter' (2016) 12(2) *European Constitutional Law Review*, pp. 318-329

[315] Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner and Digital Rights Ireland Ltd*, European Court of Justice (ECJ), Judgment of the Grand Chamber of the Court, Judgment of 6 October 2015 (referred to as '*Schrems v. Ireland*'), para. 94.

[316] *Ibid*, para. 95.

references to the idea of the existence of an essence in the rights, which the Convention protects. One of the very first and early cases, which explicitly touched upon the existence of an essence at the core of human rights, is a collective case from 1968, better known as '*the Belgian Linguistic Cases*.'[317] In its judgement on the alleged violation of the right to education under Article 2 of Protocol No. 1 of the ECHR, the Plenary Court opined that 'the right to education, by its very nature, calls for regulation by the State.'[318] The Court added that 'such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.'[319] Thereafter, the ECtHR, on multiple occasions, referred to the *Belgian Linguistic Cases* and emphasised that an essence existed at the very core of the right to education with an inviolable character. In this regard, for example, in the cases of *Campbell and Cosans v. the United Kingdom*[320] and *Mürsel Eren v. Turkey*,[321] the Court asserted that the very nature of the right to education as a fundamental right is that the 'State must regulate access to educational facilities and establishments.'

Moreover, in the cases of *Golder v. the United Kingdom*[322] and *Prince Hans-Adam II of Liechtenstein v. Germany*,[323] while interpreting Article 6 of the ECHR, the Court ruled that paragraph 1 of this Article encompasses the essential element of the right to a fair trial. In other words, Article 6(1) of the ECHR, containing the right to access an independent and impartial tribunal, is an essential element inherent in the core of the right to a fair trial, without which the latter right would not happen.[324] This essential element originates from the

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[317] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits)*, Application Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, European Court of Human Rights, Judgement of Plenary Court (23 July 1968), referred to as '*the Belgian Linguistic Cases*'.

[318] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits)*, Application Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, European Court of Human Rights, Judgement of Plenary Court (23 July 1968), p. 28, paras 4 and 5 under Subsection I.B. on the Meaning and Scope of Article 2 pf the Protocol No. 1.

[319] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits)*, Application Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, European Court of Human Rights, Judgement of Plenary Court (23 July 1968), p. 28, paras 4 and 5.

[320] *Campbell and Cosans v. the United Kingdom*, Application No. 7511/76; 7743/76, European Court of Human Rights, Chamber Judgement (25 February 1982), paras 93-41.

[321] *Mürsel Eren v. Turkey*, Application No. 60856/00, European Court of Human Rights, Final Judgement of the Second Section of the Court (7 February 2006), para. 44.

[322] *Golder v. the United Kingdom*, Application No. 4451/70, European Court of Human Rights, Judgement of the Plenary Court (21 February 1975), paras 28-40.

[323] *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, European Court of Human Rights, Grand Chamber Judgement (12 July 2001), paras 43-45.

[324] *Golder v. the United Kingdom*, Application No. 4451/70, European Court of Human Rights, Judgement of the Plenary Court (21 February 1975), paras 28-40. Also, see: *Prince Hans-Adam II of*

prohibition of the denial of justice as a well-established and widely recognised principle of law.[325]

Similar to the ECHR, the text of another important human rights treaty, which is silent on the existence of an essence in human rights, is the 1966 International Covenant on Civil and Political Rights (the '1966 ICCPR'). However, within its interpretative capacity, the UN Human Rights Committee (HRC) in its General Comment No. 27 has clearly referred to the 'existence of an essence in human rights.' Especially with regard to interpreting the permissible grounds for restricting the right to freedom of movement as stipulated under Article 12(3) of the 1966 ICCPR, the Committee asserts that 'States should always be guided by the principle that the restrictions must not impair the essence of the right.'[326]

By applying the idea of the existence of an essence in fundamental rights and the 'essence test' to the subject under study in this dissertation, the relevant question is what exactly the essence or inviolable elements at the core of the right to seek asylum are, considering the fact that this right is as fundamental right in the EU. Based on the analysis I sketched in the previous pages of this section on the conceptual and doctrinal elements of the right to seek asylum (Subsections 2.3.1 and 2.3.2.1), the essence at the core of the right to seek asylum lays in two main elements. The **first essential element** is that asylum seekers should be able to enter the territory of EU States to access the RSD procedures and an individual assessment of their asylum claims. Hence, no EU State can categorically prevent a group of people from entering or accessing its territory for seeking asylum based on a discriminatory ground such as religion, colour, race, ethnicity, etc. As Article 1(F) of the Refugee Convention is an exclusion clause and an exception to the general rule, in practice, this article should be interpreted and used in a very limited, reserved, and restricted manner.[327] Based on this essential element, the mass expulsion of asylum seekers is also

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Liechtenstein v. Germany, Application No. 42527/98, European Court of Human Rights, Grand Chamber Judgement (12 July 2001), paras 43-45.

[325] *Golder v. the United Kingdom*, Application No. 4451/70, European Court of Human Rights, Judgement of the Plenary Court (21 February 1975), paras 28-40. Also, see: *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, European Court of Human Rights, Grand Chamber Judgement (12 July 2001), paras 43-45.

[326] The ICCPR General Comment No. 27: Article 12 (Freedom of Movement), adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999, UN Doc. No. CCPR/C/21/Rev.1/Add.9, para. 13.

[327] Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 62/159 and Human Rights Council resolution 6/28, adopted by the General Assembly at its 62nd session on 15 August 2007, UN doc. A/62/263, paras. 65-69.

prohibited, because this practice prevents the individual assessment of asylum cases.

The **second essential element** of the right to seek asylum is the principle of *non-refoulement*. Even more essential is the absolute and non-derogable prohibition of *refoulement* to torture and other inhuman or degrading treatment or punishment known as a *jus cogens* norm of international law.[328] No derogation from the two main essential cores of the right to seek asylum is allowed even in situations of emergency such as a threat of major terrorist attack. The right to seek asylum being a not-absolute human right does not automatically mean that every aspect of this right could be limited. The essential elements of this right – meaning entering the territory for the EU to access the asylum procedure and the prohibition of *non-refoulement* – are the absolute and non-derogable parts of the right to seek asylum, derogation from which even in times of emergency is not allowed. As the jurisprudence of the ECHR has shown, the ultimate aim of a legal system of human rights protection is to 'protect rights, which are not theoretical or illusory, but real and effective.'[329] Therefore, realising the inviolable and essential elements of the right to seek asylum makes this right a real and meaningful human right in practice in the EU.

However, by looking at the current state practices in the EU, we could observe that this is not the case in reality. The security concerns of the EU and its Member States have curtailed the realisation of right to seek asylum as a fundamental right. Making immigration a major security issue in the EU has led to laws, policies, and practices, which prevent asylum seekers from entering the EU territory or accessing asylum procedures. To name some of these practices, I could refer to the interception of boats carrying immigrants on the high seas, the collective expulsion of immigrants, and other non-arrival or *non-entrée* policies. In the past few years in the aftermath of the so-called 'refugee crisis' in

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[328] For definition of *jus cogens*, see: Article 53 of the 1969 Vienna Convention on the law of Treaties (the 'VCLT'). For more information on the *jus cogens* norms, being at the core and above all of the sources of international law, see: Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism', in Menno T. Kamminga (ed.), *Challenges in International Human Rights Law* (Vol. 3, London: Routledge, 2014), pp. 155-206.

[329] In this regard, see: *Airey v. Ireland*, Application No. 6289/73, European Court of Human Rights, Chamber Judgment (9 October 1979), para. 24. In this regard, also see: *Soering v. United Kingdom*, Application No. 14038/88, European Court of Human Rights, Plenary Decision (07 July 1989), para. 87. And, see: *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, European Court of Human Rights, Grand Chamber Judgement (12 July 2001), para. 45. Also, see: *Gäfgen v. Germany*, Application No. 22978/05, European Court of Human Rights, Grand Chamber Decision (1 June 2010), para. 123. Also, see: *Murray v. The Netherlands*, Application No. 10511/10, European Court of Human Rights, Grand Chamber, Decision (26 April 2016), para. 104.

Europe, promoting policies leading to the externalisation of EU borders and preventing asylum seekers from entering the EU territory, the number of cases for people entering the consular premises of different European countries and asking for visas for the purpose of seeking asylum has increased.[330] However, the unwillingness of EU Member States in issuing humanitarian visas and the prevention of the departure of asylum seekers through agreements with non-EU countries (such as agreements signed with Turkey and Libya) have shown that the two essential elements of the right to seek asylum are undermined.

Therefore, the focus in this dissertation is on analysing how the security concerns of the EU affects the two essential elements of the right to seek asylum. In Chapters 4, 5, and 6, I will scrutinise the implications of bringing security concerns into immigration policies on the core elements of the right to seek asylum, meaning on the right to access the RSD procedures in the EU and the protection of the principle of *non-refoulement*, especially expulsion to torture and other forms of ill-treatment. The next chapter discusses the theory of securitisation of immigration, in order to build the theoretical framework for addressing the main research question in Chapters 4, 5, and 6.

2.4. CONCLUSION

In Chapter 2, first, I defined the term asylum and presented a short introduction to the history of the practice of asylum seeking. Thereafter, I gave an analytical account on the theories and philosophical foundations, upon which the modern international regime of refugee protection and the right to seek asylum as a normative human right are constructed.

The term asylum is a Latin word, with the Greek origin of 'asylon,' translated to 'freedom from seizure.' The history of asylum seeking is as old as human life on Earth. It has existed since the time our ancestors protected themselves and their loved ones from the adversaries of nature and other humans by finding sanctuary. With the development of civilisations, the practice of asylum turned into a religious-societal institution very much bound to holy places such as temples, churches, monasteries, and other religious avenues. That is why this kind of asylum is known as 'territorial asylum.' For example, in Ancient Greece, the temples in the city-states granted asylum to those criminals who were to be punished and to slaves escaping their masters. This practice emerged from the idea that the absolute power of law needed mitigation by the interference of the

[330] Amongst all, the recent cases such as the cases of *X and X v. Belgium* (from the CJEU) and *N.D. and N.T. v. Spain* (from the ECtHR) are of most direct interest to the topic of my thesis. In this regard, see: *X and X v. Belgium*, C 638/16 PPU, Court of Justice of the European Union, Grand Chamber, Decision (7 March 2017). Also, see: *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020).

fear of divinity. In contrast, the Roman Empire used the generous practice of asylum offered by the Greeks to dominate Greek city-states. Once established in Greece, the Romans imposed restrictions on asylum and showed no mercy to those breaking Roman laws.

By the time that the Ancient Roman Empire had collapsed and Christianity emerged in Europe, the church became a place of asylum and the priest was the authority behind allowing asylum. This gave a more personalised character to the institution of asylum during the Middle Ages. With this vast ecclesiastical power over the institution of asylum in Europe, those who opposed asylum by introducing obstacles to the practice of asylum seeking, were condemned by the church and excommunicated by bishops. The European emperors were not, indeed, satisfied that the church and the bishops had full control over social institutions and practices such as asylum seeking. This battle of power between emperors and the church continued until the eleventh and twelfth centuries, when the canon and ecclesiastical law of asylum underwent drastic reform similar to other legal and social institutions.

At the end of the fifteenth and early sixteenth centuries and with the formation of nation-states in Europe, the institution of asylum departed more and more from its divine character towards a more secular one. By the rise of the Reformation and advancement of Protestantism, the power of the church in handling criminal justice matters significantly reduced. The newly formed civil authorities claimed full power over serving justice and decided to secularise the institution of asylum from the divine power. European kings, one after another, started to erode and dismantle the institution of asylum within the territories under their ruling.

The ancestors of international law, Grotius, Wolff, and de Vattel all agreed upon a 'natural law' regarding asylum. However, each reserved different levels of importance for protecting the national security and public safety of host society. Perhaps these are the first documents within the intellectual history of law that discussed the concept of 'security' in relation to asylum.

As opposed to the term asylum and the practice of asylum seeking, the term 'refugee' is a modern concept and the result of the creation of nation-states in Europe. The word 'refugee' originating from '*réfugié*' appeared for the first time in history in the official documents of 1685 by referring to the Protestant Huguenots, who were persecuted under the ruling of King Louis XIV of France. Being in the same religious and political line as Huguenots, Prussia opened its territory to them and benefited from their labour in rebuilding the kingdom. The practice of seeking asylum became so political that by the end of the eighteenth century, kingdoms hardly allowed fugitives to settle in their territories. This

situation created a need for signing agreements on the extradition of criminals, in which some exceptions for those persecuted because of political convictions were recognised. Therefore, by the early nineteenth century, no territorial asylum, nor asylum for those who had committed non-political crimes, existed in Europe. Instead, a new form of asylum named 'political asylum' came to the picture.

After the 1789 French Revolution, the need to protect those fleeing political oppression became a legal institution in the post-Revolutionary French Constitution of 1793. This is the first time that the concept of political asylum became a rule of positive law as a constitutional right. The political environment in post-Revolution France and the Napoleonic Wars encouraged states to create laws for imposing controls on territorial borders. The backlash of this new system of border control became evident during WWI and its aftermath with the displacement of Russians, Armenians, and Greeks, who had to flee persecution in their countries of origin. A new class of people wandered in the World with no blonging to anywhere. This is how human history created 'statelessness.' The suffocating political atmosphere during the interwar period made it impossible to find a solution to the 'problem' of refugees. However, Nansen, against all the odds, managed to reconcile the interests of the main powers of the World at that time with the interests of those displaced, and created an identity and travel document called the 'Nansen Passport.' The holder of this document had the right to travel, enter, and reside in fifty countries.

Nansen hoped that the darkness of WWI had taught humanity the lesson that there should be no more war. Regrettably, he was much mistaken. The Second World War and the series of wars that have since followed have demonstrated that there is seemingly no end to the greed and brutality of humankind. The international community reacted to the human suffering caused by WWII by establishing the UN, hoping that this entity would comprise the building blocks necessary for World peace, prosperity, and security. When it comes to the 'problem' of refugees, the 1948 UDHR, the 1951 Refugee Convention, and its 1967 Protocol are the pillars of an international regime of refugee protection.

However, the principle upon which this legacy is constructed contains an inherent bias, i.e. the principle of state sovereignty. This principle infiltrates the concept of 'national security' into the realm of the right to seek asylum. However, by analysing the composing conceptual and doctrinal elements of the right to seek asylum through the lenses of the Hohfeldian and Alexy's theory of rights, I concluded that no security concern as such is a reasonable justification to prevent those in need of protection from accessing asylum procedures. The reason for this claim is that the right to seek asylum – similar to other fundamental rights – holds an essential and inviolable core, which allows

absolutely no derogation. The elements of **first** entering EU territory for accessing the RSD procedures, and **second** the prohibition of *non-refoulement* are the two essential elements of this inviolable core, located at the very heart of the right to seek asylum, without which this right would not crystallise as a real and effective basic and fundamental human right.

3. THE SECURITISATION OF IMMIGRATION AND THE RIGHT TO SEEK ASYLUM: A MATTER OF LAW OR POLICY?

3.1. INTRODUCTION

The aim of this chapter is to elaborate on the theory of the securitisation of immigration for discovering and analysing the implications of this theory on the right to seek asylum in Chapters 4, 5, and 6. In order to understand the theory of securitisation, it is pertinent first to have a picture of the concept of security itself. Accordingly, I start Section 3.2 of this chapter by defining the concept of security and its derivatives (Subsection 3.2.1). The effort to define the term 'security' will set the scene for understanding the theory of securitisation in general and the application of this theory to the issue of immigration, particularly. To define the term 'security,' I need to provide an account on the ontology and epistemology of this term. This means that I should first explore how the knowledge about the concept of security is produced and studied. This study brings an interdisciplinary character to my research, since the concept of security is the subject of exploration mainly in the school of security studies and several of its sub-branches, all of which fall under political science.

Thereafter, in Subsection 3.2.2, based on the evolution of the concept of security through time – especially after the end of the Cold War era – I introduce the formation and the creation of the theory of securitisation within the sub discipline of Security Studies as a branch of International Relations (IR). At the end of this section, I will provide one of the most exhaustive definitions available on securitisation (given by Balzacq), and elaborate on this theory as a process of 'speech-act.' This section provides the knowledge background required to introduce the securitisation of immigration and unravel the tangled relationship between terrorism and asylum seeking.

Section 3.3 of this chapter contains two subsections. Subsection 3.3.1 addresses the clash between the so-called 'war on terror' and the right to seek asylum, by focusing on the fact that not all types of immigration are securitised by the EU or its Member States. In this subsection, I argue that it would be a fallacy to deduce a causal link between terrorism and asylum seeking or between terrorists and asylum seekers. However, the reality of policies and practices at EU external borders tells a very different story, which directs us to the analysis of Subsection 3.3.2 on implementing the right to seek asylum in a highly securitised environment. In this part, by investigating the approaches of the three key stakeholders of immigration – meaning the EU Member States, human rights

organisations, and the European Courts – I demonstrate that the realisation of the right to seek asylum in a securitised environment faces many significant challenges. While EU States deal with the issue of asylum as a purely matter of politics, human rights defenders (such as the Office of the UN High Commissioner for Human Rights and the UN Special Rapporteur on Human Rights and Counter-Terrorism) take a completely opposite path. The Reports of these UN mandate holders illustrate how the securitisation of immigration results in violating the well-established norms of international and regional human rights law – amongst them most importantly the principles of non-discrimination and *non-refoulement*.

The third approach is where the jurisprudence of European human rights courts stand, which is extremely unclear and confusing. Sometimes the implementation of the right to seek asylum becomes a matter of law, and on occasion, its infringement is justified as a matter of policy. In this part of Chapter 3, I introduce the theory of 'legal interpretivism' formulated by the contemporary legal philosopher Ronald Dworkin and his theory of 'law as integrity.' According to Dworkin's theoretical framework, while deciding on 'hard cases,' the institution of constitutional rights, which is a matter of law, rests on the powerful principles of 'human dignity' and 'political equality.' Therefore, there is a grave 'injustice' if matters of social policy or administrative efficiency impedes the proper procedural practices for realising those rights. This theory is very well applicable to the realisation of the right to seek asylum in the EU as a fundamental right. Once immigration is securitised, the normal balancing exercise between different rights or between rights and policies would no longer function. Under this scenario, authorities could easily justify the infringement of individual fundamental and constitutional rights through the label of 'emergency' and the necessity for 'extraordinary measures.'

At the end of Chapter 3, I seek a critical outlook against the securitisation of immigration by using the analytical tools available in the field of critical security studies. According to the critical school of security studies, we should move beyond the 'speech-act' processes of securitisation to be able to analyse the implications of this process on human rights discourse. Therefore, at the end of Chapter 3, I prepare the scene for analysing the implications of the securitisation of immigration in the EU on the right to seek asylum in the remaining chapters of this dissertation.

3.2. THE THEORY OF SECURITISATION

3.2.1. SETTING THE SCENE BY ELABORATING ON THE CONCEPT OF SECURITY

There is no exaggeration in claiming that the concept of security, as an abstract concept, is one of the vaguest and most controversial notions in the current system of human knowledge.[331] Referring to the contemporary political scientist James Der Derian, indeed, no other concept within the social sciences 'packs the metaphysical punch, nor commands the disciplinary power of "security".'[332] One way of explaining the vagueness of this concept and difficulty in defining it is through Russell's theoretical framework on human knowledge. The British philosopher Bertrand Russell,[333] writing in the late nineteenth and early twentieth centuries, asserted that all our knowledge of events and objects 'radiates from a space-time centre, which is the little region that we are occupying at the moments.'[334] Applying Russell's idea of knowledge to the concept of security, the reason for the complexity in defining this term is that security – similar to other abstract concepts – is highly susceptible to the 'spatio-temporal' aspects of human perception.[335] In other words, the meaning of security very much depends on **who** is defining it, **whose** security exactly we are talking about, and within which **temporal** and **spatial** contexts the definition is taking place, i.e. **when** and **where** we are defining security. Consequently, before we could even successfully define security, it is pertinent to unpack the epistemological and ontological aspects of this concept.[336]

Within the fields of science, the study, analysis, and understanding of the concept of security and it derivatives is the subject of 'security studies.' Security

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[331] Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10, p. 1.
[332] James Der Derian, *Critical Practices in International Theory: Selected Essays* (Oxford; New York: Routledge, 2009), pp. 149-151. In this regard, also see: James Der Derian, 'The Value of Security: Hobbes, Marx, Nietzsche, and Baudrillard', in David Campbell and Michael Dillon (eds), *The Political Subject of Violence* (Manchester, UK; New York: Manchester University Press, 1993), pp. 94-113, pp. 94-97.
[333] Bertrand Arthur William Russell (1872-1970) was a British philosopher, logician, and social critic, best known for his work in mathematical logic, analytic philosophy, and the theory of knowledge. In this regard, see: The Stanford Encyclopedia of Philosophy, 'Bertrand Russell', <plato.stanford.edu/entries/russell/>.
[334] Bertrand Russell, *Human Knowledge: Its Scope and Limits* (Oxford; New York: Routledge 2009), p. 19.
[335] *Ibid*, pp. 18 and 19.
[336] James Der Derian, *Critical Practices in International Theory: Selected Essays* (Oxford; New York: Routledge, 2009), p. 149. In this regard, also see: James Der Derian, 'The Value of Security: Hobbes, Marx, Nietzsche, and Baudrillard', in David Campbell and Michael Dillon (eds), *The Political Subject of Violence* (Manchester, UK; New York: Manchester University Press, 1993), pp. 94-113, p. 95.

studies falls under the field of 'International Relations (IR).'[337] To be more precise in the epistemological understanding of the concept of security, we should first differentiate between 'International Relations' or 'IR' in upper case and 'international relations' in lower case. The former is a scientific sub-discipline within the social sciences, which studies the latter. The subject matter of international relations is the relationship between the World actors. In this dissertation, I use the abbreviation 'IR' to refer to International Relations as an academic field within political and social sciences.[338]

The discipline of IR is a by-product of WWI in the early twentieth century.[339] Because of this war, in 1919, an urgent need and sheer desperation to prevent another war of such a huge scale resulted in the establishment of the Department of International Politics[340] at the University of Wales in Aberystwyth (known today as 'Aberystwyth University').[341] The scholars of social and political sciences based at Aberystwyth created this new discipline to study and understand the causes of war and to find possible solutions to prevent it from happening again.[342] The discipline of IR – although being related – is distinct from other disciplines within the social sciences such as history, economics, geography, and international law. IR as an academic sub discipline is 'the study of politics, economics, and law at a global level with a special emphasis on preventing wars and promoting the World peace and security.'[343] Therefore, it directly concerns the relationships between those legal and

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337 Richard Devetak, 'Introduction: The Origins and Changing Agendas of International Relations', in Richard Devetak, Jim George, and Sarah Percy (eds), *An Introduction to International Relations* (3rd edn, Singapore: Cambridge University Press, 2017), pp. 1-22, p. 4.
338 Richard Devetak, 'Introduction: The Origins and Changing Agendas of International Relations', in Richard Devetak, Jim George, and Sarah Percy (eds), *An Introduction to International Relations* (3rd edn, Singapore: Cambridge University Press, 2017), pp. 1-22.
339 Scott Burchill and Andrew Linklater, 'Introduction', in Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Terry Nardin, Matthew Paterson, Christian Reus-Smit, and Jacqui True (eds), *Theories of International Relations* (5th edn, New York: Palgrave Macmillan Ltd., 2013), pp. 1-31, p. 5.
340 International politics is the same as international relations. For more information in this regard, see: Richard Devetak, 'Introduction: The Origins and Changing Agendas of International Relations', in Richard Devetak, Jim George, and Sarah Percy (eds), *An Introduction to International Relations* (3rd edn, Singapore: Cambridge University Press, 2017), pp. 1-22, p. 4.
341 Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10, p. 1. In this regard, see: Patricia Owens, John Baylis, and Steve Smith, 'Introduction: From International Politics to World Politics', in John Baylis, Patricia Owens, and Steve Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (7th edn, New York: Oxford University Press, 2017), pp. 1-15.
342 Patricia Owens, John Baylis, and Steve Smith, 'Introduction: From International Politics to World Politics', in John Baylis, Patricia Owens, and Steve Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (7th edn, New York: Oxford University Press, 2017), pp. 1-15.
343 Scott Burchill and Andrew Linklater, 'Introduction', in Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Terry Nardin, Matthew Paterson, Christian Reus-Smit, and Jacqui True (eds), *Theories of International Relations* (5th edn, New York: Palgrave Macmillan Ltd., 2013), pp. 1-31.

political entities in the World, which have a capacity to function at a global level and beyond national borders. These entities are:

- Sovereign states;
- Inter-governmental organisations (IGOs);
- International non-governmental organisations (INGOs);
- Non-governmental organisations (NGOs);
- Multi-national corporations.[344]

As mentioned above, the primary goal of IR is to understand wars and to prevent them through solutions offered by knowledge-based analyses. Therefore, it is accurate to claim that the concept of security is located at the very heart of IR studies. The sub-branch of IR, which studies the concept of security, its derivatives, and implications, is called 'security studies.' Security, as the main subject in security studies, is a matter of 'high politics.'[345] This means that the very existence and survival of the agents of World politics (mentioned above) depend upon the debates and properties constructed around the concept and the state of security. Security studies have always been concerned with *war* and primarily with the ways, we could prevent it, and if its outbreak is inevitable, how we could possibly limit and control the negative impacts of war on humans. Therefore, the second focus of security studies is *human rights project*, i.e. how to prevent atrocities such as genocide, ethnic cleansing, war crimes, crimes against humanity, slavery, torture, and other gross forms of human rights violations, which could more easily take place during wars. These mass and gross violations of human rights are more prone to happen in war situations, because during wars the 'state of emergency' prevails over the application of human rights norms. However, what we should not ignore in this context is that some human rights rules are absolute in nature and no derogation from them is allowed even during public emergencies or wars.[346]

After allocating the epistemology of security within the social sciences, it is time to address the ontology of this concept for better understanding it. Although security – as an utterly abstract concept – is incredibly contested and vague, most scholars of security studies have reached some consensus on one single

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344 Patricia Owens, John Baylis, and Steve Smith, 'Introduction: From International Politics to World Politics', in John Baylis, Patricia Owens, and Steve Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (7th edn, New York: Oxford University Press, 2017), pp. 1-15.
345 Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10.
346 Christian Reus-Smit and Duncan Snidal, 'Between Utopia and Reality: The Practical Discourses of International Relations', in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (New York: Oxford University Press, 2010), pp. 3-37, pp. 16 and 17.

main element, which eventually constitutes the totality of this concept.[347] The consensus is over the term 'threat.'[348] As mentioned earlier, the reason for the creation of IR and thereafter security studies was the 'fear of war' or to be more precise, the 'fear of the threat of war;' hence, the terms 'threat' and the 'fear of threat' are located at the centre of defining security.[349] No matter who defines security or whose security, when, and where we are talking about, all that we could at the end agree on is that security represents the 'absence of a threat.' In other words, security is simply the 'lack' or 'non-existence of a threat.'[350]

During the interwar period and WWII, the concept of security primarily intertwined with the threat of war between powerful States of the time, namely Germany, the US, the UK, the Soviet Union, Japan, and China.[351] However, by the start of the Cold War immediately in the aftermath of WWII,[352] security studies focused on direct inter-state armed conflicts mainly between the US (the West) and the Soviet Union (the East).[353] Hence, traditionally only states were the 'referent objects of security' – meaning that states were the only entities that their existence was threatened by the military invasion of another state. Therefore, the issue of inter-state war became equivalent to the national security of states.[354]

The dissolution of the Soviet Union in 1991 closed the chapter of the Cold War in history and to some degree, the nuclear arms race between the Western and Eastern superpowers in World politics. Since the end of the Cold War in the early 1990s,[355] threats against national security cover a much wider range of issues

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[347] For a more detailed account on different approaches to the concept of security and consequently varied definitions of security, see: Anthony D. Burke, 'Security', in Richard Devetak, Jim George, and Sarah Percy (eds), *An Introduction to International Relations* (3rd edn, Singapore: Cambridge University Press, 2017), pp. 198-209.

[348] Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10, p. 2.

[349] Diane A. Desierto, Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation (Leiden: Martinus Nijhoff Publishers, 2012), pp. 146-148.

[350] Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10, p. 3.

[351] Richard James Overy, *The Inter-war Crisis 1919-1939* (2nd edn, Harlow: Pearson Education Limited, 2007), pp. 76-93.

[352] The Cold War lasted for about half a century (1947-1991), ending with the dissolution of the Soviet Union in 1991. In this regard, see: Peter Kenez, *A history of the Soviet Union from the Beginning to the End* (2nd edn, New York: Cambridge University Press, 2006), pp. 261-291.

[353] The security during the Cold War is the subject of another sub-branch of security, i.e. 'strategic studies.' For more information, see: John Baylis and James J. Wirtz, 'Introduction', John Baylis, James J. Wirtz, and Colin S. Gray (eds), *Strategy in the Contemporary World: An Introduction to Strategic Studies* (5th edn, New York: Oxford University Press, 2016), pp. 1-14.

[354] Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (New York: Cambridge University Press, 2009), p. 26.

[355] The current era we are living in now is the 'post-Cold War era.' In this regard, see: Kjell Goldmann, Ulf Hannerz, and Charles Westin, 'Introduction: Nationalism and Internationalism in the Post-Cold War

including public health emergencies,[356] environmental degradation, the threat of terrorism and wars waged by non-state actors, the threats of transnational organised crimes such as drug smuggling, human trafficking, and even the irregular movement of populations.[357] In the light of these rapid changes, new referent objects of security – besides sovereign states – have emerged in World politics.

In addition, the importance of the human rights discourse in the aftermath of WWII has made individuals an active and influential agent in international relations and a new subject of international law.[358] The development of modern technologies and their influence on media and telecommunication techniques have made various domestic players such as grassroots movements and civil society actors more relevant than ever and no longer simply a matter of internal politics.[359] To quote Alan Collins in this regard, '[t]he process of globalization has led to internal issues becoming externalized and external issues being internalized.'[360] In the highly connected World we live in today, we should always remember that the slightest change in one part of the World has immense, unpredictable impact on the other parts. For example, the ongoing proxy wars in the Middle East and the civil war in Syria, amongst much unrest in other parts of the region, is no longer just the matter of the security of one state. On the contrary, the security of one referent object may result in the insecurity of another.

Against this background information, by bringing new subjects such as society, identity, individuals, public health, and the environment, besides the sovereign

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Era', in Kjell Goldmann, Ulf Hannerz, and Charles Westin (eds), *Nationalism and Internationalism in the Post-Cold War Era* (London; New York: Routledge, 2000), pp. 1-20, pp. 1-3.

[356] For the global public health emergencies during the twentieth and twenty-first centuries, we could name HIV/AIDS, Ebola, influenza A (A/H1N1), SARS, and COVID-19. For more information, see: The World Health Organisation (WHO), 'Pandemic influenza', <www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza>. Also, see: The World Health Organisation (WHO), 'Past Pandemics', <https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza/past-pandemics>. For more information on the pandemics as an issue of security and on the nexus between 'health' and 'security,' see: Stefan Elbe, 'Health and Security', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 379-392. And: Brigit Toebes, 'Human Rights and Public Health: Towards a Balanced Relationship', in Myriam Feinberg, Laura Niada-Avshalom, and Brigit Toebes (eds), *National Security, Public Health: Exceptions to Human Rights?* (Oxford; New York: Routledge, 2016), pp. 106-122.

[357] Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10, pp. 1, 2, and 8-10.

[358] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, New York: Oxford University Press, 2019), p. 111.

[359] Ronald R. Krebs, 'The Politics of National Security', in Alexandra Gheciu and William C. Wohlforth (eds), *The Oxford Handbook of International Security* (New York: Oxford University Press, 2018), pp. 259-273.

[360] Alan Collins, 'Introduction: What is Security Studies?', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 1-10, p. 2.

nation-states, as the referent objects of security, the traditional theories of security studies are no longer sufficient in analysing the newly emerged security issues. There are two traditional IR theories that offer opposing conceptual frameworks for understanding security: 'realism' and 'neorealism,' on the one hand, and 'liberalism' and 'neoliberalism,' on the other.[361] Since the end of the Cold War, as opposed to the traditional theories, new conceptual frameworks have emerged to study security. The IR theory of securitisation is one such example of non-traditional approaches to studying security.[362]

The theory of securitisation is the intellectual product of two decades of research and academic work at the Conflict and Peace Research Institute in Copenhagen – also known as the 'Copenhagen School' in IR.[363] The scholarly work of some IR theorists – amongst them most importantly Barry Buzan and his colleagues Ole Wæver and Jaap de Wilde – created this theory. In the first edition of his book published in 1983 on the subject of national security, Buzan asserted that 'the concept of national security was an underdeveloped concept,' which required expansion 'beyond military considerations and [should] encompass non-military sectors such as political, social, economic, and environmental security.'[364] In 1998, Buzan and his colleagues further developed this theory by

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[361] With regard to the use of these two IR theories in security studies, see the following chapters, respectively. Charles Louis Glaser, 'Realism', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 13-29, and Patrick Morgan, 'Liberalism and Liberal Internationalism', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 30-46.

[362] The list of non-traditional IR theories used in security studies is long. However, amongst them, the most important ones include 'constructivism,' 'post-structuralism,' 'post-colonialism,' 'gender security studies and feminism,' 'securitisation theory,' 'human security,' and 'critical security studies.' With regard to the 'constructivism' approach to security, see: Christine Agius, 'Social Constructivism', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 74-90. On a 'post-structural' outlook to security, see: J. Marshall Beier, 'Poststructural Insights: Making Subjects and Objects of Security', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 111-125. For the 'post-colonial' reading of security, see: Mark Laffey and Suthaharan Nadarajah, 'Postcolonialism', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 126-143. For a feminist and gender-based approach to security, see: Caroline Kennedy and Sophia Dingli, 'Gender and Security', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 159-172. On 'securitisation theory,' see: Ralf Emmers, 'Securitization', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 173-187. On 'human security' approach to security, see: Randolph B. Persaud, 'Human Security', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 144-158. On 'critical security studies,' see: David Mutimer, 'Critical Security Studies: A Schismatic History', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 91-110.

[363] The Conflict and Peace Research Institute is now at the Danish Institute for International Studies. The main goal of the Danish research institute is to conduct multidisciplinary research on peace and security. For more information, see: The Danish Institute for International Studies (DIIS), 'About DIIS', <diis.dk/en/about-diis/the-institute/about-diis>.

[364] Barry Buzan, *People, States, and Fear: The National Security Problem in International Relations* (Hemel Hempstead: Wheatsheaf Books Ltd, 1983), pp. 1-8.

publishing their most important scholarly work on the theory of securitisation entitled, 'Security: A New Framework for Analysis.'[365] The main premise of this work is that the 'language' and 'tool' of security could tackle any issue in today's World.

Some IR scholars, however, have warned against the intellectual and political dangers posed by the theory of securitisation and over-securitising a wider range of issues.[366] For example, according to Walt, viewing non-military issues as threats to security, 'would destroy the intellectual coherence of the field [of security studies] and make it more difficult to devise solutions to any of [...] important problems such as pollution, disease, child abuse, or economic recession.'[367]

In 2011, the political scientist Thierry Braspenning-Balzacq elaborated further on the theory of securitisation that this school of thought was not an original theory standing alone on its own feet. According to Balzacq, securitisation is a theory constructed through borrowing many bricks of thoughts from other non-traditional IR theories such as 'constructivism,' 'post-structuralism,' and the 'critical security theory.'[368] Therefore, anything could become a security problem through 'social constructivism' and 'discursive politics.'[369] To paraphrase Balzacq, we as a community choose to deal with some social phenomena in a particular way; we name something a security problem and once we have done so, our attitude towards that issue or our way of interaction with it changes from a societal or political matter to a security issue.

The process of changing public opinion and the behaviour of actors after calling a subject a security threat is 'speech-act.'[370] The basic idea behind 'speech-act' is that certain statements have the power of describing things or events without the intention of judging them being false or true. What is meant exactly by

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[365] Barry Buzan, Ole Wæver, and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder, Colorado; London: Lynne Rienner Publishers, 1998).

[366] *Ibid*, pp. 1-20. Also, see: Didier Bigo, 'Liberty, Whose Liberty? The Hague Programme and the Conception of Freedom', in Thierry Balzacq and Sergio Carrera (eds), *Security Versus Freedom? A Challenge for Europe's Future* (Oxford; New York: Routledge, 2006), pp. 35-44.

[367] Stephen Martin Walt, 'The Renaissance of Security Studies' (1991) 35(2) *International Studies Quarterly*, pp. 211-239, p. 213.

[368] Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in Thierry Balzacq (ed.), *Securitisation Theory: How Security Problems Emerge and Dissolve* (London; New York: Routledge, 2011), pp. 1-30.

[369] *Ibid*. On the importance of the use of language and discourse in security studies, see: David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis: University of Minnesota Press, 1992), pp. 2-23.

[370] Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in Thierry Balzacq (ed.), *Securitisation Theory: How Security Problems Emerge and Dissolve* (London; New York: Routledge, 2011), pp. 1-30. Also see: Ralf Emmers, 'Securitization', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 173-187.

'speech-act' is that within the process of securitisation, the securitising actors convince a particular audience through using 'assertive language' and 'discursive politics,' and certain practices – or even both – that 'something' poses an 'existential threat to the safety and security' of that particular audience – either physical safety or economic, ideological, societal, or identity security.[371] The former act of securitisation is known as the 'philosophical securitisation,' since it uses the tool of language and is based on the philosophy of semiotics, while the latter is called the 'sociological securitisation,' as the agent or actor of securitisation performs certain '*habitus*' or acts.[372] The *habitus* are the practices of the securitising actors as results of power games within a certain societal context.[373] To sum up this process, the definition of securitisation that Balzacq has offered seems to be an exhaustive one:

> [Securitisation is] an articulated assemblage of practices whereby heuristic artefacts [such as] (metaphors, policy tools, image repertoires, analogies, stereotypes, emotions, etc.) are contextually mobilized by a securitizing actor, who works to prompt an audience to build a coherent network of implications (feelings, sensations, thoughts, and intuitions) about the critical vulnerability of a referent object, that concurs with the securitizing actor's reasons for choices and actions, by investing the referent subject with such an aura of unprecedented threatening complexion that a customized policy must be undertaken immediately to block its development.[374]

According to this definition, by the end of the securitisation process, the 'subject' has already elevated its position from being on the political agenda to the security agenda of the state.[375] In order to sustain the status of securitisation, the securitising speech-act should repeat or even intensify through time; otherwise, the matter under question might de-securitise and return to the level of politicisation or even non-politicisation.

In addition, as the above-mentioned definition of Balzacq suggests, securitisation is the politics of 'exceptionalism.' This means that under

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[371] Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in Thierry Balzacq (ed.), *Securitisation Theory: How Security Problems Emerge and Dissolve* (London; New York: Routledge, 2011), pp. 1-30, pp. 1 and 2.
[372] *Ibid*, pp. 1-4.
[373] Ralf Emmers, 'Securitization', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 173-187, p. 176. In this regard, also see: Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in Thierry Balzacq (ed.), *Securitisation Theory: How Security Problems Emerge and Dissolve* (London; New York: Routledge, 2011), pp. 1-30, pp. 2 and 3.
[374] Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in Thierry Balzacq (ed.), *Securitisation Theory: How Security Problems Emerge and Dissolve* (London; New York: Routledge, 2011), pp. 1-30, p. 3.
[375] Barry Buzan, Ole Wæver, and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder, Colorado; London: Lynne Rienner Publishers, 1998), p. 23. In this regard, also see: Ralf Emmers, 'Securitization', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 173-187, p. 175.

exceptional circumstances, we could easily justify the use of extraordinary measures, which we would not employ in regular politics. A step further, if we employ harder security measures such as military forces or the use of violence to handle securitised issues, we are militarising the matter. At this stage, we have entered into an ultra-level of panic, which I would term the 'politics of paranoia.' The final chapter of this dissertation elaborates further on the justifications for using extraordinary and extra-legal measures in controlling the EU external borders in the name of the 'state-of-exception' or the 'state-of-emergency.' Figure 2 below visualises the processes of securitisation and ultra-securitisation (or militarisation) and *vice versa*.

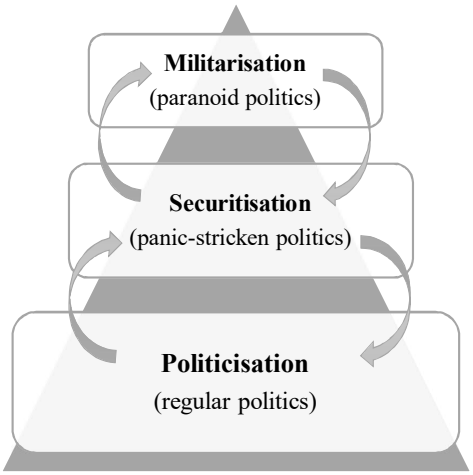

Figure 2. The securitisation and de-securitisation processes.

3.2.2. WAR ON TERROR AND THE SECURITISATION OF IMMIGRATION IN THE EUROPEAN UNION

After learning about the concept of security and its categorisations within the epistemological field, and by understanding the theory of securitisation in general, it is time to return to the main research question of this doctoral dissertation and see how this background information helps answer that question. The main research question in this thesis is what the implications of securitisation of immigration are on the right to seek asylum. Before responding this question (which comes in Chapters 4, 5, and 6), I need to elaborate further on the theory of securitisation, particularly in relation to immigration.

In this dissertation, I shall address the securitisation of immigration only in the EU. When we say that immigration is a security threat to the EU, regardless of whether this statement is factually accurate or not, we have created an existential narrative through which immigration endangers EU security. This means immigration is no longer a regular societal, legal, or political issue –

which could be addressed through normal political-legal means. On the contrary, an exceptional situation prevails, which in order to solve requires the employment of extraordinary measures that are not necessarily legal. To note, the concept of national security within the context of EU foreign policy is known as EU 'internal security.' Therefore, in this dissertation, I shall use the phrase 'internal security' when it comes to EU security and the phrase 'national security' when talking about the security of EU individual Member States.

The securitisation of immigration in Europe has not happened in a vacuum. The formation of the attitude that immigration is a thereat to the security of the EU is the outcome of multiple factors and incidents. The economic, social or collective, and identity securities all have contributed to the speech-act, leading to the portrayal of immigration as a threat to EU security.[376] Amongst the security concerns of the EU Member States for the past three decades, the threat of terrorism and fears arising from that have leapt to the top of the agenda of EU institutions and its Member States.[377] Figure 3 illustrates the link between immigration and security in a regulary political environment (non-securitised) with the overlapping area being economic, social, identity, or physical securities. In the case of this doctoral dissertation, I shall assume that this overlapping area is terrorism and terrorist-related crimes.

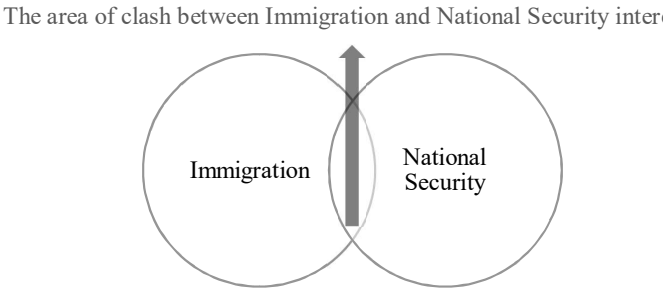

Figure 3. The immigration-national security nexus.

The issue of immigration and security meeting each other at an intersection is nothing new to the scholarship and the practices of states and decision-makers. As discussed in Chapter 2, the issue of national security and the safety of host society entered into discussion on asylum with the formation of nation-states after the 1648 Peace of Westphalia.[378] Notwithstanding the fact that the trace of the immigration and security nexus dates back to the mid-seventeenth century, to view immigration through the prism of **exclusively security** is something

[376] Audie Klotz, 'Migration', in Alexandra Gheciu and William C. Wohlforth (eds), *The Oxford Handbook of International Security* (New York: Oxford University Press, 2018), pp. 442-456.
[377] Sam Mullins, *Jihadist Infiltration of Migrant Flows to Europe: Perpetrators, Modus Operandi and Policy Implications* (Cham: Springer Nature Switzerland AG, 2019), pp. 1-18.
[378] See: Subsection 2.2.2 of Chapter 2 of this dissertation.

new and a by-product of the end of the Cold War. In the post-Cold War era that we live in now, several unprecedented security issues have started to appear in security studies, issues such as the human rights of individuals. In addition, a novel outlook to security and the conceptualisation of different security practices have begun to develop approaches such as the human security approach.[379]

The domination of viewing immigration through the lenses of security intensified further because of the 9/11 attacks and the international counterterrorism policies following that.[380] In fact, the international concern over global terrorism has gone through significant shifts for the last two decades. At the end of the Cold War and during the 1990s, although there was no consensus about the definition of terrorism, states agreed on a distinct line between international and domestic terrorism, with an emphasis on the general idea that 'one nation's terrorists were another nation's freedom fighters.'[381] However, with 9/11 and the attacks that followed, the line dividing international and domestic terrorism became more and more blurred.[382] The fear arising from the growth of Communism has been replaced with the fear of radical political Islam spreading. As of today, the problem of radical Islamic terrorism has become a global matter.[383] The international coalition against Al-Qaeda and the Islamic State of Iraq and the Levant (ISIS) testifies to this.

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[379] Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171.

[380] *Ibid.* Also, see: Anastassia Tsoukala, 'Defining the Terrorist Threat in the Post-September 11 Era', in Didier Bigo and Anastassia Tsoukala (eds), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* (Oxford; New York: Routledge, 2008), pp. 49-99, pp. 65-69. Also, see: Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317, p. 295.

[381] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (New York: Cambridge University Press, 2005), p. 18. Also, See: Ashok Swain, *Understanding Emerging Security Challenges: Threats and Opportunities* (Oxford; New York: Routledge, 2013), pp. 2 and 3.

[382] Christopher Rudolph, *National Security and Immigration: Policy Development in the United States and Western Europe since 1945* (Stanford: Stanford University Press, 2006), pp. 1 and 2. Also, see: Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317. Also, see: Gabriella Lazaridis, 'Introduction', in Gabriella Lazaridis (ed.), *Security, Insecurity and Migration in Europe* (Oxford; New York: Routledge, 2016), pp. 1-12.

[383] Ashok Swain, *Understanding Emerging Security Challenges: Threats and Opportunities* (Oxford; New York: Routledge, 2013), p. 3. In this regard, also see: Ali Al'amin Mazrui, 'The Resurgence of Islam and the Decline of Communism: What is the Connection?' (1991) 23(3) *Futures*, pp. 273-288. Also, see: Arolda Elbasani and Olivier Roy, 'Islam in the Post-Communist Balkans: Alternative Pathways to God' (2015) 15(4) *Southeast European and Black Sea Studies*, pp. 457-471.

Since the 2015-2016 attacks in different European cities, the security dimensions of terrorism – especially that of radical Islamic terrorism – have become so bold that EU leaders swiftly have intensified their model of speech and behaviour towards Muslim immigrants. This shift in language and behaviour could be conceptualised under the theory of the securitisation of immigration.[384] To be more accurate, however, one should make distinction between different categories of immigrants and point out that indeed not all immigrants are perceived as threats to the security of EU. History has shown that the European countries have been able to cope well with the large number of immigrants, those having positive impact on the wealth and the growth of capital within the single market area. In addition, immigrants with similar or homogenous systems of values, identity, and religion as the host societies have always been welcomed to Europe.[385]

On the contrary, the category of immigrants, defined as 'forced migrants' or 'asylum seekers', especially those coming from 'majority-Muslim' countries of origin, are the subject referents of security and are deemed to bring terrorism and crimes associated with that to the EU.[386] The public opinion and the institutional narrative of EU is that, in Member States with a larger number of Muslim asylum seekers, a greater **existential threat** is present against the survival of a **secular** polity. Moreover, there is a perception that Muslim immigrants – particularly Muslim asylum seekers – threaten the **homogeneity** of European identity, religion, class, ethnicity, and hence the **coherent** social structure of the EU.[387] As a result, this particular category of immigrants is

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[384] Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317, pp. 295-300. In this regard, also see: Elspeth Guild and Didier Bigo, *Anti- & Counter-Terrorism and Human Rights in Europe: 5 Snapshots of Current Controversies* (Online: Éditions L'Harmattan, 2018), pp. 79-92.

[385] Gabriella Lazaridis, *International Migration into Europe: From Subjects to Abjects* (Basingstoke, Hampshire; New York Palgrave Macmillan, 2015), pp.107-123.

[386] John Crowley, 'Where Does the State Actually Start? The Contemporary Governance of Work and Migration', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Oxford; New York: Routledge, 2016), pp. 140-160, p. 142. Also, see: Laurent Bonelli, 'The Control of the Enemy within? Police Intelligence in the French Suburbs (*banlieues*) and its Relevance for Globalization', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Oxford; New York: Routledge, 2016), pp. 193-208.

[387] Elspeth Guild and Didier Bigo, *Anti- & Counter-Terrorism and Human Rights in Europe: 5 Snapshots of Current Controversies* (Online: Éditions L'Harmattan, 2018), pp. 79-82. Also, see: Elspeth Guild, 'The Legal Framework: Who is Entitled to Move?', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Oxford; New York: Routledge, 2016), pp. 14-48. Also, see: Didier Bigo, 'Frontier Controls in the European Union: Who is in Control?', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Oxford; New York: Routledge, 2016), pp. 49-99, p. 63.

somehow associated with a general sense of 'insecurity' and 'instability' in the majority of EU host societies.[388] If we agree that 'security' constitutes freedom from fear of threat and insecurity is feeling a threat then securitising immigration gives an illusion to the members of host societies that those in charge are constructing an environment of 'political trust,' 'loyalty,' and 'identity.'[389] The way they do this is through projecting 'others,' the 'outsiders,' or 'aliens' as the source of fear and instability – a process which very much resonates with racism and xenophobia.

Moreover, the securitisation of immigration involves a set of political assurances, in which not only the ruling party, but also the opposition – particularly during elections through their media and campaign races – frame immigrants and asylum seekers as the agencies of crisis, the causes of emergencies, and the enemies of the societies that host them.[390] Creating a climate of threat, emergency, and urgency politically benefits the ruling government by creating a perception that the political community is in charge. This is a vicious-circule mode of reproducing a sense of insecurity. When the process of securitisation happens to immigration in the EU and towards a certain category of immigrants (mainly Muslim asylum seekers), the practice of asylum seeking, which has always existed in the history of humankind, suddenly becomes a threatening act against stability of the EU. Figure 4 shows that once immigration is securitised, it loses all its attributions and amenities and becomes entirely a matter of security.

Figure 4. The Securitisation of immigration.

[388] Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Oxford; New York: Routledge, 2006), pp. 44-47.
[389] *Ibid*, pp. 47-57.
[390] *Ibid*, pp. 60.

3.3. ADDRESSING THE TANGLED RELATIONSHIP BETWEEN TERRORISM AND ASYLUM SEEKING

3.3.1. THE CLASH BETWEEN THE FIGHT AGAINST TERROR AND THE RIGHT TO SEEK ASYLUM

The relation between terrorism and asylum seeking, especially in the case of asylum seekers coming from primarily Muslim countries of origin, is multi-layered and extremely complex. It is factually inaccurate to obtain a causal link between these two separate – but at the same time – two tightly intertwined and interrelated phenomena.[391] Besides a lack of universally accepted definition of terrorism,[392] the reason for the complexity of understanding the nexus between terrorism and asylum seeking is that terrorism, similar to many other crimes, is not just simply the result of one factor. Instead, this crime is the outcome of numerous multifaceted factors, interplaying with each other in a very complex way.[393]

Notwithstanding the fact that no universal definition of terrorism exists, what agreed internationally is that terrorism as an act of violence indeed is a crime.[394] Simultaneously, terrorism has become one of the most pressing security threats of the twenty-first century.[395] Holding both legal (criminal law) and political (national security) aspects, dealing with terrorism is extremely difficult. On the one hand, taking terrorism as a crime, we would need to present a clear-cut and exhaustive definition in the criminal codes. This is to comply with the principle of legality of penalties and punishment in criminal law, i.e. *nulla poena sine lege*, which is a necessary part of the rule of law. Deriving from this principle, which is both a customary norm and stated in Article 15 of the 1966 ICCPR, the national criminal codes must explicitly and clearly state all the composing elements of a crime (the principle of *nullum crimen sine lege*).[396]

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[391] With regard to a recent research on immigration to Europe and its link with radical Islamic terrorism, see: Sam Mullins, *Jihadist Infiltration of Migrant Flows to Europe: Perpetrators, Modus Operandi and Policy Implications* (Cham: Springer Nature Switzerland AG, 2019). For more information on the complex nexus between terrorism and migration, see: Elspeth Guild, 'Terrorism and Migration Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 436-448.

[392] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2019), pp. 29-32.

[393] *Ibid*, p. 16.

[394] *Ibid*, pp. 29-32.

[395] Julian Richards, *A Guide to National Security: Threats, Responses and Strategies* (Oxford: Oxford University Press, 2012), pp. 35-40.

[396] Elspeth Guild, 'Terrorism and Migration Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar

On the other hand, considering terrorism as a matter of national security, and therefore, becoming a subject of political debates, makes this crime highly susceptible to ambiguities and interpretation of beneficiary political actors. This complicated nature of terrorism makes the nexus between terrorism and asylum seeking even more puzzling.[397] In this regard, for example, by looking at the following three premises, we could conclude that it is a fallacy to simply deduct a causal link between terrorism and Muslim asylum seekers. **First**, not all terrorists are asylum seekers from the predominantly Muslim countries of origin.[398] **Secondly**, not all Muslim asylum seekers turn out to be terrorists.[399] In fact, statistics and figures have shown that only a very small portion of Muslim asylum seekers have committed terrorist crimes or have been involved in one way or another with Jihadist-Islamic terrorist organisations.[400]

Thirdly, as an undeniable fact, 'non-Muslims' also have committed some of the deadliest terrorist attacks in Europe.[401] According to the European Union

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Publishing, 2020), pp. 436-448. Also, see: Marcello Di Filippo, 'The Definition(s) of Terrorism in International Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 2-15. Also, see: Geoff Gilbert, 'Terrorism and International Refugee Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 2-15. And, see: Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism', in Menno T. Kamminga (ed.), *Challenges in International Human Rights Law* (Vol. 3, London: Routledge, 2014), pp. 155-206. Also, see: Ben Saul, 'Civilising the Exception: Universally Defining Terrorism', in Aniceto Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (London: Springer Science, 2012), pp. 79-100.

397 For more detailed information in this regard, see: Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001* (Oxford: Routledge, 2016), pp. 37-70. Also, see: Alex Peter Schmid, 'The Definition of Terrorism', in Alex Peter Schmid (ed.), *The Routledge Handbook of Terrorism Research* (Oxford; New York: Routledge, 2011), pp. 39-157, pp. 39-87. Also see: Anthony Richards, 'Defining Terrorism', in Andrew Silke (ed.), *Routledge Handbook of Terrorism and Counterterrorism* (Oxford; New York: Routledge, 2018), pp. 13-21, pp. 13-20.

398 Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317, pp. 296-299.

399 Tarik Fraihi, '(De-)Escalating Radicalisation: The Debate within Immigrant Communities in Europe', in Rik Coolsaet (ed.), *Jihadi Terrorism and the Radicalisation Challenge: European and American Experiences* (2nd edn, Oxford; New York: Routledge, 2016), pp. 205-213, p. 207.

400 With regard to the latest trends and facts on the situation of terrorism in Europe, see: The European Union (EU) Terrorism Situation and Trend Report (TE-SAT) 2020, by the European Union Agency for Law Enforcement Cooperation (Europol). In this regard, also see: Sam Mullins, *Jihadist Infiltration of Migrant Flows to Europe: Perpetrators, Modus Operandi and Policy Implications* (Cham: Springer Nature Switzerland AG, 2019), pp. 19-41.

401 In Europe, terrorism for centuries had been associated with non-Muslims, for example, the Irish Republican Army (IRA) in the UK, because of the long-standing disputes in Northern Ireland. For more information in this regard see: Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and*

Agency for Law Enforcement Cooperation (Europol), 'both jihadist and right-wing extremist propaganda incite individuals to perpetrate acts of violence autonomously and praise perpetrators as "martyrs" or "saints," respectively.'[402] Therefore, it is more reasonable to say that any radical or extremist political sect may employ violent means to achieve political and/or ideological goals.

However, one might oppose this argument by asking why the EU should take even the slightest risk and allow a small fraction of Muslims, who might be associated with terrorist organisations, or may become radicalised later on and possibly commit terrorist crimes, to enter EU territory. This line of argument might continue such that what would be wrong in having the majority of Muslim communities pay for the mistakes of the minority, who happen to share the same religious identity. I would like to respond to this argument from the three following perspectives. **First**, there should be no punishment before a crime has happened. This is against the principle of legality (*nulla poena sine lege*) in criminal law. Therefore, we cannot prevent someone from accessing the territory of EU by simply assuming that they may in future become radicalised, join terrorist organisations, and commit terrorist crimes.

Secondly, we should remember that the practice of 'risk assessment' is at the very heart of protecting national security.[403] We cannot just assume that someone or a group of people is a threat to national security or the internal security of EU without individually assessing their case or without checking their background. Therefore, many policies that prevent asylum seekers from accessing the territory of EU and deny asylum claim procedures – which includes comprehensive risk assessment – is against the very idea of protecting national security. **Thirdly**, a majority of those who have committed some of the recent terrorist crimes in the EU are not members of any radical Islamic terrorist organisations such as Al-Qaeda or ISIS. These people are the so-called 'lone wolves' or 'lone-actor terrorists' who became radicalised after arriving in the EU and while spending an idle life in detention camps under harsh living conditions.[404]

Global Processes: A View from Forced Migration Studies (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317, pp. 296-299.

[402] For more information in this regard and on the trends of acts of terrorism by different radical groups, see: The 2020 Europol report at The European Union (EU) Terrorism Situation and Trend Report (TE-SAT) 2020, by the European Union Agency for Law Enforcement Cooperation (Europol), pp. 5 and 6.

[403] Julian Richards, *A Guide to National Security: Threats, Responses and Strategies* (Oxford: Oxford University Press, 2012), p. 5.

[404] Sakina Abushi and Götz Nordbruch, 'Preventing the Risk of Radicalisation of Asylum Seekers and Refugees, and Far-Right Mobilisation against Asylum Seekers, Refugees and Immigrants: Breaking the Cycle' (2020) *Policy Brief by Radicalisation Awareness Network* (RAN), pp. 3-19. Also, see: Khalid Koser and Amy Cunningham, 'Migration, Violent Extremism and Social Exclusion', in Marie McAuliffe

Since the 2015-2016 terrorist attacks in the EU, the shadow of the fight against terrorism has fallen so heavily on Muslim communities that the right to seek asylum has started to lose all legal weight. Especially when it comes to applying the principle of non-discrimination with regard to asylum seekers, certain groups are discriminated against on the ground of religion. For example, suspecting that a certain community represents terrorist threats – in this case, Muslim asylum seekers – is purely a matter of policy.[405]

To give an example of this bias, since 2019, the Chinese Government has systematically persecuted Hong Kong protesters who opposed the security and extradition bill facilitating the return of those suspected of crimes from Hong Kong to Mainland China. The reason for the vast wave of protests is that if the bill were to become a new law, it would give endless power to China over Hong Kong, leading to oppression of the freedom of expression and the safety and security of journalists and free media.[406] With the surge of the 2019 crisis in Hong Kong resulting in the persecution of protestors by the Chinese Government, some EU leaders publicly welcomed Hong Kong citizens to Europe with a promise of asylum protection.[407] In sharp contrast, when it comes to

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and Martin Ruhs (eds), *World Migration Report 2018* (Geneva: International Organization for Migration, 2018), pp. 209-223, pp. 213-216. Also, see: Alex Peter Schmid, *Links between Terrorism and Migration: An Exploration* (The Hague: International Centre for Counter-Terrorism, 2016), pp. 35-51. Also, see: Monish Bhatia, 'Turning Asylum Seekers into 'Dangerous Criminals': Experiences of the Criminal Justice System of Those Seeking Sanctuary' (2015) 4(3) *International Journal for Crime, Justice and Social Democracy*, pp. 97-111.

[405] On the theory of 'suspect community', see: Emma Ylitalo-James, 'Suspect Community: A Product of the Prevention of Terrorism Acts or a Product of Conflict Dynamics?' (2020) 14(3) *Perspectives on Terrorism*, pp. 46-58.

[406] BBC, 'The Hong Kong protests explained in 100 and 500 words', <www.bbc.com/news/world-asia-china-49317695>. Also, see: The New York Times, 'Boris Johnson Pledges to Admit 3 Million from Hong Kong to U.K.', <www.nytimes.com/2020/06/03/world/europe/boris-johnson-uk-hong-kong-china.html>. Also, see: The Guardian, 'Hong Kong protester announces asylum granted in Germany', <www.theguardian.com/world/2020/oct/20/hong-kong-protester-announces-asylum-granted-in-germany>. Also, see: BBC, 'Hong Kong anti-government protests', <www.bbc.com/news/topics/c95yz8vxvy8t/hong-kong-anti-government-protests>. After months of protests and violent persecution of demonstrators in Hong Kong, the Committee of the National People's Congress of China adopted a National Security Act on 30 June 2020 to oppress the oppositions even further. On the Hong Kong National Security Act, see: BBC, 'Hong Kong security law: China passes controversial legislation', <www.bbc.com/news/world-asia-china-53230391>. About the reaction of the EU towards Hong Kong National Security law, see: The Guardian, 'European leaders condemn China over 'deplorable' Hong Kong security bill, <www.theguardian.com/world/2020/jun/30/european-leaders-condemn-china-over-deplorable-hong-kong-security-bill>. Also, see: Council of the European Union, 'Council conclusions on Hong Kong released on 24 July 2020', <www.consilium.europa.eu/media/45222/council-conclusions-on-hong-kong.pdf>.

[407] BBC, 'Hong Kong: UK makes citizenship offer to residents', <www.bbc.com/news/uk-politics-53246899>. Also, see: The New York Times, 'Boris Johnson Pledges to Admit 3 Million from Hong Kong to U.K.', <www.nytimes.com/2020/06/03/world/europe/boris-johnson-uk-hong-kong-china.html>.

asylum seekers from the Middle East and Africa, the EU has tightened its asylum policies further and further.[408]

Therefore, the issue of asylum is no longer a matter of right or principle, but rather a matter of policy. In Chapter 2 of this thesis, I showed the development of the right to seek asylum through history and in the preparatory work of Article 14 of the 1948 UDHR, Article 18 of the EU Charter, and the formation of the principle of *non-refoulement* as one of the customary norms of international law. This study illustrated that the right to seek asylum has been endorsed by the international community as one of the fundamental and basic human rights, and not just a matter of policy *per se*. Hence, the EU Member States should not be permitted to claim that they have a choice to include or exclude this right from their human rights obligations.

Nonetheless, looking at the current practices of EU institutions and Member States, we cannot deny that the political aspects of managing asylum prevails over human rights obligations. There is no doubt that management policies should develop based on existing law and principles. Therefore, since asylum is clearly a matter of human rights, the legislation and policy-making decisions in this regard should originate from human rights law and principles, amongst them most importantly, the fundamental right to seek asylum and the principle of *non-refoulement*. This discussion brings us to the question that if security policies tend to override the fulfilment of the right to seek asylum, would this right any longer have any practical or effective value. The following part responds to this question by addressing the challenging nuances of implementing the right to seek asylum in practice.

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[408] In this regard, see, for example, The Independent, 'Refugees forced to put themselves in danger to join relatives under Home Office family reunion policy', <www.independent.co.uk/news/uk/home-news/refugees-family-reunion-safe-legal-route-home-office-red-cross-b1721205.html>. Also, see: Deutsche Welle (DW) News, 'EU weighs tighter border controls after Paris terrorism summit', <www.dw.com/en/top-stories/s-9097>. In addition, see: Deutsche Welle (DW) News, 'France's Macron wants 'real' police protecting EU borders, <www.dw.com/en/frances-macron-wants-real-police-protecting-eu-borders/a-55512155>. Also, see: European Council on Refugees and Exiles (ECRE), 'Things are Heating up along the Balkan Route', <www.ecre.org/things-are-heating-up-along-the-balkan-route/>. Also, see: International - Der Spiegel, 'Illegal Practices: EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign', <www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7?utm_source=dlvr.it&utm_medium=twitter#ref=rss>. Moreover, see: The Guardian, '"Catastrophe for human rights" as Greece steps up refugee "pushbacks"', <www.theguardian.com/global-development/2020/sep/27/catastrophe-for-human-rights-as-greece-steps-up-refugee-pushbacks>. In addition, see: The Guardian, 'EU border force 'complicit' in illegal campaign to stop refugees landing, <www.theguardian.com/global-development/2020/oct/24/eu-border-force-complicit-in-campaign-to-stop-refugees-landing>.

3.3.2. THE IMPLEMENTATION OF THE RIGHT TO SEEK ASYLUM IN PRACTICE IN A HIGHLY SECURITISED ENVIRONMENT: A MATTER OF LAW OR POLICY?

The tension between human rights and security is nothing new to constitutional lawyers. In the same manner that the 9/11 terrorist attacks brought the issue of safeguarding national security in direct conflict with the right to seek asylum and the freedom of movement, other basic and fundamental human rights have been heavily affected by securitisation.[409] In this regard, some contemporary constitutional law scholars have produced some knowledge on the tension between the right to privacy and protection of personal data as well as the right to private and family life,[410] the right to a fair trial and due process, and the right to an effective remedy[411] when the issue of national security is at stake.[412] What I have learned from this research is that by taking a highly securitised approach in the so-called era of the 'war on terror,' the European courts have given a wide discretion to the political branches of national governments in dealing with issues in which the fundamental rights of individuals seem to be in clash with safeguarding national security.[413]

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[409] In this regard, see, for example, Federico Fabbrini, *Fundamental Rights in Europe* (Oxford: Oxford University Press, 2014), pp. 51-95. Also, see: Lord Justice (retired) Stephen Sedley, 'Terrorism and Security: Back to the Future?', in David Cole, Federico Fabbrini, and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2013), pp. 13-21. Also, see: Clive Walker, 'Terrorists on Trial: an Open or Closed Case?', in David Cole, Federico Fabbrini, and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2013), pp. 209-228. And, see: Tuomas Ojanen, 'Administrative Counter-Terrorism Measures: A Strategy to Circumvent Human Rights in the Fight against Terrorism?', in David Cole, Federico Fabbrini, and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2013), pp. 249-267.

[410] The right to privacy and family life are the subjects of Article 8 of the ECHR and Article 7 of the EU Charter of Fundamental Rights.

[411] The rights to a fair trial and due process as well as the right to an effective remedy are the subjects of Articles 6 and 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights.

[412] In this regard, see, for example: Arianna Vedaschi and Gabriele Marino Noberasco, 'From DRD to PNR: Looking for a New Balance between Privacy and Security', in David Cole, Federico Fabbrini, and Stephen Schulhofer (eds), *Surveillance, Privacy and Trans-Atlantic Relations* (Portland: Hart Publishing, 2017), pp. 67-87. Also, see: Evangelia Psychogiopoulou and Maja Brkan, 'Introduction: Courts, Privacy and Data Protection in the Digital Environment', in Maja Brkan and Evangelia Psychogiopoulou (eds), *Courts, Privacy and Data Protection in the Digital Environment* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 1-9. Also, see: Evangelia Psychogiopoulou, 'The European Court of Human Rights, Privacy and Data Protection in the Digital Era', in Maja Brkan and Evangelia Psychogiopoulou (eds), *Courts, Privacy and Data Protection in the Digital Environment* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 32-62.

[413] Federico Fabbrini, *Fundamental Rights in Europe* (Oxford: Oxford University Press, 2014), p. 52.

In the EU, similar to the US, the public pressure to respond to the threat of terrorism and state insecurities related to that has encouraged governments to adopt policies resulting in restrictive counterterrorism measures. The legitimacy of these policies came from mainly the serial resolutions adopted by the UN Security Council in the aftermath of 9/11. A few days after the terrorist attacks against the Twin Towers at the World Trade Centre complex, in New York City, USA, the UN Security Council adopted Resolution S/RES/1373(2001) with the title 'Threats to International Peace and Security caused by Terrorist Acts.' According to this resolution, all UN Member States shall deny a 'safe haven' to those connected to terrorism[414] and shall prevent any suspects from accessing their territories.[415] This was a turning point in many states applying intense security measures against terrorism. Some of these measures include extraordinary renditions[416] in interrogation and detention without charge (similar to what has happened in Guantanamo Bay and other 'black sites' belonging to the CIA in Europe),[417] expelling suspects of terrorism to places where they would face torture and other inhumane acts,[418] and waging complex proxy wars in the Middle East.[419] For example, the Swedish Government in the

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[414] UN Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting on 28 September 2001, UN doc. S/RES/1373(2001), para. 2(c). For in depth analysis in this regard, see: Geoff Gilbert, 'Terrorism and International Refugee Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 423-435.

[415] UN Security Council Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting on 28 September 2001, UN doc. S/RES/1373(2001), para. 2(d).

[416] The phrase 'extraordinary rendition' refers to 'transfer of a person from one State to another, for the purpose of arrest, detention, and/or interrogation by the receiving State'. In this regard, see: Michael John Garcia, 'Renditions: Constraints Imposed by Laws on Torture' (2009) *Congressional Research Service (CRS) Report for Congress Members and Committee*, p. 1. Also, see: Silvia Borelli, 'Extraordinary Rendition, Counter-Terrorism and International Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 336-353. Moreover, see: Elspeth Guild, 'Terrorism and Migration Law', in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd edn, Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2020), pp. 436-448.

[417] Btihaj Ajana, 'Introduction to Identity, Security and Democracy', in Emilio Mordini and Manfred Green (eds), *Identity, Security and Democracy: The Wider Social and Ethical Implications of Automated Systems for Human Identification* (IOS Press: Amsterdam, 2009), pp. 1-10, p. 2. In this regards, also see: Henry F. Carey, *Reaping What You Sow: A Comparative Examination of Torture Reform in the United States, France, Argentina, and Israel* (Santa Barbara, California: ABC-CLIO, LLC, 2012), pp. 28, 29, 204, and 216-218. In this regard, also see: Amnesty International, 'European complicity in CIA torture in 'black sites'', <www.amnesty.org/en/latest/news/2020/02/european-complicity-in-cia-torture-in-black-sites/>.

[418] In this regard, see: *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, UN Committee Against Torture (CAT): Communication No. 233/2003 (referred to as '*Agiza v. Sweden*'), 24 May 2005, UN doc. CAT/C/34/D/233/2003 and *Mohammed Alzery v. Sweden*, UN Human Rights Committee (HRC): Communication No. 1416/2005, 10 November 2006, UN doc. CCPR/C/88/D/1416/2005 (referred to as '*Alzery v. Sweden*').

[419] David C. Gompert and John Gordon IV, *War by Other Means: Building Complete and Balanced Capabilities for Counterinsurgency* (Rand Corporation: Santa Monica, 2008), pp. 2-5.

cases of *Agiza v. Sweden* and *Alzery v. Sweden* excluded the applicants from international protection and extradited them to Egypt on the ground of being 'security threats.' This decision was made based on the information that the Government of Sweden had obtained from the US intelligence service (CIA) and by relying on the memoranda of understanding, which the Swedish State Secretary had signed with Egyptian officials in the Swedish Embassy in Cairo. Later on, the Committee against Torture and the Human Rights Committee, respectively, found that both applicants were tortured and subjected to other inhumane and degrading acts upon their expulsion to Egypt.

Since 2001, the international community has continuously overweighed the security concerns of states against the right to freedom of movement and the right to seek asylum by referring to the Security Council resolutions on counterterrorism.[420] Consequently, national courts have been reluctant to oppose the decisions of EU governments and their political bodies (decisions made by relying on the Security Council resolutions related to counterterrorism). For example, in 2007, the UK House of Lords in the case of *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*[421] rejected the application on the ground that the UN Charter and resolutions adopted by the UN Security Council under Chapter VII of the Charter had priority over the ECHR as those measures were necessary for imperative reasons of World peace and security.[422] What the House of Lords ignored in this case was the fact that the Security Council resolutions on countering terrorism do not remove the responsibility of states towards human rights protection, based on the principles of equality and non-discrimination.[423]

Hiding behind the counterterrorism resolutions of the UN was not exclusive to the UK Government. Some other EU Member States deployed similar extraordinary measures in their 'war on terror,' which did not necessarily comply with their international and European human rights obligations. As a

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[420] UN Security Council Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting on 14 September 2005, UN doc. S/RES/1624(2005). UN Security Council Resolution 1566 (2004), adopted by the Security Council at its 5053rd meeting on 8 October 2004, UN doc. S/RES/1566(2004). UN Security Council Resolution 1535 (2004), adopted by the Security Council at its 4936th meeting on 26 March 2004, UN doc. S/RES/1535(2004).

[421] R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent) [2007] UKHL 58, 12 December 2007.

[422] In this regard, see the opinion of Lord Bingham of Cornhill, as part of the opinions of the Lords of Appeal for judgement in the cause: *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007, paras 2 and 3.

[423] Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism', in Menno T. Kamminga (ed.), *Challenges in International Human Rights Law* (Vol. 3, London: Routledge, 2014), pp. 155-206.

result, the UN Human Rights Council (replacing the UN Commission on Human Rights in 2005) felt the need to take action to prevent the violation of established human rights rules and standards in the highly securitised atmosphere of the 'war on terror.' Hence, in 2005, at the international level of human rights protection, the UN Human Rights Council (at that time the UN Commission on Human Rights) adopted Resolution 2005/80, according to which the mandate of a 'special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' was created.[424] The mandate holder of this special rapporteur is an independent expert assigned to:

> [...] gather, request, receive and exchange information on alleged violations of human rights and fundamental freedoms while countering terrorism, and to report regularly to the Human Rights Council and General Assembly about *inter alia* identified good policies and practices, as well as existing and emerging challenges and present recommendations on ways and means to overcome them.[425]

Within their mandates, all three Special Rapporteurs so far have addressed the negative impacts of the securitisation of immigration on the right to seek asylum in the context of counterterrorism measures and policies. For example, Fionnuala Ní Aoláin (the current Special Rapporteur) while reminding of the adverse impact of the UN Security Council Resolution 1373(2001),[426] warned against the misuse of 'terrorism rhetoric' against refugees and asylum seekers – that this rhetoric, reproduced by some states, merely serves discriminatory and racist political agendas by feeding on 'public anxiety and fear.'[427] In addition, in her annual report submitted to the UN General Assembly in September 2020, on multiple occasions, she emphasised that in all matters connected to combatting terrorism, the rules of international law – in particular international

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[424] The Office of the High Commissioner for Human Rights (UN Human Rights), 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', <www.ohchr.org/en/issues/terrorism/pages/srterrorismindex.aspx>.

[425] The first mandate older was Martin Scheinin (2005-2011), succeeded by Ben Emmerson (2011-2017). The current UN Special Rapporteur on Human Rights and Counter-Terrorism is Fionnuala Ní Aoláin (2017-present). In this regard, see: The Office of the High Commissioner for Human Rights (UN Human Rights), 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', <www.ohchr.org/en/issues/terrorism/pages/srterrorismindex.aspx>.

[426] Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin, submitted in accordance with Assembly resolution 72/180 and Human Rights Council resolution 31/3 at its Seventy-third session on 3 September 2018, UN Doc. A/73/45453, para. 35.

[427] Fionnuala Ní Aoláin, 'Calling out the Misuse of Terrorism Rhetoric against Refugee and Asylum Seekers', (Online: Just Security, 2019), available at: <www.justsecurity.org/67289/calling-out-the-misuse-of-terrorism-rhetoric-against-refugee-and-asylum-seekers/>.

human rights, refugee, and humanitarian law – must be observed by all states.[428]

The former Special Rapporteur on Human Rights and Counter-Terrorism, Ben Emmerson (2011-2017), in his 2016 Report submitted to the UN General Assembly, addressed the impact of counterterrorism measures on the human rights of immigrants and refugees and concluded the Report with some recommendations for the modification of state actions.[429] Emmerson started this Report by acknowledging the challenges that the states, international organisations, and civil societies have had in dealing with terrorism, especially considering that, as of 2016, some terrorist organisations (such as ISIS) had occupied territories. He continued that because many of the people who approached the European borders came from areas where terrorist groups were active and with the growth of the phenomenon of 'foreign fighters' in Europe,[430] a perception has been formed that the movement of people is a threat to national security.[431] However, he asserted that states must not use the 'security concerns' as an excuse to deny access to humanitarian and refugee protection to those coming from terrorist-affected areas.[432]

The Special Rapporteur, further, expressed his concerns about the existing institutional and policy structures, which have integrated immigration and border controls into security frameworks. According to him, the result of this policy setting is 'policing,' 'defence,' 'militarisation,' and 'criminality' at the

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[428] Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin, submitted in accordance with General Assembly resolution 72/180 and Human Rights Council resolution 40/16, adopted by the General Assembly at its Seventy-fifth session on 3 September 2020, UN doc. A/75/337, paras 11, 24, 28, and 42.

[429] Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7, adopted by the General Assembly at its 71st session on 13 September 2016, UN doc. A/71/384.

[430] The term 'foreign fighter' in this context is the emigration of Europeans to areas where terrorists are active and voluntarily participate in their military training and activities. As a general term, 'foreign fighter' has been defined as 'an individual who leaves his or her country of origin or habitual residence to join a non-State armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship'. In this regard, see: United Nations Office on Drugs and Crime, 'Foreign Terrorist Fighters Manual for Judicial Training Institutes: South-Eastern Europe, <www.unodc.org/documents/terrorism/Publications/FTF%20manual/000_Final_Manual_English_Printed_Version_-_no_foreword.pdf>. Also, see: Foreign Fighters under International Law, *Geneva Academy of International Humanitarian Law and Human Rights*, Academy Briefing No. 7 (Geneva, 2014), p. 6.

[431] Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, adopted by the General Assembly at its 71st session on 13 September 2016, UN doc. A/71/384, paras 6-9.

[432] *Ibid*, para. 10.

European external borders over rights and human rights-based approaches.[433] In this regard, the Office of the UN High Commissioner for Human Rights (OHCHR), in its 'Guidelines on Human Rights at International Borders,' asserted:

> International borders are not zones of exclusion or exception for human rights obligations. States are entitled to exercise jurisdiction at their international borders, but they must do so in light of their human rights obligations. This means that the human rights of all persons at international borders must be respected in the pursuit of border control, law enforcement and other State objectives, regardless of which authorities perform border governance measures and where such measures take place.[434]

Similarly, as part of his mandate, Martin Scheinin, the first UN Special Rapporteur on Human Rights and Counter-Terrorism (2005-2011), submitted a comprehensive report to the UN General Assembly in 2007, addressing '[…] some of the challenges to refugee law and asylum caused by global measures to counterterrorism.'[435] In this Report, he examined the following issues:

> […] pre-entry interception and screening measures related to border control; detention of asylum-seekers and shortcomings in securing court review of such detention; exclusion from refugee or other protection status; the application and non-derogability of the principle of non-refoulement; the return, repatriation or resettlement of rejected asylum-seekers, including persons detained for terrorism-related reasons; the use of so-called diplomatic assurances; and strengthening global responsibility for international protection as an inherent part of a comprehensive counter-terrorism strategy.[436]

Amongst the issues addressed by Scheinin and Emmerson in their respective 2007 and 2016 Reports, the prohibition on discrimination and a firm stand on the non-derogability of the principle of *non-refoulement* are of direct interest to the topic of this dissertation. With regard to the implementation of the right to seek asylum and the status of the institution of asylum in the context of counterterrorism, Scheinin and Emmerson have reiterated that the immigration control policies of some countries have been discriminating against those seeking refuge from countries, where Al-Qaeda or ISIS operate or where their

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[433] *Ibid*, para 11. Also, see: Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, submitted to General Assembly on 24 April 2013, UN doc. A/HRC/23/46.
[434] The OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders, Office of the United Nations High Commissioner for Human Rights (2014), p. 1, <www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf>
[435] The Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 62/159 and Human Rights Council resolution 6/28, adopted by the General Assembly at its 62nd session on 15 August 2007, UN doc. A/62/263.
[436] *Ibid*, p. 2 (the summary page of the Report).

supporters are known to reside.[437] In the case of this particular group, asylum seekers are either detained indefinitely at the border cross points or are returned with no admission or with just applying a summary or accelerated procedure under the title of 'unlawful or illegal mass migrants,' without respect for the due process of law.[438] With reference to the principle of *non-refoulement*, both Scheinin and Emmerson have observed that the violation of this prohibition has been going on for the past two decades in the format of 'forcible removals,' under the premises of 'deportation,' 'expulsion,' 'extradition,' and 'rendition' or through 'non-admission policies at the borders.'[439]

The prohibition of *refoulement* possesses an absolute and non-derogable nature of norms (known as a *jus cogens* norm), whenever a risk of torture, inhuman and degrading treatment is involved in the removal of asylum seekers. Based on this analysis and moving back to the question asked at the beginning of this subsection (the question of whether the application of the right to seek asylum in practice is a matter of law or politics), it would, indeed, be farfetched to provide a unified answer. As shown in the previous paragraphs, depending on who approaches the right to seek asylum, the answer to this question would vary. If taking the position of EU Governments, one would wish to make the implementation of the right to seek asylum, as far as possible, a matter of politics, because this approach would give wider room for interpreting the

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[437] The Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 62/159 and Human Rights Council resolution 6/28, adopted by the General Assembly at its 62nd session on 15 August 2007, UN doc. A/62/263, paras. 30-32, 35, and 46. In this regard, also see: Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7, adopted by the General Assembly at its 71st session on 13 September 2016, UN doc. A/71/384, paras 17, 29, and 45.

[438] The Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 62/159 and Human Rights Council resolution 6/28, adopted by the General Assembly at its 62nd session on 15 August 2007, UN doc. A/62/263, para. 47. Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7, adopted by the General Assembly at its 71st session on 13 September 2016, UN doc. A/71/384, paras 26, 36, and 41.

[439] The Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 62/159 and Human Rights Council resolution 6/28, adopted by the General Assembly at its 62nd session on 15 August 2007, UN doc. A/62/263, paras 50, 78, and 79. Also, see: Report of the Special Rapporteur of the Human Rights Council on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 22/8 and 25/7, adopted by the General Assembly at its 71st session on 13 September 2016, UN doc. A/71/384, paras 30, 36, 37, and 55(c).

notion of 'national security' and therefore, act according to the political agenda of the desired ruling parties.

On the opposite side, looking at the position of human-rights advocacy actors, such as the Special Rapporteur on Human Rights and Counter-Terrorism and the UN Office of the High Commissioner on Human Rights, the implementation of the right to seek asylum should always be a matter of law, rules, and principles. However, the question here remains that where European courts stand in this regard. The unclear positions of the European human rights courts (the ECtHR and the CJEU) brings us to two contemporary constitutional theories, namely Alexy's theory of 'constitutional rights' based on 'balancing' and 'rationality,'[440] and Dworkin's theory of 'law as integrity,' based on 'law as an interpretive concept.'[441] Both of these theories could converge under the umbrella of 'legal interpretivism.'[442]

As one of the most recent schools of legal thought, the theory of legal interpretivism offers an alternative approach to the traditional schools of 'legal positivism'[443] and a 'natural theory of law,'[444] in an effort to understand the 'nature of law.' According to the positivist jurists such as Austin, 'the existence of law is one thing, its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.' The preposition of positivism is not to address the merits of law, nor to determine if they are intelligible or important; instead, it is to determine whether laws or legal systems exist. In addition, the answer to the question whether a society has a legal system depends on the 'presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law.'[445] The natural law theory accepts one of the premises of legal positivism namely, 'law can be considered and spoken of as a sheer social fact of power and practice.' However, natural law jurists add that law should also contain 'a set of reasons for action that can be and often are

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[440] In this regard, see: Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, New York: Oxford University Press, 2010).

[441] In this regard, see: Ronald Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Harvard University Press, 2006). Also, see: Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986). Also, see: Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013).

[442] Stanford Encyclopedia of Philosophy, 'Legal Interpretivism', <plato.stanford.edu/entries/law-interpretivist/>.

[443] Stanford Encyclopedia of Philosophy, 'Legal Positivism', <plato.stanford.edu/entries/legal-positivism/>.

[444] Stanford Encyclopedia of Philosophy, 'Natural Law Theories', <plato.stanford.edu/entries/natural-law-theories/>.

[445] Stanford Encyclopedia of Philosophy, 'Legal Positivism', <plato.stanford.edu/entries/legal-positivism/>.

sound as reasons and therefore normative for reasonable people addressed by them;' in other words, 'unjust laws are not laws.'[446] In fact, an interpretivist approach to the law is an intellectual effort to find a balance or a middle-way between positivism and the theory of natural law, in order to fill in the gaps found in both of these schools of thought.[447]

Legal interpretivism suggests that law is not a neutral entity created in a vacuum (what positivists believe); instead, law is a concept filled with the 'shared practices and values of a community.'[448] Once the community has decided upon a new law, the participants in the course of practicing law might agree or disagree with each other on the meaning of that law.[449] The battle of agreeing *versus* disagreeing creates a dynamic environment, in which all the values behind the law are tested. As a result, the accuracy or falsehood of the law is checked and balanced. This is what the theory of natural law lacks, i.e. there is no check and balance of values in a natural law setting. According to legal interpretivism, for a legal system to function well in practice, a 'thread of coherence' should link all the stages of legal reasoning.[450] This thread of coherence is the most fragile and difficult thing to keep intact in deciding about cases where the matters of values and policies contradict each other.[451] Both Alexy and Dworkin call these cases, 'hard' or 'controversial' cases, and according to them, in the process of adjudicating (or 'adjudicative practice') on these hard cases, the coherence or the incoherence of a legal system is exposed.[452]

Within his theory of constitutional rights and discursive or argumentative law, Alexy emphasises the importance of distinguishing between 'rules' and 'principles,' as different forms of law or as different, but relevant, components in building a legal system.[453] The reason for the necessity of this distinction is

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[446] Stanford Encyclopedia of Philosophy, 'Natural Law Theories', <plato.stanford.edu/entries/natural-law-theories/>.
[447] The Stanford Encyclopedia of Philosophy, 'Interpretation and Coherence in Legal Reasoning', <plato.stanford.edu/entries/legal-reas-interpret/>. Also, see: Ronald Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Harvard University Press, 2006), pp. 9-11 and 26-29.
[448] Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), pp. 195-202.
[449] *Ibid*, pp. 202-206.
[450] *Ibid*, pp. 206-208
[451] Dworkin defines 'legal reasoning' as the use of 'a vast network of principles of legal derivation or political morality'. With regard to this definition, see: Ronald Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Harvard University Press, 2006), p. 50. In this regard, also see: The Stanford Encyclopedia of Philosophy, 'Interpretation and Coherence in Legal Reasoning', <stanford.library.sydney.edu.au/archives/fall2008/entries/legal-reas-interpret/>.
[452] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, New York: Oxford University Press, 2010), pp. 8-10. In this regard, also, see: Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. 81-130.
[453] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, New York: Oxford University Press, 2010), pp. 13-15. For a full account on the outline of a theory of legal argumentation or

that, '[i]f there is no clarity in the structure of constitutional rights and constitutional rights norms, then there will be no clarity in constitutional adjudication either.'[454] Applying this theory to the right to seek asylum as a constitutional right, the elements of 'principle' and 'rule' are distinguished from each other. The right to seek asylum, as a norm or rule with a constitutional and fundamental right character, is constructed upon the very basic principles and common values of human communities. These values are some principles such as 'the principle of inherent and essential nature of human dignity,' 'the principle of equal and inalienable rights of all members of the human family,' and 'an essential and inherent value in human life,' 'human safety,' 'human security,' and 'human physical and mental integrity.'[455] These general values and principles have been enacted in the form of rules under various legislation.

Applying the theory of legal interpretivism to the securitisation of immigration, the implementation of the right to seek asylum does not seem to be only a matter of law (meaning applying certain rules based on the principles mentioned above). The question is what would happen in practice to the right to seek asylum as a fundamental and constitutional right, when implemented in highly politicised, securitised, or even militarised contexts. This is one example of the 'hard cases' discussed by Alexy and Dworkin. Even though Alexy has extensively elaborated on the role of 'balancing act' or 'balancing exercise' in deciding about colliding instances of individual rights versus collective interests,[456] I was unable to find an answer to the question which side of the coin prevails in a highly securitised environment: the side of law or the side of politics. To Alexy, the rights of individuals and public interests are matters of principles. Thus, as 'optimization requirements,' when two principles collide, we simply need to exercise a balancing act on the basis of the principle of proportionality in order to satisfy the intention of the law to the highest degree possible, the limit for this highest degree being the principle of legality.[457]

However, Dworkin's theory of 'law as integrity' seems to be offering a guiding hand in solving the hard case of tension between the right to seek asylum as a matter of law, and safeguarding national security as a matter of politics. In fact,

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discursive law, see: Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (translated by Ruth Adler and Neil MacCormick, New York: Oxford University Press, 1989), pp. 221-286.

[454] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, New York: Oxford University Press, 2010), p. 15.

[455] These values are enshrined in the preamble and Articles 1-5 of the 1948 UDHR.

[456] For more detailed analysis on Alexy's stand with regard to the conflict of rules and principles and the balancing exercise, see: Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, New York: Oxford University Press, 2010), pp. 44-110.

[457] *Ibid*, pp. 47-86.

to Dworkin, the matters of public interest (given here that the issue of national security is a matter of public interest) are 'policies,'[458] which he defines as, 'standards that set out a goal to be reached, generally for the purpose of making some improvements in the economic, political, or social conditions of the community.'[459] Meanwhile, Dworkin makes a distinct division between 'policies' and 'principles,' and defines the latter as, 'standards that need to be observed, not because they are to meet goals such an economic, political, or social betterment, but, because they are necessary for the fulfilment of "justice" and "fairness," as the ultimate moral dimension of the law.'[460]

Moreover, to Dworkin, law is what judges and legal scholars interpret, i.e. law as an 'interpretive concept.' These legal practitioners should interpret the law in the same direction as 'moral principles and values, amongst them most importantly the principles of "justice" and "fairness".'[461] This is what I have understood as Dworkin's conception of 'law as integrity' and this method of interpretation seems to be giving the law a coherent and consistent body.[462] Applying Dworkin's philosophy of 'law as integrity' to this research, cases related to the right to seek asylum with a link to security must be interpreted and decided based on the principles and values upon which the EU community is founded. These values are the principles of human dignity, respect for human life, human integrity, human safety, and security.[463]

According to the theory of 'law as integrity,' for a legal system to be harmonised and to make sense as a logical body, the system should function coherently. In other words, all the composing elements of law, meaning the elements of values, principles and norms should go together harmoniously, hand in hand, heading in the same direction to reach the ultimate goal of law: 'justice' and 'fairness.' Referring to Dworkin, what helps the law to remain on this track are the principles of 'morality' or 'the shared values of the community.'[464]

However, the question remains that what role policies, as external factors to the law but extremely influential ones, play in this scenario, especially when we are trapped in a dilemma to choose between the right to seek asylum, on the one

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[458] Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. 82-90.
[459] *Ibid*, p. 22.
[460] *Ibid*, pp. 22 and 23.
[461] *Ibid*, pp. 10-12.
[462] On the creation and defence of Dworkin of his theory of 'law as integrity', see the following sources respectively: Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), pp. 164-168, and Ronald Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Harvard University Press, 2006), pp. 75-105.
[463] The values and principles upon which the EU is founded are stipulated under the preamble and Article 2 of the Treaty on European Union (TEU).
[464] Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), pp. 206-215.

hand, and national security, on the other. Back to Dworkin, this situation is indeed an example of the distinction between the arguments of 'principles,' on the one hand, and the arguments of 'policy', on the other. Dworkin might not have offered a clear-cut answer to which side of the scale to take, but he has provided legal practitioners with some indicators, a toolkit, based on which judges and, those who hold discretionary power, could apply when deciding on hard asylum cases. In Dworkin's toolkit, I found the following tools for interpretation. Based on his theory of 'law as integrity,' there should be a 'consistency in the application of principles in question,' because the judges and other governmental officials have a 'political responsibility' in justifying their decisions.[465] Through the prism of his theory of law as interpretation, Dworkin suggests **three grounds** for a matter of policy to overrule a matter of right. We can assume here that safeguarding national security is a matter of public or societal policy. **First**, only if the decision maker shows that the values protected by the principles and legal rights are not really at stake (through a factual assessment of the case). **Second**, if the decision maker, through the exercise of a balancing act, demonstrates that a greater value (and therefore a right) is at stake. **Third**, only if the decision maker can prove that dismissing the matter of policy brings greater harm to society if the matter of principle is prevailed through interpretation and the factual assessment of the case.[466]

According to Dworkin, the institution of constitutional rights, which is a matter of law, rests on the powerful ideas and principles of 'human dignity' and 'political equality.' Therefore, there is grave 'injustice' if the matters of social policy or efficiency infringes those rights.[467] Nevertheless, in the highly securitised environment of immigration, how should the governments protect the fundamental and constitutional right of an individual to seek asylum? It comes all down to what kind of interpretation the judges decide to apply – whether they choose to be on the side of human dignity and equality or on the side of public policy. In response to this scenario, Dworkin asserts that the normal balancing exercise between different rights or between rights and policies would not work, because through securitisation, the government could justify the employment of 'emergency' measure and the violation of individual's rights.[468] Extraordinary measures could be easily justified in exceptional circumstances because of public emergency.

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[465] Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. 81-88.
[466] *Ibid*, p. 200.
[467] *Ibid*, pp. 198 and 199.
[468] *Ibid*, pp. 195-197.

In order to unfold the relation of asylum policies with regard to the right to seek asylum, I shall analyse the kind of policies governments could adopt in a given situation. The Merriam-Webster Dictionary defines policy as, 'a definite course or method of action selected by government, institution, group of people or even individual from amongst alternatives and in the light of given conditions to guide and, usually, to determine present and future decisions.'[469] We could apply the same definition to asylum policies since they are a certain plan for a series of actions. For example, the 'EU asylum policy' is a plan, according to which different EU actors could approach the issue of asylum. Policy as a driving force behind the actions of actors could be 'reactive' – meaning created in response to a current pressing problem or to a matter of urgency or emergency.[470] An example of a reactive asylum policy in the EU is the 'externalisation of European border control.' This policy is the direct result of securitising immigration and employing extraordinary measures in response to terrorism by perceiving that asylum seekers represent threats to EU security.

To the contrary, a policy could be 'proactive,' meaning that a plan is designed for a course of actions in order to *prevent* a problem from happening in the first place.[471] A proactive example of asylum policy could be focusing on the integration of asylum seekers in a manner to avoid radicalisation, while the plan is subjected to evolutionary analysis, scrutiny, and chances of improvement. This is the model of approach that the school of critical security studies, for example, has adopted by highlighting the defects of the securitisation theory and has opened new windows in addressing the referent objects of security. According to those taking a critical approach to security and security studies, the theory of securitisation of immigration is a reactive policy approach. Instead, we

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[469] Merriam-Webster Dictionary, 'Policy', <www.merriam-webster.com/dictionary/policy?src=search-dict-hed>.

[470] In this regard, see: Cristina Fernández, Alejandra Manavella, Iñaki Rivera, and Gabriela Rodríguez, 'Exceptionalism and its Impact on the Euro-Mediterranean Area', in Didier Bigo, Sergio Carrera, Elspeth Guild, and R.B.J. Walker (eds), *Europe's 21st Century Challenge: Delivering Liberty* (Oxford; New York: Routledge, 2016), pp. 201-215, p. 212. In this regard, also, see: Richard Staring, 'Controlling Immigration and Organized Crime in the Netherlands. Dutch Developments and Debates on Human Smuggling and Trafficking', in Elspeth Guild and P. Paul E. Minderhoud (eds), *Immigration And Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Rights* (Leiden: Martinus Nijhoff Publishers, 2006), pp. 241-269, pp. 248-265.

[471] Christiane Timmerman, Helene Marie-Lou De Clerck, Kenneth Hemmerechts, and Roos Willems, 'Imagining Europe from the Outside: The Role of Perceptions of Human Rights in Europe in Migration Aspirations in Turkey, Morocco, Senegal and Ukraine', in Natalia Chaban and Martin Holland (eds), *Communicating Europe in Times of Crisis: External Perceptions of the European Union* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2014), pp. 220-247, pp. 221. In this regard, also, see: Martin Holland and Natalia Chaban, 'Conclusions: Perceptions, Prisms, Prospects', in Natalia Chaban and Martin Holland (eds), *Communicating Europe in Times of Crisis: External Perceptions of the European Union* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2014), pp. 248-252, p. 252.

should take a proactive approach when deciding on immigration including asylum policies.[472] Asylum policies and asylum law may be mistaken to be similar things. These two are different entities – although highly influential on each other and sometimes one disguising the other. As explained, policies are plans used to guide the decisions and actions of an organisation or institution; while law is a set of established rules used to implement 'justice' and 'order' in society. Not all policies are legal and not all law is considered when making policies. Policy is a plan for action, but law is an established procedure to realise the will of the legislator or widely accepted standards that must be followed by all members of society. However, policies are sometimes used to create law after certain time has passed and the procedure approved. Moreover, by keeping in mind the binding nature of law, it should be adhered to in creating new policies; otherwise, that particular policy is illegal and hence, not legitimate. For example, the policy of not allowing asylum seekers to access EU territory for lodging asylum applications through different methods of externalised EU border control is illegal. The existing refugee law together with customary norms international law (such as the principle of *non-refoulement*) prohibit any penalisation or deportation of those in need of international protection.

As explained earlier, according to the theory of securitisation, the security concerns of state – such as national security – are the main targets for insecurity. The critical theory to security, however, while acknowledging the normative dimensions of the securitisation approach extends our attention to challenge the existing hierarchal structures, coercion, and tyranny, embedded in the power-relation between the sovereign state and asylum seekers.[473] In this regard, another example of a proactive approach to EU asylum policy is to address the root causes of terrorism in a holistic manner. We should first give an answer to the question what makes young, mostly educated, second-generation

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[472] In this regard, see: Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171. Also, see: Michael J. Butler and Zena Wolf, 'Introduction: Revisiting Securitization and the 'Constructivist Turn' in Security Studies', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 3-27. Also, see: Roxanna Sjöstedt, 'Assessing Securitization Theory: Theoretical Discussions and Empirical Developments', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 28-46. In addition, see: Blanca Camps-Febrer, 'Counter-Terrorism as a Technology of Securitization: Approaching the Moroccan Case', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 69-90.

[473] Roxanna Sjöstedt, 'Assessing Securitization Theory: Theoretical Discussions and Empirical Developments', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 28-46, p. 33.

immigrants find attraction in radical Islam or in far-right extremism, so that they are willing to employ violence to make their voice heard.

The debate over immigration and security should not take place in a vacuum; instead, it should occur against a background of facts and comprehensive knowledge drawn from across multiple disciplines. This includes addressing the conditions conductive to terrorism and determining the role of the West's foreign policies – including the EU and its Member States – in the Middle East and Africa and towards the majority-Muslim countries of those regions.[474] For example, we should not forget the historical contexts within which the US and the UK considered the overthrew of the democratically-elected governments in the Middle East such as the government of Prime Minister Mohammad Mosaddegh in favour of strengthening the monarchical rule of the Shah, Mohammad Reza Pahlavi in the 1953 *coup d'état*.[475] The intention behind this political manipulation was securing Western interests over Iran's oil reserves after the nationalisation of the Iranian oil industry in 1951, and thereafter, the confirmation of nationalisation as a domestic affair by the International Court of Justice (ICJ) in 1952.[476]

Another example is the chaos created by the World powers in Afghanistan since the Anglo-Russian 'Great Game' of the early twentieth century, which accelerated during the Cold War. The main result of this power struggle was the creation of the Mujahedeen and the Taliban, the formation of Al-Qaeda, 9/11 attacks, the immediate invasion of Afghanistan by the US and NATO coalition (as an act of collective self-defence), the invasion of Iraq, and the formation of ISIS.[477] A very clear chain of events; however, studying foreign policy lies well

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[474] For more information and a deeper analysis on this issue, see, for example, Christian Koch, 'EU Policy in the Middle East: Unfulfilled Aspirations', in Shahram Akbarzadeh (ed.), *Routledge Handbook of International Relations in the Middle East* (Oxford; New York: Routledge, 2019), pp. 222-236.

[475] In this regard, see: Ervand Abrahamian, *The Coup: 1953, the CIA, and the Roots of Modern U.S.-Iranian Relations* (New York: The New Press, 2013).

[476] With regard to detailed information on the role of the US and UK governments and their secret services in the 1953 *coup d'état* in Iran and its snowball effect on the future of Iran and the Middle East, see: Ervand Abrahamian, *The Coup: 1953, the CIA, and the Roots of Modern U.S.-Iranian Relations* (New York: The New Press, 2013). In this regard, also see: Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror* (Hoboken, New Jersey: John Wiley & Sons, Inc., 2011). On the judgement of ICJ in the case of the Anglo-Iranian Oil Company, which objected the claim of the UK over the Iranian oil reserves and its industry, see: *United Kingdom v. Iran* (Anglo-Iranian Oil Co. Case) - Judgment of 22 July 1952 - Preliminary Objection - Judgments [1952] ICJ 2; ICJ Reports 1952, p 93; [1952] ICJ Reports 93 (22 July 1952).

[477] For a brief but informative account on the modern history of Afghanistan and the events behind the creation of the Taliban and Al-Qaeda, see: Michael Rubin, 'Who Is Responsible for the Taliban?' (Online: Middle East Review of International Affairs, 2002), <www.washingtoninstitute.org/policy-analysis/view/who-is-responsible-for-the-taliban>. Also, see: Veronica L. Taylor, 'Afghanistan', in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (New York: Oxford University Press, 2019), pp. 675-700, pp. 679-681

outside the focus of this research. Nonetheless, what needs to be emphasised is that the majority of asylum seekers coming from the Middle East are themselves the victims of terrorism and political unrest in the region. Looking at the ongoing proxy wars in the Middle East, one could observe that all the major political powers in the World have a role to play.[478] Hence, all should share the responsibility – whether it be finding ways to de-escalate the violence in the region or bearing the humanitarian consequences of this violence and warfare. The least that these stakeholders and other interested parties could do is to let civilians access their territories to apply for protection.

As mentioned above, policies are so powerful that sometimes they may affect existing law in the form of changing them – for better or even for worse. In the context of the right to seek asylum, the principle of *non-refoulement* is the bedrock of refugee legal protection regime. If policies affect this principle and the law that has been made based on that in a negative way, the legal system of refugee protection may break. The current practices of EU actors towards asylum show that the policies, which have emerged from the securitisation of immigration, are negatively affecting the principle of *non-refoulement*, replacing this principle with *non-entrée* policies.

Merely focusing on the theory of securitisation is inadequate to analyse the effects of this theory on the law in a comprehensive manner. The way to a more comprehensive understanding of the effects of policies on law is to move beyond the theory of securitisation and examine closely the gaps in this theory through the lenses of critical security studies. A critical approach to security and securitisation is the result of recent developments in the form of a 'constructivist turn' in security studies. This turn has also developed in response to the securitisation of immigration.[479] The critical and analytical methods available to critical security studies – such as critical discourse analysis – provide the analytical tools to discover and scrutinise the negative implications that the securitisation of immigration has upon the right to seek asylum as a fundamental right.[480] Critical security studies highlight the challenges, limitations, and shortcomings of the theory of securitisation from various

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[478] Hilly Moodrick-Even Khen, Nir T. Boms, and Sareta Ashraph, 'Introduction: An Overview of Stakeholders and Interests', in Hilly Moodrick-Even Khen, Nir T. Boms, and Sareta Ashraph (eds), *The Syrian War: Between Justice and Political Reality* (Cambridge: Cambridge University Press, 2020), pp. 1-8. In this regard, also see: Amichai Cohen, 'Syria: International Use of Force and Humanitarian Intervention', in Hilly Moodrick-Even Khen, Nir T. Boms, and Sareta Ashraph (eds), *The Syrian War: Between Justice and Political Reality* (Cambridge: Cambridge University Press, 2020), pp. 11-28.
[479] Michael J. Butler and Zena Wolf, 'Introduction: Revisiting Securitization and the 'Constructivist Turn' in Security Studies', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 3-27.
[480] *Ibid*, pp. 9 and 10.

security aspects.[481] The main criticism of critical security studies is towards the conceptual framing of the 'relation' between immigration and security. Security is not just a condition of state or individual; however, it refers to 'sets of knowledge' and a 'variety of discourses, technologies, and practices,' which all make a link between the social process of human mobility and population movements, on the one hand, and the search for governmental control and reinforcing sovereignty, on the other.[482]

Based on this outlook, different aspects of securitising immigration – especially the securitisation of asylum seeking – could be criticised through paying attention to everyday 'practices,' 'contexts,' and 'power relations.'[483] For example, although human security focuses on the protection of vulnerable people and dismantling the harmful practices of the state, this theory lacks the element of empowering the victims of human rights violations. A critical approach to human security, however, suggests that individuals subjected to violation of human rights are influential political actors and legal agents, who are capable of standing up for their own rights and winning them back – and not simply the beneficiaries of charities and humanitarian aid with a passive position.[484]

From a national security point of view, the theory of securitisation of immigration reproduces the 'speech-act' of immigrants being 'threats' even though its intent is to develop immigration policies that could possibly enhance the security of hosting state as the main referent object of security.[485] The

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[481] David Mutimer, 'Critical Security Studies: A Schismatic History', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 91-110, pp. 93-97.

[482] Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171, pp. 161-163.

[483] Roxanna Sjöstedt, 'Assessing Securitization Theory: Theoretical Discussions and Empirical Developments', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 28-46, pp. 35. In this regard, also, see: Didier Bigo and Elspeth Guild, 'Policing at a Distance: Schengen Visa Policies', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Oxford; New York: Routledge, 2016), pp. 233-263.

[484] Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171, pp. 163 and 164. For more criticisms of the theory of human security, see: Randolph B. Persaud, 'Human Security', in Alan Collins (ed.), *Contemporary Security Studies* (5th edn, Oxford: Oxford University Press, 2019), pp. 144-158, pp. 153-156.

[485] Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171, pp. 162-164. In this regard, also, see: Roxanna Sjöstedt, 'Assessing Securitization Theory: Theoretical Discussions and Empirical Developments', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 28-46, pp. 35-38. Also, see: In this regard, see, for example: Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001',

scholars of critical security studies, therefore, suggest that instead of focusing on the process of securitisation itself as an act of politics or speech-act, it would be more pragmatic and beneficial for society to move beyond the securitisation of immigration and look at the consequences of practices and power relations. One way of doing so is to analyse the effects of securitising immigration on the rights of individuals within human rights discourse.[486] In this way, we would be able to fill the gaps in the securitisation theory and respond to the criticisms posed against it.[487] Therefore, to answer the main research question of this dissertation, in the chapters that follow, I will address the implications and consequences of securitising immigration in the EU on the right to seek asylum as a fundamental right.

3.4. CONCLUSION

In this chapter, for understanding the theory of securitisation of immigration, I first gave an account on the meaning of the concept of security and its different variations. From the point of view of the theory of knowledge, formulised by Russell, the concept of security is immensely vague, because the understanding of this concept is highly dependent on the spatio-temporal contexts. Moreover, the subjects and objects of security, as well, have an influence on the meaning of security.

Thereafter, I studied the ontology and epistemology of the concept of security. A sub-branch of political sciences International Relations (IR) studies this concept, more specifically under the category of security studies. IR as a field of study is a by-product of WWI – created by political scientists at University of Wales in Aberystwyth – to study and understand the causes of war and to find ways to prevent it. Notwithstanding the vagueness of the concept of security, scholars of security studies have agreed on one element in defining and understanding security: a 'lack of threat of war' or a 'lack of fear of the threat of war.' This understanding of security sustained until the end of the Cold War.

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in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317.

[486] Jef Huysmans and Vicki Squire, 'Migration and Security', in Myriam Dunn Cavelty and Thierry Balzacq (eds), *Routledge Handbook of Security Studies* (2nd edn, Oxford; New York: Routledge 2017), pp. 161-171, pp. 164-168. Also, see: Elspeth Guild, 'Protection, Threat and Movement of Persons: Examining the Relationship of Terrorism and Migration in EU Law after 11 September 2001', in Francois Crepeau, Delphine Nakache, Michael Collyer, Nathaniel H. Goetz, and Art Hansen (eds), *Forced Migration and Global Processes: A View from Forced Migration Studies* (Lanham, Maryland; Oxford: Lexington Books, 2006), pp. 295-317, pp. 303-306.

[487] In this regard, see, for example, Blanca Camps-Febrer, 'Counter-Terrorism as a Technology of Securitization: Approaching the Moroccan Case', in Michael J. Butler (ed.), *Securitization Revisited: Contemporary Applications and Insights* (London; New York: Routledge, 2020), pp. 69-90.

However, by the end of the Cold War and the nuclear arms race in the early 1990s, the range of threats to security of states expanded to cover a variety of issues including public health, economic prosperity, environmental degradation, and societal identity. In this new era, anything could be possibly and potentially a matter of security, so some scholars of security studies such as Barry Buzan and his colleagues created the theory of 'securitisation,' as an alternative to the traditional security theories. According to Buzan and his colleagues, the 'language' and 'tool' of security could tackle any issue in today's World.

Two decades after the creation of this theory, another scholar of security studies, Thierry Balzacq – by collecting scholarship in the field – provided a comprehensive definition on the theory of securitisation. According to Balzacq, securitisation is a process known as 'speech-act,' through which an issue changes its character in public opinion from an ordinary political/societal issue to a security concern. The speech-act may include the use of a certain type of language (the language of security) or behaving in a certain manner. The result of the securitisation process is that normal rules no longer would apply; whereas, the employment and use of extraordinary measures becomes justified under these exceptional 'emergency' circumstances.

Since the 2015-2016 terrorist attacks, securitisation has more than ever affected the immigration of people from the Global South to the EU. Nonetheless, we should remain aware that the securitisation of immigration in the EU has not occurred suddenly in a vacuum; the formation of this attitude is the outcome of multiple factors and incidents. Economic, social or collective, and identity securities all have contributed to the speech-act leading to the portrayal of immigrants as threats against the security of the EU. Amongst the security concerns of the past three decades, the threat of terrorism and fears arising from that have leaped to the top of the political agenda of EU institutions and its Member States. The securitisation of immigration in the EU is partly the result of public pressure to respond urgently to the threat of terrorism. Hence, state insecurities related to that have encouraged governmental bodies to adopt policies, resulting in extraordinary and restrictive counterterrorism measures. For example, different reports from Special Rapporteurs on Human Rights and Counter-Terrorism have shown how the securitisation of immigration has struck hard at the most basic and fundamental rules of human rights such as the prohibition of discrimination and the principle of *non-refoulement*.

Applying Dworkin's theory of legal interpretivism and law as integrity to the topic of this dissertation, one could analyse the perceived tension between fulfilling the right to seek asylum, on the one hand, and safeguarding national security, on the other, as the difference between the matters of principle and

policy, respectively. In this regard, Dworkin offers a tool for interpretation to practitioners and to those whose decisions matter. Using Dworkin's scale to decide on asylum cases and the right to seek asylum – as a constitutional and fundamental human right – is a matter of law. Henceforth, the interpretation of the right to seek asylum and its juxtaposition against national security – which is a matter of policy – must rely on the powerful ideas and principles of 'human dignity' and 'political equality.' Not taking the right to seek asylum seriously thus constitutes gross 'injustice;' if we simply allow matters of social policy or efficiency to infringe this right. Based on this reading of law, a critical security study outlook helps me discover and analyse the negative implications of securitising immigration upon the right to seek asylum in the following chapters.

4. THE SECURITISATION OF IMMIGRATION IN EU LAW AND PRACTICE

4.1. INTRODUCTION

In the previous chapter of this dissertation, I elaborated on the concept of security, the theory of securitisation, and what the securitisation of immigration means. At the end of that chapter, I discussed that critical security studies have been exposing the damaging practical effects of securitisation on the human rights discourse. The main aim of this school of thought is to move beyond the process of securitisation itself as a process speech-act, and instead, to focus on addressing the implications of securitisation on the enjoyment of rights. The ultimate goal of this 'moving beyond' is to create pragmatic ways, through which right holders could be active agents in the realisation of their rights rather than simply being passive objects to the power of duty bearers.

As the geographical scope of this research suggests, I will analyse the practices of the two courts in the EU dealing with fundamental and human rights, i.e. the CJEU and the ECtHR. The main aim of this chapter is to unveil that the EU and its Member States, by bringing security as an excuse, are undermining the position of the right to seek asylum as a fundamental human right. One of the reasons for this claim is the use of the language of security within the EU law on asylum and the practice of EU actors, especially within the jurisprudence of the CJEU.

After a critical discursive analysis of EU law on asylum, in this chapter, I will critically analyse the most important asylum case law related to the right to seek asylum within the jurisprudence of the CJEU meaning the case of *X and X v. Belgium* (2017). Article 18 the EU Charter is the stipulation of the right to seek asylum as a fundamental right. However, looking at its reasoning in the case of *X and X v. Belgium*, the CJEU removes the burden for violating the right to seek asylum from the shoulder of EU Member States by granting a full power of discretion on asylum-related matters to the States. This position of the Court makes Article 18 of the EU Charter meaningless because the CJEU, as the enforcing power behind the Charter, is not willing to take an independent stand and safeguard the protection of this article. The main question, thus, arising here is, if gaining access to the territory of EU for the purpose of asylum protection is within the discretion of individual States, why did the drafters of the EU Charter included the right to seek asylum in this law?

4.2. THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE GUARDIANSHIP OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

Article 2 of the TEU places emphasis on the 'respect for human rights' – including the rights of persons belonging to 'minorities' – as one of the constituting values of the EU. Adding to the 'respect for human rights,' the same article explicitly states that the EU is founded on other values such as 'respect for human dignity, freedom, democracy, equality, and the rule of law.' Article 7 of the same document provides for some mechanisms in order to determine the existence of and to sanction any 'serious and persistent breach' of the founding values of the EU. Once a serious and persistent breach of the EU values is determined, the Council of the European Union (the Council) acting by a qualified majority may decide to suspend certain rights of the Member State in question. These rights are those that derive from the application of the EU Treaties to the Member State, including the voting rights of the representative of the government of that Member State in the Council.[488]

In addition to the determination and sanction mechanisms mentioned under Article 7 of the TEU, when it comes particularly to respecting human rights, Article 6(1) of the same document gives a binding and authoritative power to the EU Charter. With the same legal value as the EU Treaties, the Charter is a primary source of EU law. Published in the Official Journal of the European Communities on 18 December 2000 (2000/C 364/01), the Charter became legally binding when the Treaty of Lisbon entered into force on 01 December 2009.[489] By incorporating all the rights set out in the EU Charter into the TFEU, the EU places great emphasis on all Member States respecting fundamental rights – those mentioned in the Charter.[490] Considering this position, the EU Charter of Fundamental Rights constitutes the EU's moral foundation.[491] Accordingly, the Charter stipulates:

> [The EU,] conscious of its spiritual and moral heritage, is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it

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[488] Paragraphs 1-3 of Article 7 of the TEU.
[489] The European Parliament, 'Fact Sheets on the European Union: The Protection of Fundamental Rights in the EU', <www.europarl.europa.eu/factsheets/en/sheet/146/European-Union-Charter>.
[490] Simon Usherwood and John Pinder, *The European Union: A Very Short Introduction* (4th edn, Oxford: Oxford University Press, 2018), p. 54.
[491] Marie-José Schmitt, *The Charter of Fundamental Rights of the European Union: Reading Guide in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the European Social Charter* (Strasbourg: Conference of the INGOs of the Council of Europe, 2008), pp. 10 and 11.

> is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.[492]

The Court of Justice of the European Union (CJEU) in Luxembourg is the judiciary body of the EU. As the final authority in relation to the main EU Treaties, the Charter, and other sources of EU law, the CJEU assures that EU law is interpreted and applied consistently across the Union. Moreover, the CJEU ensures that all EU institutions and Member States do what EU law requires.[493] The Preamble of the EU Charter gives the jurisdiction over the interpretation of the Charter to the CJEU and the national courts in the Member States, with due regard to the explanations prepared under the authority of the Praesidium of the Convention.[494]

In spite of the fact that protecting fundamental rights is one of the underlying principles of the EU, whether the CJEU is a human rights court is a matter of serious debate. As mentioned above, Article 2 of the TEU states that, the EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society, in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' In this regard, Williams reminds us that the CJEU is *not* a creature of human rights; neither was it ever constructed for realising human rights. He asserts that, instead, the human rights protection agenda was added later on to the remit of the Court when the EU project widened from an initially economic cooperation to also including matters of societal justice.[495] In fact, the whole idea behind the Treaty of Rome or the Treaty establishing the European Economic Community (EEC)[496] was to establish a 'system for capitalist free market economic cooperation.'[497]

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[492] The Preamble of the EU Charter is legally as binding as the main text and articles of this document. In this regard, see: The Preamble of the Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Communities on 18 December 2000 (2000/C 364/01).
[493] European Union, 'Court of Justice of the European Union (CJEU)', <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>.
[494] The Preamble of the Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Communities on 18 December 2000 (2000/C 364/01).
[495] Andrew Williams, 'Human Rights in the EU', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), pp. 249-270, p. 250.
[496] Treaty establishing the European Economic Community (EEC Treaty or the Treaty of Rome), Document 11957E/TXT (EEC).
[497] Andrew Williams, 'Human Rights in the EU', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), pp. 249-270, p.

However, with adopting the Treaty of Lisbon in 2007 and the full expansion of the EU project to a societal enterprise, the EU founders concluded that the moral legitimacy and a value-based identity of the EU would be in danger if the issues of fundamental and basic human rights had continued to be ignored by EU law.[498] Since the Treaty of Lisbon entered into force in 2009, the EU Charter has become the main legal source of human and fundamental rights within EU law. Hence, the CJEU stands to be the main EU judicial authority in charge of adjudicating human rights issues and fundamental rights matters falling under the jurisdiction of the EU Charter.[499]

Considering the legal nature of the EU Charter as a primary source of EU law[500] and based on the principles of the 'primacy of EU law' and its 'direct effect,' the provisions of the EU Charter have supremacy over national law.[501] The principle of the 'primacy of EU law' was established by the European Court of Justice (ECJ) in the landmark case of *Costa v. ENEL* in 1964. Accordingly, '[…] all EU law has absolute and unconditional precedence and should always be given precedence over all conflicting provisions of national law. The latter, therefore, can never be invoked to escape the application of EU law. This obligation to award priority to EU law applies to all state bodies, legislative, executive, and judicial.'[502]

The principle of the 'direct effect of EU law' was also created by the ECJ in 1963 in the case of *Van Gend en Loos v. the Netherlands*. In this case, the Court ruled

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252. Also, see: Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge; New York: Cambridge University Press, 2010), pp. 110 and 111.

[498] Andrew Williams, 'Human Rights in the EU', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), pp. 249-270, pp. 250 and 251. According to Williams, the claims thereafter made by the ECJ, the EU Commission, and the Council that human rights were fundamental in the creation of the EU is a total 'myth.' In this regard, see: Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge; New York: Cambridge University Press, 2010), p. 110.

[499] For further insights on how the CJEU has transformed from a tribunal of economic and commercial matters to become a court of human rights and fundamental rights adjudication, see: Gráinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law*, pp. 168-184. Also, see: Sergio Carrera, Marie De Somer, and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (2012) *Centre for European Policy Studies (CEPS) Papers in Liberty and Security in Europe*, ISBN 978-94-6138-222-1, pp. 5-8.

[500] Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (New York: Cambridge University Press, 2018), p. 24.

[501] Monica Claes, 'The Primacy of EU Law in European and National Law', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), pp. 178-211.

[502] Case 6/64, *Flaminio Costa v. ENEL* (*Ente Nazionale Energia Elettrica or the National Electricity Board* of Italy), European Court of Justice (ECJ), Judgement of the Court, decision of 15 July 1964 (referred to as '*Costa v. ENEL*').

that the EC law in question (Article 12 of the EEC) had a 'direct application within the territory of Member State,' due to the spirit of the Treaty – meaning the establishment of a 'Common Market and of institutions with sovereign rights.'[503] Therefore, the EU Charter – as a primary source of EU law – has a direct effect and applicability in the legal order of individual EU Member States.[504]

4.3. THE RIGHT TO SEEK ASYLUM WITHIN THE CONTEXT OF THE SECURITISATION OF IMMIGRATION IN THE EU

4.3.1. THE PARADOX OF PROTECTING THE RIGHT TO SEEK ASYLUM UNDER THE EU ASYLUM LAW

Although based on the ECHR and other human rights instruments (both European and international), the EU Charter has been not only complementary, but also extremely innovative to legal sources by including new categories of human rights and fundamental freedoms. Article 6(3) of the TEU reiterates that the fundamental human rights guaranteed under the ECHR constitute the general principles of EU law, because these fundamental rights have originated from the constitutional traditions common to all Member States. To emphasise the important role of the ECHR on EU law in general, and on the system of human rights protection established by the EU Charter specifically, Article 6(2) of the TEU obliges the EU to accede to the ECHR. Moreover, the EU Charter in Article 52(3) and (4) explicitly recognises all human rights and fundamental freedoms included in the ECHR and those coming from 'the constitutional traditions common to the Member States.'

The EU Charter encompasses the areas of human rights, which the ECHR had ignored. In this regard, some issues such as disability, age, sexual identities, and gender orientation as grounds for discrimination,[505] the access to EU

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[503] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen (the Netherlands)*, European Court of Justice (ECJ), Judgement of the Court, decision of 5 February 1963.
[504] For detailed information on the principle of the direct effect of EU law, see: Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd ed., London: Bloomsbury Publishing, 2018), pp. 135-143. Also, see: Dorota Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), pp. 212-248, pp. 212-219. For more information on the direct effect of the EU Charter as a primary source of EU law, see: Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (New York: Cambridge University Press, 2018), pp. 162 and 163.
[505] For detailed analysis in this regard, see: Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (New York: Cambridge University Press, 2018), pp. 52 and 53.

documents,[506] the protection of personal data and access to data,[507] the right to good administration,[508] and the right to asylum have all been explicitly recognised as fundamental rights under the EU Charter.[509] For example, paragraph 1 of Article 21 of the EU Charter – under the title of 'non-discrimination' – stipulates that, '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' Article 42 of the EU Charter – under the title 'right of access to documents' – stipulates that, '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.'

Keeping these foundations in mind, the part of the EU Charter relevant to the topic of this dissertation is Article 18. This Article falls under Title II of the Charter on the subject of 'Freedoms,' with the general title of the 'Right to asylum,' and makes no distinction between the 'right to seek asylum' and 'enjoy asylum.' Although the drafters of the EU Charter were aware of the division that the 1948 UDHR had made in this regard, they consciously chose to keep to a general title for Article 18 – meaning the 'right to asylum.'[510] Therefore, it is reasonable to claim that this article includes both the right to seek and enjoy asylum once asylum is granted. Whenever I refer to Article 18 of the EU Charter, the 'asylum seeking' part of this right is intended, since what I study here is the implications of the securitisation of immigration on the right to seek asylum in the EU. Having this clarification in mind, Article 18 of the EU Charter reads:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the

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[506] Article 42 of the EU Charter.
[507] Paragraphs 1 and 2 of Article 8 of the EU Charter, besides recognising 'the right to the protection of personal data', stipulates that '[s]uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'. In continuation of Article 8(2), the Charter provides that 'everyone has the right of access to data, which has been collected concerning him or her, and the right to have it rectified'.
[508] Article 41 of the EU Charter specifies the components of the right to good administration.
[509] Article 18 of the EU Charter is the legal basis for the right to asylum recognised within EU law as a fundamental human right.
[510] Draft Charter of Fundamental Rights of the European Union, Brussels, 11 October 2000 (18.10) (OR. fr) CHARTE 4473/00. Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50. <www.europarl.europa.eu/charter/pdf/04473_en.pdf>. For a detailed analysis in this regard, see: Maarten den Heijer, 'Article 18 – Right to Asylum', in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford; Portland, Oregon: Hart Publishing, 2014), pp. 519-542, pp. 523 and 524.

> Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').[511]

Including the right to asylum in the text of the EU Charter under Article 18 is based on Article 63(1)[512] of the Treaty establishing the European Community (TEC).[513] According to Article 63(1) of this treaty, the 1951 Refugee Convention and its Protocol of 1967 should be used as a reference point for adopting EU asylum policies and all legislation on asylum within EU law. Following the TEC's lead, the first paragraph of Article 78 of the TFEU – substituting Article 63 of the TEC – stipulates that:

> The EU shall develop ***a common policy*** on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.[514] [Emphasis added.]

A literal reading of Article 18 of the EU Charter suggests a general ambit for the right to asylum. Taken alone, this Article does not guarantee a substantial right to asylum; but instead, it refers to the 1951 Refugee Convention and its Protocol and the main EU Treaties. As a well-established matter of EU law, the EU Charter does not extend the competence of the EU and its institutions beyond the Treaties and subsequent legislation.[515] Article 18 of the EU Charter, together with Article 78 of the TFEU, set the legal foundation for developing a system of secondary sources on asylum – both binding and soft law – within EU law. This collection of law is the 'Common European Asylum System' (CEAS),[516] which includes various types of EU secondary legislation as a part of a corpus of EU law called the 'EU Asylum *Acquis*.' The EU *acquis* is a 'body of common rights and obligations that bind all EU States.' This body of law, which is constantly evolving, is comprised of the content, principles and political objectives of EU Treaties, legislation adopted pursuant to the Treaties, the case law of the Court of Justice, declarations and resolutions adopted by the Union, the international agreements concluded by the EU, and the agreements between Member

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[511] Article 18 of the Charter of Fundamental Rights of the European Union, Published in the Official Journal of the European Communities on 18 December 2000 (2000/C 364/01).
[512] Article 78 of the TFEU replaces this article.
[513] Treaty establishing the European Community (TEC), published in the Official Journal of the European Communities on 24 December 2002 (2002/c 325/01).
[514] Article 78(1) of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), published in the Official Journal of the European Union on 7 June 2016 (2016/C 326/47).
[515] Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (New York: Cambridge University Press, 2018), pp. 233-235.
[516] The European Commission, 'Migration and Home Affairs: Common European Asylum System', <ec.europa.eu/home-affairs/what-we-do/policies/asylum_en>.

States.[517] Amongst them, the following documents are of utmost importance when it comes to the realisation of the elements composing the right to seek asylum.[518] It is noteworthy stating here that this list is not exhaustive and is given in reverse chronology, starting from the most recent, as follows:

- The 2016 Schengen Border Codes;[519]
- The 2013 EU Asylum Procedures Directive;[520]
- The 2013 Reception Conditions Directive;[521]
- The 2013 Dublin Regulation;[522]
- The 2013 Eurodac Regulation;[523]
- The 2011 EU Qualification Directive;[524]
- The 2001 Temporary Protection Directive.[525]

The existence of an *acquis* such as the CEAS might create an assumption that the implantation of Article 18 of the EU Charter is a harmonised, comprehensive, and well-functioning area of law and practice in the EU. In stark contrast, however, the realisation of the right to seek asylum, in practice within the EU Member States, is far from a harmonised or well-functioning

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[517] The European Commission, 'Migration and Home Affairs: Acquis', <ec.europa.eu/home-affairs/e-library/glossary/acquis_en>.
[518] The components of the right to seek asylum were mentioned in Chapter 2 under Subsection 2.3.1. These elements are in Table 3 under the same subsection.
[519] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a union code on the rules governing the movement of persons across borders.
[520] Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), 26 June 2013.
[521] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 26 June 2013.
[522] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast), 26 June 2013.
[523] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).
[524] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 13 December 2011.
[525] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof, 20 July 2001.

orchestration.[526] In fact, the implementation of the right to seek asylum under Article 18 of the EU Charter is a highly contested and fragmented sphere of law, which in reality divides into twenty-seven ways of implementation – as many as the number of EU Member States.[527]

Nevertheless, considering the position of the CJEU as the guardian of the Charter, one may be inclined to think that the Court would provide a kind of interpretation, which would harmonise the practices of EU Member States. In addition, we may wish for an interpretation, which according to Article 18 of the EU Charter, would crystallise the right to seek asylum without contradicting – in any way – the most important legal instrument on refugee protection, meaning the 1951 Refugee Convention and its 1967 Protocol. However, by looking at the EU Treaties and some secondary legislation within the CEAS, we are able to trace a dominant securitisation shadow affecting the EU law and policies on asylum. To elaborate, as follows, I will scrutinise how, in reality, the right to seek asylum is impossible to truly implement in the EU, which unavoidably leads to this right being rendered ineffective and therefore, meaningless in practice.

Even though Article 18 of the EU Charter explicitly guarantees the right to seek asylum as a fundamental right, the EU law does not provide for pragmatic ways, in practice and in reality, to facilitate the arrival of asylum seekers for fulfilling the right to seek asylum.[528] Those seeking asylum in the EU are mainly nationals of countries who require an entry visa[529] or a residence permit accompanied with a valid travel document[530] to enter into the EU territory. The EU Regulation 2018/1806, in its first Annex, has listed the third-country nationals who must

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[526] Helen O'Nions, *Asylum – A Right Denied: A Critical Analysis of European Asylum Policy* (Farnham: Ashgate Publishing Limited, 2016), pp. 100-132. Also, see: Kris Pollet, 'Accessing Fair and Efficient Asylum Procedures in the EU: Legal Safeguards and Loopholes in the Common European Asylum System', in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Portland: Bloomsbury Publishing, 2017), pp. 137-166.

[527] Helen O'Nions, *Asylum – A Right Denied: A Critical Analysis of European Asylum Policy* (Farnham: Ashgate Publishing Limited, 2016), pp. 125-132.

[528] Erik Fribergh and Morten Kjaerum, *Handbook on European law relating to Asylum, Borders and Immigration* (Luxembourg: Publications Office of the European Union, 2016), pp. 35-37.

[529] For more detailed information on the citizenship of the majority of asylum applicants in the EU since 2013, see the website of Eurostat: Eurostat: Statistics Explained, 'Asylum Statistics, Citizenship of first-time applicants: largest numbers from Syria, Afghanistan, and Venezuela', <ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Citizenship_of_first-time_applicants:_largest_numbers_from_Syria.2C_Afghanistan_and_Venezuela>.

[530] Regulation (EU) 2017/1954 of the European Parliament and of the Council of 25 October 2017 amending council regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals, published in the Official Journal of the European Union on 01 November 2017 (L 286/9).

hold a visa when entering the EU external borders.[531] Furthermore, without gaining access to the territories of the EU Member States, it is practically impossible to lodge an asylum application in the EU.[532] Because of this paradoxical vicious circle and the counter-intuitive EU law on asylum, these individuals, who often do not qualify for ordinary visas or entry permits, are compelled to cross external EU borders in an irregular or unauthorised manner.

Further, EU law has repeatedly criminalised crossing the external borders of the EU in an irregular or unauthorised manner. Because of this criminalisation of border crossing, the EU institutions and Member States have adopted immigration policies and practices that are heavily securitised or even militarised. The existing literature in the field of critical migration studies have considered the labelling of undocumented immigrants as 'criminals' because of their irregular migratory status, as the 'criminalisation of immigration' or 'crimmigration,' which in itself is a form of securitisation of immigration.[533] The criminalisation of immigration in EU law is linked closely to the crimes of human smuggling and human trafficking. This is exactly where a clear clash with the established international standards governing the protection of asylum seekers comes to attention.

According to the so-called 'non-penalisation clause' stipulated under Article 31(1) of the 1951 Refugee Convention – which in itself is based on the principle of non-discrimination – no penalties or sanctions shall be imposed on asylum seekers based on their 'immigration status.' In other words, whether the entry or residence of an asylum seeker is inhumanely labelled as 'legal' or 'illegal' should not affect the full enjoyment of all components of the right to seek asylum. I shall list these components in details here for a greater emphasis:

- The right to enter to the EU or to gain access to the EU territory for the purpose of asylum seeking;

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[531] In this regard, see: Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), published in the Official Journal of the European Union on 28 November 2018 (L 303/39).

[532] Marialena Tsirli and Michael O'Flaherty, *Handbook on European Law relating to Asylum, Borders and Immigration* (Luxembourg: Publications Office of the European Union, 2020), pp. 44-46. In this regard, also see: Erik Fribergh and Morten Kjaerum, *Handbook on European law relating to Asylum, Borders and Immigration* (Luxembourg: Publications Office of the European Union, 2016), pp. 35-37.

[533] Chiara Maria Ricci, 'Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the 'Facilitators' Package", in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Leiden: Brill Publishers, 2020), pp. 34-56. In this regard, also see: Magdalena Kmak, 'Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention' (2018) 15 *No Foundations: An Interdisciplinary Journal of Law and Justice*, pp. 1-22. Also, see: Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (London: Springer, 2015). Also, see: Elspeth Guild, *Criminalisation of Migration in Europe: Human Rights Implications* (Paris: The Council of Europe Commissioner for Human Rights, 2009).

- The right to have access to asylum procedures including the RSD procedures performed by authorised officials such as national immigration services or the UNHCR-assigned mandate holders;
- The right to temporary residence in the EU for duration of asylum application procedure;
- The prohibition of expulsion and the full compliance of the EU and its Member States with obligations under the principle of *non-refoulement*;
- The right to liberty and personal security for asylum seekers including the freedom of movement within the territory of the country of asylum and the prohibition of arbitrary and indefinite detention of asylum seekers;
- The right to an appeal in the case of receiving a negative decision on an asylum application as part of procedural rights;
- The right to a fair trial and an effective remedy in situations where any of substantial and procedural rights are allegedly infringed;
- The right to an effective remedy in situations where the violation of any of the above-mentioned rights are proved in an independent judicial or administrative trial.

Henceforth, based on Article 31(1) of the 1951 Refugee Convention, the enjoyment of the right to seek asylum and its constituting components should be implemented with no reserve to or with no discrimination on the ground of the individual's immigration status. Regardless of the existence of the 'non-penalisation clause' by the virtue of Article 31(1) of the 1951 Refugee Convection, the EU Treaties and in following them, the CEAS and its legislation have divided immigrants to Europe – including those seeking international protection – into two distinct categories of 'legal' *versus* 'illegal' immigrants. According to Article 79 of the TFEU:

> 1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
>
> (b) the definition of the rights of third-country nationals residing ***legally*** in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
>
> (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

> (d) combating trafficking in persons, in particular women and children.[534] [Emphasis added.]

The so-called 'legal immigrants' are those who go through visa application procedures and obtain a visa to enter into the EU. Whereas, the inhumanely labelled 'illegal immigrants' are those who for one reason or another are unable or unwilling to go through these procedures. As we know from the established international legal regime of refugee protection and the 1951 Convention-based definition of refugee, asylum seekers have to leave their countries of origin in despair and due to a 'well-founded fear of persecution.' In addition, asylum seekers are 'unable' or 'unwilling' to go through the official bureaucratic procedures of obtaining 'legal' travel documents. In this regard, Article 1(A)(2) of the 1951 Refugee Convention defines a 'refugee' as:

> [...] a person, who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[535]

Therefore, the element of 'fear' from the authorities of the country of origin and not trusting them are the determining factors for being an asylum seeker and later on a refugee. In simple terms, asylum seekers are not tourists or leisure travellers, nor are they travelling for business activities, who could plan their journey months in advance and make rational choices during the path. Asylum seekers are individuals with an urgent need of protection from persecution; these people have been forced to flee their countries of origin in order to save their lives, or the lives of their family members, and their very basic human rights and freedoms. Therefore, going to the authorities of the country of origin to obtain official travel documents would indeed expose them to a greater danger of persecution, and for this reason, the 1951 Refugee Convention has naturally included a 'non-penalisation clause.'

Furthermore, following Article 79 of the TFEU, the EU secondary legislation in the fields of asylum and immigration law have continued to categorise immigrants into two groups of 'legal' *versus* 'illegal' immigrants. This securitised perspective of EU law has resulted in further restrictive legislation in the area of

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[534] In this regard, see paragraphs 1 and 2 of Article 79 of the Treaty on the Functioning of the European Union (TFEU), published in the Official Journal of the European Union on 7 June 2016 (2016/C 326/47).
[535] Article 1(A)(2) of the 1951 Refugee Convention and its 1967 Protocol relating to the status of refugees.

border control and border security. Articles 1 and 2 of the 2016 Schengen Borders Code have divided EU borders into two types of 'internal' and 'external' borders, by imposing greater emphasis on external border control for the purpose of securing the freedom of movement of persons within the EU, and for creating Europe as an 'area of freedom, security, and justice.'[536]

Notwithstanding the fact that Article 4 of the 2016 Schengen Borders Code reminds Member States of their obligations towards those in need of international protection, the remainder of this legislation places all its emphasis on the importance of preventing 'illegal immigration' and safeguarding the 'internal security of the EU' through 'external border control.' While mentioning the compliance with the fundamental rights of those in need of international protection ***only once***,[537] the 2016 Schengen Borders Code and its annexes repeat ***more than twenty times*** that border control mechanisms are in the direct interests of Member States in combating 'illegal immigration' and protecting the 'internal security' of Europe. In this regard, we can refer, for example, to paragraph six of the preamble of the 2016 Schengen Code, Article 8(3)(c)(iii), and Article 13(1) and (4) of the same document. According to these provisions, the EU legislator implies that asylum seeking is an excuse for illegal immigration to Europe, which is automatically a threat to the internal security of the EU.

As explained above, EU law has divided immigrants into the two categories of 'legal' and hence, 'desirable' *versus* 'illegal' and therefore, 'undesirable' immigrants. In addition to labelling the latter group 'illegal,' EU law has given a 'security threat' character to this category of immigrants by positioning them alongside human traffickers, smugglers, and the perpetrators of other organised crimes such as drug traffickers and terrorists. This is, in addition to considering so-called 'illegal immigrants' potential threats to the national security, public policy, public health, and international relations of Member States. In this regard, for example, paragraph six of the preamble of the 2016 Schengen Borders Code reiterates that, '[b]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member

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[536] For an overall discussion on the creation of EU as an area of 'freedom, security, and justice', see: Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in Neil Walker (ed.), *Europe's Area of Freedom, Security, and Justice* (New York: Oxford University Press, 2004), pp. 3-37. In this regard, also see: Rens van Munster, *Securitizing Immigration: The Politics of Risk in the EU* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2009), pp. 65-97.

[537] Article 4 of the 2016 Schengen Borders Code with the title of 'Fundamental Rights' reads that in applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter, relevant international law, including the 1951 Geneva Convention, obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.

States which have abolished internal border control.' In addition, the same paragraph continues with the promise that, '[b]order control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.'[538] Henceforth, it is feasible to claim that the EU immigration agenda and its asylum *acquis*, which insist on immigration being an issue of crime and security, clearly demonstrate the obvious case of the securitisation of immigration in the EU. The process of the securitisation of immigration includes various instances of speech-acts as showed above. Moreover, by using the language of 'fight,' 'war,' or 'combat' against 'illegal' immigration in many contexts related to the management of population movement into Europe. At legislative level, we could refer back to paragraph six of the preamble of the 2016 Schengen Borders Code, according to which combatting illegal immigration could be achieved through external border control. At executive level and within the practice of EU institutions, we could exemplify the establishment of the Joint Operational Team Mare (JOT Mare) launched by Europol. According to Europol, JOT Mare is an intelligence-based operation, which is shaped according to some intelligence information revealing that organised criminal groups are actively facilitating the transport of irregular migrants across the Mediterranean, and that these groups have links to human trafficking, drugs, firearms, and even terrorism.[539]

The emphasis of the law and practices of EU agencies and some Member States on external border surveillance, flourishing businesses and technologies related to controlling the movement of immigration are other instances of securitising immigration into the EU. In this regard, for example, we could name the creation of the European Border and Coast Guard Agency (Frontex) in 2005, with the main mandate of conducting border control at external Schengen borders.[540] In November 2019, the EU Council officially adopted the Commission's proposal to reinforce Frontex to have a standing corps of ten

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[538] With regard to in-depth discussions on how the emergence and the development of European politics on internal security has created an environment of threat and the securitisation of immigration, see: Rens van Munster, *Securitizing Immigration: The Politics of Risk in the EU* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2009), pp. 16-64. In this regard, also see: Kay Hailbronner, 'Asylum Law in the Context of a European Migration Policy', in Neil Walker (ed.), *Europe's Area of Freedom, Security, and Justice* (New York: Oxford University Press, 2004), pp. 41-88, pp. 41-43.

[539] For more information in this regard, see: Europol, 'Joint operational team launched to combat irregular migration in the Mediterranean', <www.europol.europa.eu/newsroom/news/joint-operational-team-launched-to-combat-irregular-migration-in-mediterranean>.

[540] The EU Regulation (EU) 2016/1624 developed the Frontex.

thousand border guards.[541] The collection of biometric data and the EU Commission's controversial proposal for creating 'Smart Borders' are more examples of the acts to further securitise immigration into the EU. The mass collection of biometric data and the long-term storage of such data (in the case of asylum seekers, for example, their biometric data is kept in the European Dactyloscopy database known as 'Eurodac') is highly criticised for the alleged violation of the right to privacy, and is considered to be against the protection of personal data.[542] The challenges of managing data related to immigration control pushed the EU towards establishing the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) in 2011.[543]

An increasing trend in the privatisation and commercialisation of migration control at EU external borders has raised serious concerns with regard to the alleged violation of human rights of immigrants and particularly refugees and asylum seekers, since the latter group are outlawed and considered 'illegals.' This 'clandestine' situation makes one wonder who ultimately benefits and at what cost. The stakeholders involved here are European states and the EU, private and/or multinational corporations, and asylum seekers. In this environment of securitisation, criminalisation, privatisation, and the commercialisation of immigration to the EU, this is what is happening in reality.

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[541] The European Commission, 'EU delivers on stronger European Border and Coast Guard to support Member States', <//ec.europa.eu/commission/presscorner/detail/en/statement_19_6237>. Also, see the EU Regulation 2019/1896 on the expansion of Frontex.

[542] For example, in a campaign mobilised by thirty-one NGOs, the European Parliament is urged to rethink plans to overhaul Eurodac. In this regard, see: The Guardian, 'EU 'seeking to turn migrant database into mass surveillance tool'', <www.theguardian.com/world/2021/sep/08/eu-seeking-to-turn-migrant-database-into-mass-surveillance-tool>.

[543] Julian Kamasa, 'New Technologies for Border Controls in Europe' (2019) 255 *CSS Analyses in Security Policy*, pp. 2-4. Also, see: Elspeth Guild, 'The Dark Side of Globalisation: Do EU Border Controls Contribute to Death in the Mediterranean?', in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Oxford; New York: Routledge, 2017), pp. 312-331. Moreover, see: Elspeth Guild, 'Data Protection, Privacy and the Foreigner', in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Cheltenham; Northampton, Massachusetts: Edward Elgar Publishing, 2017), pp. 380-393. Also, see: Elspeth Guild, Sergio Carrera, and Florian Geyer, 'The Commission's New Border Package: Does it take us one step closer to a 'cyber-fortress Europe'?' (2008) 154 *Centre for European Policy Studies (CEPS) Policy Brief*. For a more critical analysis on the digitalisation of borders and the use of technologies in controlling EU frontiers, see: Didier Bigo and Elspeth Guild, 'Introduction: Policing in the Name of Freedom', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement into and within Europe* (Oxford; New York: Routledge, 2016), pp. 1-13. In this regard, also see: Didier Bigo, 'Frontier Controls in the European Union: Who is in Control?', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement into and within Europe* (Oxford; New York: Routledge, 2016), pp. 49-99. In addition, see: Didier Bigo and Elspeth Guild, 'Policing at a Distance: Schengen Visa Policies', in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement into and within Europe* (Oxford; New York: Routledge, 2016), pp. 233-263.

The first category reinforces its power and further emphasises its sovereignty (and wins public opinion), and the second entity makes tremendous monetary gain; whereas, the latter group pays the price of power and money for the benefit of the first two groups through endangering their lives and losing their most fundamental freedoms and human rights.[544] As evidence, some anthropological accounts have shown how the ***immigration industry*** is dependent on the illegal status of a certain category of people (in this case asylum seekers) as the 'economic value' of this unethical business.[545]

The current policies of voluntary and involuntary return or repatriation of immigrants to the country of origin – or to the last non-EU country of departure – also exemplifies the securitisation of immigration into the EU. One instance of these policies is the establishment of a European Return Fund in 2007 to facilitate the return of immigrants to their countries of origin.[546] To add, we could refer to the EU's extraterritorial control of immigration[547] through the non-arrival or *non-entrée* policies of agreements with third countries,[548] non-rescue policies, and the interception, disruption and return of boats carrying migrants on the high seas known as examples of the extraterritorial control of EU borders.[549]

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[544] On how the European border control has turned into a business with little or no consideration for human rights of asylum seekers, see: Georg Menz, 'The Neoliberalized State and the Growth of the Migration Industry', in Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (Oxford; New York: Routledge, 2013), pp. 108-127.

[545] Ruben Andersson, *Illegality, Inc.: Clandestine Migration and the Business of Bordering Europe* (Oakland: University of California Press, 2014), pp. 66-97. For further analysis in this regard, see: Patrizia Zanoni and Tammar B. Zilber, 'What Are We Missing? Exploring Ethnographic Possibilities beyond MOS Conventions', in Raza Mir, Anne-Laure Fayard (eds), *The Routledge Companion to Anthropology and Business* (New York; Oxford: Routledge, 2021), pp. 394-413.

[546] Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 on establishing the European Return Fund for the period 2008 to 2013.

[547] On the challenges of human rights protection in the cases of externalisation of border control, see: Maarten den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in Bernhard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Brill, 2010), pp. 169-198.

[548] With regard to an in-depth analysis on the externalisation of the EU border control in the form of deals with third-countries, see: Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Oxford; New York: Routledge, 2019). Also, see: Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017), pp. 173-178.

[549] In this regard, see: Marie-Laure Basilien-Gainche, 'Leave and Let Die: The EU Banopticon Approach to Migrants at Sea', in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Leiden; Boston: Brill, 2016), pp. 327-352. Also, see: Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017), pp. 188-199. Also, see: Jasmine Coppens, 'Interception of Migrant Boats at Sea', in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive*

The ultra-securitised and militarised measures against irregular immigration in the EU through placing it in the same category as the crimes of human smuggling and human trafficking are also examples of using a speech-act in labelling a certain category of immigrants as threats and dangerous to safety and public order.[550] In this regard, the EU is completely ignoring the fact that the existence of the crime of human smuggling and its darkest side, human trafficking, are inevitable results of the lack of 'legal' channels for asylum seekers and other types of immigrants to enter into and gain access to EU territory.[551] As Carrera and Guild have rightly pointed out, '[t]here is nothing existential about irregularity,' for the reason that, '[…] the label of "irregularity" can never be determined independently of the activities of the immigration and border guards.'[552] In other words, the exercise of power by a sovereign State, and how this power is imposed and inserted upon humans, determines an immigrant to be regularly or irregularly present on the territory of a State.[553]

It is also worth mentioning that, as opposed to the outlook of EU law towards undocumented forced immigrants, this category of people are not criminals in a technical legal sense. They are, in fact, in danger of their lives, basic human rights, and fundamental freedoms, who with legitimate intention are exercising the right to seek asylum in order to gain individual security. However, by taking a securitised approach towards these people, the EU seeks to build a quasi-legal justification – or as I would term it – a '*façade*' to hide behind while grossly violating its own constituting moral values and human rights obligations.

Approach: Integrating Maritime Security with Human Rights (Leiden; Boston: Brill, 2016), pp. 200-221.

[550] For example, the Council Directive 2002/90/EC does not even mention human smuggling or human trafficking; instead, it refers to 'facilitation of irregular immigration'. For further analysis on this, see: Alessandro Spena, 'Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?', in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies, 2016), pp. 33-40. In this regard, also see: Sergio Carrera and Elspeth Guild, 'Migrant Smuggling in the EU: What Do the Facts Tell Us?', in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies, 2016), pp. 11-16.

[551] Arjen Leerkes, 'Managing Migration through Legitimacy? Alternatives to the Criminalisation of Unauthorised Migration', in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies, 2016), pp. 24-32.

[552] Sergio Carrera and Elspeth Guild, 'Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach', in Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU* (Brussels: Centre for European Policy Studies, 2016), pp. 1-9, pp. 3 and 4.

[553] *Ibid*, p. 4.

4.3.2. ANALYSING THE APPROACH OF THE COURT OF JUSTICE OF EU TOWARDS PROTECTING THE RIGHT TO SEEK ASYLUM UNDER ARTICLE 18 OF THE EU CHARTER

In addition to the securitisation of immigration within the EU legal framework, the more problematic and concerning aspect of securitisation comes from the approach of the CJEU towards the fundamental right to seek asylum. Having in mind the analysis I provided in the previous subsection on securitised EU legislation on immigration, in the remaining part of this chapter, I will analyse the jurisprudence of the CJEU under Article 18 of the EU Charter. For the purpose of this analysis, I will apply the theoretical framework offered by critical security studies – more specifically, critical discourse analysis and the theory of legal interpretivism as formulated by Ronald Dworkin.

Based on this critical analysis, I conclude that notwithstanding the fact that the CJEU is the guarantor and guardian of the EU Charter, this Court is not, in reality, performing in the way expected to safeguard the EU Charter, certainly, when it comes to the protection of the right to seek asylum. The jurisprudence of the CJEU with regard to Article 18 of the EU Charter demonstrates a high level of submission and deference to the political will of EU Member States and to the securitisation of immigration in the sense of not allowing asylum seekers to gain access to EU territories. Therefore, the right to seek asylum under Article 18 of the EU Charter – in reality and in practice – becomes meaningless and self-defeating. This is one of the negative outcomes of the securitisation of immigration in the EU upon the right to seek asylum as a fundamental right.

The most important case, which has been decided so far by the CJEU with regard to the right to seek asylum under Article 18 of the EU Charter is the case of *X and X v. Belgium* (2017).[554] The facts of this case unfold in this way that in 2016, a married couple from Aleppo (Syria), together with their three very young minor children, travelled to the Embassy of Belgium in Beirut (Lebanon) and lodged a visa application based on Article 25(1)(a) of the EU Visa Code.[555] According to this article, a Member State shall issue a 'visa with limited territorial validity,' when this decision is deemed to be necessary based on 'humanitarian grounds' and due to the State's 'international obligations.'[556] The applicants submitted that the purpose of the type of visa they were applying, i.e.

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[554] C-638/16 PPU, *X and X v. État belge* (Belgium), Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), Decision of 7 March 2017 (referred to as '*X and X v. Belgium*').
[555] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Schengen or EU Visa Code), published in Official Journal of the European Union on 15 September 2009 (L 243/1).
[556] See Article 25(1)(a) of the EU Visa Code (Regulation (EC) No 810/2009).

a Schengen visa with limited territorial validity (also known as a *humanitarian visa*),[557] was 'to enable them to leave the besieged city of Aleppo in order to apply for asylum in Belgium.' In the main proceedings of this case at national level, one of the applicants claimed that they had been abducted by a terrorist group, then beaten, tortured, and finally released following the payment of a ransom. During the same proceedings, both applicants emphasised the ongoing Civil-Proxy War in Syria and the imminent dangerous situation and insecurities specifically in Aleppo. In addition to war, considering their faith as 'Orthodox Christians,' they claimed to be at a greater risk of persecution in their particular case based on their religious beliefs. They added that it had become impossible for them to register as refugees in neighbouring countries, due to the closure of borders between Lebanon and Syria.[558]

The Belgian immigration authorities refused to grant the applicants a visa with limited territorial validity under Article 25(1)(a) of the EU Visa Code, i.e. they were denied a humanitarian visa. The Belgian Embassy communicated the rejection decision of the Immigration Office to the applicants in the main proceedings, reasoning that:

> [...] the applicants intended to stay more than 90 days in Belgium, [while] Article 3 of the ECHR did not require States that are parties to the convention to admit into their respective territories 'victims of a catastrophic situation' and that Belgian diplomatic posts were not among the authorities to which a foreign national could submit an application for asylum. [Therefore,] authorising the issue of an entry visa to the applicants in the main proceedings in order for them to be able to lodge an application for asylum in Belgium would amount to allowing such an application to be submitted to a diplomatic post.[559]

During the appeal instance, the Council for Asylum and Immigration Proceedings of Belgium (the Belgian Immigration Court) referred this case to the CJEU for a preliminary ruling, with regard to the interpretation of Article 25(1)(a) of the EU Visa Code, and specifically in the light of Articles 4 and 18 of the EU Charter. The main questions of the Belgian Government posed to the CJEU:

1. Do the "international obligations" referred to in Article 25(1)(a) of the Visa Code cover all the rights guaranteed by the Charter, including, in particular, those

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[557] The IOM Glossary on Migration defines a 'humanitarian visa' as, '[a type of] visa granting access to a temporary stay in the issuing State to a person on humanitarian grounds for a variable duration as specified in the applicable national or regional law, often aimed at complying with relevant human rights and refugee law.' For more information in this regard, see: The International Organization for Migration (IOM), *International Migration Law: Glossary on Migration* (Geneva: International Organization for Migration, 2009), pp. 97-99.
[558] C-638/16 PPU, *X and X v. État belge* (Belgium), para. 20.
[559] *Ibid*, para. 21.

guaranteed by Articles 4 and 18, and do they also cover obligations which bind the Member States, in the light of the ECHR and Article 33 of the Geneva Convention?[560]

2. Depending on the answer given to the first question, must Article 25(1)(a) of the Visa Code be interpreted as meaning that, subject to its discretion with regard to the circumstances of the case, a Member State to which an application for a visa with limited territorial validity has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established?[561]

In its answer to the first question, the CJEU started by reminding that Article 25(1)(a) of the EU Visa Code was legislated on the basis of Article 62(2)(a) and (b)(ii) of the EC Treaty, according to which the EU had to adopt measures concerning visas for intended stays of no more than ninety days.[562] On this account, Article 1 of the EU Visa Code asserted that, the objective of this Regulation was to establish procedures and conditions for issuing visas for transit through or intended stays on the territory of Member States, not exceeding ninety days in any 180-day period.[563]

Looking at the facts recorded during the main proceedings of this case, the CJEU pointed out that the applicants had submitted applications for visas on 'humanitarian grounds' based on Article 25 of the Visa Code at the Belgian embassy in Lebanon with a view to applying for asylum in Belgium immediately upon their arrival in that Member State. Upon submitting asylum applications in Belgium, thereafter, the applicants intended to be granted a residence permit with a period of validity not limited to ninety days.[564] Positioning these facts against Article 1 of the EU Visa Code, the CJEU deliberated that such an application – even if formally submitted based on Article 25 of that Code – was in contrast with the objective of the EU Visa Code; hence, it would fall outside the scope of the application of this Regulation. According to the CJEU, therefore, Article 25(1)(a) of the EU Visa Code and the concept of 'international

[560] *Ibid*, para. 28(1).
[561] *Ibid*, para. 28(2)(a).
[562] Article 62(2)(b) of the 2002 Treaty establishing the European Community (TEC or the Amsterdam Treaty) reads that the Council shall adopt measures on the crossing of the external borders of the Member States, which shall establish rules on visas for intended stays of no more than three months.
[563] Article 1(1) of the 2009 EU Visa Code assigning the objectives and scope of this Regulation, reads that, '[t]his Regulation establishes the procedures and conditions for issuing visas for intended stays on the territory of the Member States, which do not exceed 90 days in any 180-day period'.
[564] C-638/16 PPU, *X and X v. État belge* (Belgium), para. 42.

obligations' mentioned in that provision (the interpretation of which was sought by the referring court) did not apply to the case at hand in any way.[565]

Furthermore, the CJEU reasoned that until that date (the date of the facts of the case), no measures had been adopted by the EU legislature on the basis of Article 79(2)(a) of the TFEU,[566] with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds. It is pertinent mentioning here that the Belgian Government and the European Commission, in their written observations, had submitted this very same reasoning to the CJEU. Relying on this argument, the CJEU determined that the applications at issue in the main proceedings would fall solely within the scope of national law – especially for the reason that EU law has been silent on the matter of issuing visas on humanitarian grounds. Therefore, it would be only within the discretion of the national authorities *themselves* to decide whether a humanitarian visa in a given case should or not be issued. Thus, deciding positively or negatively in this regard would not be in violation of any rules of EU law. As a result, since EU law does not cover humanitarian visas, there was no need to answer the second question posed by Belgium. In other words, the CJEU ruled that the provisions of the EU Charter – in particular Articles 4 and 18 thereof – were not applicable in this case. Finally, the CJEU added that, to conclude otherwise, meant that third-country nationals would be legally allowed to lodge applications for visas based on the Visa Code and to obtain international protection in the Member State of their choice.[567] According to the CJEU, allowing this type of visa application would undermine the general structure of the EU asylum system established by the EU Regulation No. 604/2013 – known as the 2013 Dublin Regulation or Dublin system.[568]

It is worth noting here that during the proceedings of the case at the CJEU, the Advocate General Paolo Mengozzi (AG Mengozzi) had already presented his opinion to the Court before the final decision was concluded.[569] Unlike the CJEU judges, AG Mengozzi had asserted that EU Member States *did* have a positive obligation to issue humanitarian visas under Article 25(1)(a) of the EU Visa

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[565] *Ibid*, para. 43.
[566] According to Article 79(2)(a) of the TFEU, for the purpose of developing a common immigration policy, the EU shall adopt legislation governing the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits.
[567] C-638/16 PPU, *X and X v. État belge* (Belgium), para. 44.
[568] *Ibid*, para. 48.
[569] Article 253 of the TFEU describes the role of the advocate general at the CJEU as an impartial and independent expert to make in open court reasoned submissions on cases, which in accordance with the Statute of the CJEU, require their involvement.

Code, in order to fulfil their positive human rights obligations under Articles 4 and 18 of the EU Charter.[570] As both a practitioner and legal scholar, AG Mengozzi explained that, '[i]t is [...] crucial that, at a time, when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law [...]'.[571] Similarly, some scholars of EU migration law have criticised the CJEU's decision – in spite of being the guardian of the Charter – not to protect the principle of *non-refoulement* and the right to seek asylum under Articles 4 and 18 of the EU Charter.[572] Here, I shall present two arguments against the decision of the CJEU, which provide a clear answer to the main research question of this doctoral dissertation. In this discussion, I shall embed the opinions of AG Mengozzi and the available scholarly criticisms.[573] Moreover, I will apply Dworkin's theory of 'legal interpretivism' to construct an analysis – which is theoretically both in-depth and critical – in order to discover the implications of securitising immigration in the EU upon the right to seek asylum as a fundamental right.[574]

First, as described above, a critical discursive analysis reveals a heavy shadow of securitisation covering immigration. Perhaps, this securitised approach – embedded in EU legislation on immigration and asylum – has pushed the CJEU to maintain the *status quo*. However, why did the Court decide in such a way? Is it only because the law dictates so? The disturbing confrontation here is that, while the EU Charter is, in itself, a primary source of EU Law, why did the CJEU give a heavier weight to EU securitised secondary legislation, such as the infamously dysfunctional Dublin system.[575] The Dublin system is a set of laws – adopted by the EU Regulation No. 604/2013 (the 2013 Dublin III Regulation) – for allocating asylum cases to one of the EU Member States. The predecessors of this Regulation are the Council Regulation (EC) No 343/2003 (the 2003 Dublin II Regulation) and the 1997 Dublin Convention. The Dublin system exists due to this fallacy that all asylum law and practices in the EU are

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[570] Case C-638/16 PPU, *X and X v. État belge* (Belgium), Court of Justice of the European Union (CJEU), Opinion of Advocate General Paolo Mengozzi, delivered on 7 February 2017 (referred to as the 'opinion of AG Mengozzi'), para. 3.
[571] *Ibid*, para. 4.
[572] In this regard, see, for example: Stephanie Law, 'Humanitarian Admission and the Charter of Fundamental Rights', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 77-114.
[573] The opinion of AG Mengozzi in the case C-638/16 PPU, *X and X v. État belge* (Belgium).
[574] For reasons choosing Dworkin's theory of legal interpretivism in this dissertation, see: Section 3.3.
[575] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast), 26 June 2013 (referred to as the '2013 Dublin III Regulation').

harmonised because of the EU common asylum standards allowing asylum seekers to enjoy similar levels of protection in all EU Member States. However, what happen in practice testify to quite the opposite.[576]

Addressing all available knowledge including the empirical data, analytical research, and scholarly work on highlighting the deficiencies in the Dublin system, however, lies beyond the focus of this research. However, since the creation and enforcement of the Dublin system – for over twenty years – the EU Commission has launched numerous amendment proposals trying to 'fix' the inefficiency and dysfunctionality of the system.[577] One of the most cited criticisms is that the application of the Dublin Regulation have added extra layers of bureaucracy to the already lengthy RSD procedures.[578] Because of unduly prolonged asylum procedures, EU Member States have arbitrarily detained asylum seekers to prevent them from moving freely between EU countries (preventing '*secondary movement*'). In particular, this has imposed a heavier burden on the States with external Schengen borders such as Greece and Italy – an extremely challenging situation known as '*environmental or geographical determinism*,' which is highly problematic.[579] This is besides those criticisms highlighting that Dublin transfers have systematically separated the members of immigrant families – in a full violation of their rights to private and family life – and, have infringed the right of immigrants to an appeal and to an

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[576] Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?', in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill, 2016), pp. 101-142.

[577] *Ibid*. Also, see: Steve Peers, 'The Dublin III Regulation', in Steve Peers, Violeta Moreno-Lax, Madeline Garlick, and Elspeth Guild (eds), *EU Immigration and Asylum Law (Text and Commentary) Vol. 3: EU Asylum Law* (2nd edn, Leiden: Brill, 2015), pp. 345-428. Also, see: Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights', in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill, 2016), pp. 160-194.

[578] Evangelia (Lilian) Tsourdi, 'The Emerging Architecture of EU Asylum Policy Insights into the Administrative Governance of the Common European Asylum System', in Francesca Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge; New York: Cambridge University Press, 2020), pp. 191-226, pp. 193-225. In this regard, also see: Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?', in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill, 2016), pp. 101-142.

[579] Niovi Vavoula, 'Databases for Non-EU Nationals and the Right to Private Life: Towards a System of Generalised Surveillance of Movement?', in Francesca Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge; New York: Cambridge University Press, 2020), pp. 227-266. In this regard, also see: Dallal Stevens, 'Asylum Seekers, Detention and the Law: Morality in Abeyance?', in Satvinder Singh Juss, *The Ashgate Research Companion to Migration Law, Theory and Policy* (Oxford; New York: Routledge, 2016), pp. 395-422, pp. 397-399. Moreover, see: Helen O'Nions, *Asylum – A Right Denied: A Critical Analysis of European Asylum Policy* (Farnham: Ashgate Publishing Limited, 2016), pp. 101-109.

effective remedy in the cases of violating their human rights.[580] Some legal scholars and practitioners have raised a concern that although the judicial decisions have, indeed, very clearly demonstrated the system's inherent deficiencies, and despite the fact that '[...] the Dublin system violates fundamental rights in several respects, the tendency is [still] towards its ever more coercive application, regardless of the administrative, financial, and human costs.'[581]

As follows, I shall pose the second criticism against the decision of the CJEU in the case of *X and X v. Belgium*. The main question of the referring Belgian Court was whether Article 25(1)(a) of the EU Visa Code required Member States to issue a humanitarian visa, where a risk of infringement of Articles 4 and/or 18 of the EU Charter or other international obligations existed according to the facts of the case.[582] Instead of responding to this question, the CJEU asserted that, the EU Visa Code did not apply in this case because the Code only covered issuing short-term visas (90-day visas) and not the instances of long-term visas on humanitarian grounds. This interpretation from the facts of the case and from Article 25(1)(a) of the Visa Code seems beyond rational comprehension. Who said that the applicants had applied for a long-term visa? They, indeed, wanted only a short-term visa (up to 90-days validity), which is the subject matter of Article 25(1)(a) of the EU Visa Code. Why, therefore, this Article does not apply to the facts of this case? According to the CJEU, the application was refused because the Court was convinced that the intention of the applicants was to stay beyond 90 days, in order to apply for asylum in Belgium. The CJEU ruled that, although the applicants formally submitted a short-term visa application, their request fell outside the scope of the Visa Code, because in line with the Asylum Procedures Directive (2013/32/EU), applications for international

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[580] In this regard, for example, see: Paul McDonough, Magdalena Kmak, and Joanne van Selm, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' (2008) *European Council on Refugees and Exiles (ECRE)*, pp. 17-24. Also, see: The UNHCR Commentary on the EU Commission's Proposal for a recast of Dublin II Regulation (COM(2008) 820, 3 December 2008) and the EU Commission's Proposal for a recast of the Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin II Regulation (COM(2008) 825, 3 December 2008), available at, <www.refworld.org/docid/49c0ca922.html>. In this regard, also see: Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona, 'Introduction: Refugee and Forced Migration Studies in Transition', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014), pp. 1-14, pp. 3 and 4. Also, see: Ulrike Brandl, 'Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?', in Vincent Chetail, Philippe De Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill, 2016), pp. 143-158.

[581] Elspeth Guild, Cathryn Costello, Madeline Garlick, and Violeta Moreno-Lax, *Enhancing the Common European Asylum System and Alternatives to Dublin* (Brussels: EU Policy Department for Citizen's Rights and Constitutional Affairs, 2015), p. i.

[582] C-638/16 PPU, *X and X v. État belge* (Belgium), para. 28(1).

protection were to be made inside the territory of EU Member States. Allowing the present case, according to the Court, would be allowing third-country nationals to lodge visa applications to seek international protection outside EU territory. The CJEU further stated that, the present case fell within the scope of national law, because no EU measures had been adopted on the basis of Article 79(2)(a) of the TFEU on long-stay visas and residence permits on humanitarian grounds.

Opposing this argument of the Court, Article 25(1)(a) of the 2009 EU Visa Act in clear and plain wordings has recognised the issuance of humanitarian visas. According to this Article, if an element of 'necessity' is diagnosed based on the facts of the case and the circumstances around the claim, the Member State should issue a visa with limited territorial validity. When the Belgian referring Court requested from the CJEU to address the questions in an emergency manner,[583] the latter accepted this request and admitted that, '[…] the applicants in the main proceedings were facing a real risk of being subjected to inhuman and degrading treatment.'[584] The CJEU, itself, accepted that according to the facts at hand in the main proceedings, the applicants were, indeed, in an emergency humanitarian situation. According to the CJEU, the 'element of urgency' justifying the application of Article 107 of Rules of Procedure of the Court had existed in the case, and hence, the Fifth Chamber of the Court requested the case to be assigned to the Grand Chamber.[585] Therefore, ruling that the international obligations of Member States under Article 25(1)(a) of the EU Visa Act do not apply seems an absurd conclusion to reach.

In Chapter 2, Subsection 2.3.1, I broke down the constituting elements of the right to seek asylum. One of the components of this right is that asylum seekers are able to access the territory of host States and to reside on that territory without any violation of other human rights, while the RSD procedure is ongoing. All the components of the right to seek asylum are embedded in Article 18 of the Charter – both as a primary rule of EU law[586] and as one of the founding values and principles of the EU.[587] Having this in mind, the case of *X and X v. Belgium* was an excellent opportunity for the CJEU to stand out as the superior judicial body in charge of protecting EU fundamental rights, and to elaborate on

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583 According to the rules of 'urgent preliminary ruling procedure', under Article 107 of the Rules of Procedure of the Court, Article 107(2) of the Rules of Procedure of the Court of Justice stipulates that in matters of urgency, exceptional procedures shall be applied in addressing the referred question.
584 C-638/16 PPU, *X and X v. État belge* (Belgium), para. 33.
585 *Ibid*, paras 33 and 34.
586 According to Article 6(1) of the TEU, the EU recognises the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties, as primary sources of EU law.
587 The preamble of the Charter.

the right to seek asylum, its composing elements, and the positive obligation of Member States in this regard. Nevertheless, the Court regrettably allowed this chance to slip away by deferring to the Government of Belgium and the EU Commission, while surrendering to the securitised approach of EU law towards immigration.[588] This opportunity was not only to reaffirm and reinforce the position of the CJEU as 'the Guardian' of the Charter, but also it could provide a suitable forum to showcase that there could be an effective, humanitarian, and human rights-based approach to the so-called 'refugee crisis in Europe.'[589] In the same direction, AG Mengozzi advised the Court that the state-of-the-art in Article 25(1)(a) of the EU Visa Code, read in conjunction with Articles 4 and 18 of the EU Charter, had already established the legal grounds for a positive obligation on Member States to issue humanitarian visas.[590]

It is not that the CJEU purposefully or with malicious intentions ignored the fundamental character of the right to seek asylum. In fact, the problem lies with EU law, itself. With creating the category of 'illegal' immigration, EU legislation has taken away any real chance for seeking asylum.[591] In practice, asylum seekers arrive at EU external borders or enter into EU territory without

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[588] Evelien Brouwer also speculates that the CJEU's decision is perhaps political and the Court seems to have just '[…] opted for political inertia and the status quo.' In this regard, see: Evelien Brouwer, 'AG Mengozzi's Conclusion in *X and X v. Belgium* on the Positive Obligation to Issue Humanitarian Visas: A Legitimate Plea to Ensure Safe Journeys for Refugees' (2017) *Centre for European Policy Studies (CEPS) Policy Insights*, ISBN 978-94-6138-588-8. In this regard, Baumgärtel analyses this decision of the CJEU within the framework of 'strategic adjudication' in matters of hard and dilemmatic cases, in which the EU Court makes sure not to shake the legitimacy of the Court in the eyes of the Member States. For more information, in this regard, see: Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge; New York: Cambridge University Press, 2019), pp. 111-130. For a 'strategic litigation' approach toward the case of *X and X v. Belgium* from the perspective of the advocate of the applicants, see: Tristan Wibault, 'Making the Case X&X for the Humanitarian Visa', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 271-282.

[589] Evelien Brouwer, 'AG Mengozzi's Conclusion in *X and X v. Belgium* on the Positive Obligation to Issue Humanitarian Visas: A Legitimate Plea to Ensure Safe Journeys for Refugees' (2017) *Centre for European Policy Studies (CEPS) Policy Insights*, ISBN 978-94-6138-588-8. In this regard, also see: Jean-Yves Carlier and Luc Leboeuf, 'The *X. and X.* case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?', <http://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visas-and-the-genuine-enjoyment-of-the-substance-of-rights-towards-a-middle-way/>. Also, see: Violeta Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part I)', <eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/>. Also, see: Violeta Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part II)', <eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>.

[590] The opinion of AG Mengozzi in the case C-638/16 PPU, *X and X v. État belge* (Belgium), paras 3, 71-108, and 176.

[591] Stephanie Law, 'Humanitarian Admission and the Charter of Fundamental Rights', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 77-114, pp. 86-90.

possessing necessary travel documents. The rejection of humanitarian visas, however, in the case of *X and X v. Belgium* by the Belgian Government and the CJEU out of deference, gave only one message to all asylum seekers: 'either remain in the misery of war and lose your lives, or leave your faith in the hands of smugglers and human traffickers.'[592] In this regard, AG Mengozzi confronted the Court:

> Frankly, what alternatives did the applicants in the main proceedings have? Stay in Syria? Out of the question. Put themselves at the mercy of unscrupulous smugglers, risking their lives in doing so, in order to attempt to reach Italy or Greece? Intolerable. Resign themselves to becoming illegal refugees in Lebanon, with no prospect of international protection, even running the risk of being returned to Syria? Unacceptable.[593]

Using an exclamation mark (!) in judicial decisions or in the official documentation of courts is very rare. However, the case of *X and X v. Belgium* is so disturbingly absurd that AG Mengozzi, in the public version of his opinion, used this mark not once, but twice: Firstly, in paragraph 172 of his opinion:

> [The applicants] were obliged to obtain an appointment at the consulate of the Kingdom of Belgium in Lebanon, a prerequisite for being granted safe passage of 48 hours on the Lebanese territory after May 2015, travel hundreds of kilometres in a country at war and in chaos to arrive in Beirut and present themselves in person at that consulate, in order to satisfy the requirement of the latter and, finally, to return to Syria to wait for the decision of the Belgian authorities![594]

Secondly, in paragraph 173 of the same document:

> [...] as I have already highlighted, refusing to issue a visa with limited territorial validity in the circumstances of the main proceedings ultimately amounts to directly encouraging the applicants in the main proceedings, in order to be able to claim the right to international protection on the territory of a Member State, to trust their lives with those against whom the EU and its Member States are currently deploying, particularly in the Mediterranean, considerable operational and financial efforts to curb and dismantle criminal activities![595]

Perhaps, in the light of the decision of the CJEU in this case, someone should remind EU politicians and judiciary that, 'imagine yourself not had won the lottery of life by being born and living in post-WW Europe, is this the message you wanted to receive from those, who could offer you safe homes?'[596] My

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[592] The opinion of AG Mengozzi in the case C-638/16 PPU, *X and X v. État belge* (Belgium), paras 150, 152, 157, 159, 173, and 175.
[593] *Ibid*, para. 157.
[594] *Ibid*, para. 172.
[595] *Ibid*, para. 173.
[596] With regard to the role of judges in the realisation of fundamental rights in politically sensitive cases, see: Jean-Yves Carlier, 'Conclusion: The Role of the Judge in Controlling the Genuine Enjoyment of the

intention here is not to raise an emotionally invoked hypothetical solution. Rather, I seek to convey that EU law is not silent on the matter of issuing humanitarian visas; the CJEU chose to pretend otherwise.[597] In addition to the CJEU in denying humanitarian visas, it is worth mentioning that the ECtHR in the case of *M.N. and Others v. Belgium* (with similar facts to *X and X v. Belgium*) found the application inadmissible for the reason that the territorial jurisdiction of the Court could not be established under Article 1 of the ECHR.[598]

Now, I will apply Dworkin's theory of legal interpretivism to offer some insights into the matter and answer the main research question of this dissertation. The theory of 'legal interpretivism' could be applicable here to criticise the decision of the CJEU in the case of *X and X v. Belgium* with regard to Article 18 of the EU Charter. The part of Dworkin's theory of legal interpretivism, which could frame the behaviour and inaction of the CJEU into a theoretical perspective, is a 'normative theory of adjudication.' Before analysing the case of *X and X v. Belgium* through this theoretical framework, I should elaborate on Dworkin's theory of legal interpretivism as a critic of legal positivism. In other words, legal positivism is a theoretical model conceptualising law merely as a system of rules by ignoring other existing legal norms and standards such as principles and policies.[599]

Dworkin opposes the positivists' definition of law as only 'rules' by elaborating on the central propositions of this definition, which were provided by the most influential legal positivists of all time – such as John Austin and H.L.A. Hart.

Substance of the Rights', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 367-371.

[597] For more information on the existence of multiple channels available in EU law for humanitarian admission to the EU, see: Luc Leboeuf and Marie-Claire Foblets, 'Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 11-45, pp. 14-19. On the practices of the states of Italy, Germany, and Belgium, see the following sources, respectively: Katia Bianchini, 'Humanitarian Admission to Italy through Humanitarian Visas and Corridors', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 157-198. Pauline Endres de Oliveira, 'Humanitarian Admission to Germany – Access vs. Rights?', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 199-224. Serge Bodart, 'Humanitarian Admission to Belgium', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 225-237. However, for a research on identifying the gaps and inconsistencies in the EU's humanitarian visa scheme see (which gives more reason for the CJEU to make a firm human rights-based stand in this regard): Ulla Iben Jensen, *Humanitarian Visas: Option or Obligation?* (Brussels: EU Policy Department for Citizen's Rights and Constitutional Affairs, 2014).

[598] *M.N. and Others v. Belgium*, Application No. 3599/18, European Court of Human Rights, Grand Chamber, Decision (5 May 2020), paras 96-142.

[599] *Ibid*, pp. 22 and 82-84.

The nineteenth-century legal philosopher John Austin defined law as a 'set of rules,' and according to him, 'exactly these rules are exhaustive of law.'[600] Accordingly, if rules do not cover a case, the law in not applicable in that case at all. About a century later, the British legal philosopher H.L.A. Hart offered a more complex definition of law. Referring to Hart, law is a 'set of rules and *vice versa*, i.e. rules are general commands of law, which are "binding" on the members of the community for two reasons: first, a general acceptance by the community, and second, being enacted based on secondary rules, and thus, being valid.'[601] As opposed to these definitions, a 'normative theory of adjudication'[602] distinguishes between 'rules' and 'principles' as different functional units or forms of law, all existing within a legal system, on the one hand, and 'policy' as a considerations that should be taken into account when applying law in practice, on the other.[603] In Dworkin's definition, 'principle' is a 'standard that is to be observed by the members of the community because it is a requirement of "justice," "fairness," and "morality." Reversely, policy is a 'standard that sets out a goal to improve the "economic," "political," or "social" well-being of the community.'[604]

Within the reign of legal interpretivism, after distinguishing norms of law into rules, principles, and policies, we should apply the Hohfeldian theory of 'legal rights.'[605] According to this theory, collective goals – as matters of policies – might be sufficient to provide reasons for a political decision. However, these goals cannot justify a particular disadvantage against individual rights, because the latter is a matter of principle.[606] Similar to Hohfeld, Dworkin asserts that

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[600] John Austin, *The Province of Jurisprudence Determined* (New York: Cambridge University Press, 1995), pp. 18-37.
[601] Herbert Lionel Adolphus (H.L.A.) Hart, *The Concept of Law* (3rd edn, Oxford: Oxford University Press, 2012), pp. 100-110.
[602] With regard to Dworkin's further divisions in the forms of law into rules, principles (or values), and policy, see: Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. 22-31. Also, see: Ian McLeod, *Legal Theory* (6th edn, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2012), pp. 113-135. In this regard, also see: Scott J. Shapiro, 'The "Hart–Dworkin" Debate: A Short Guide for the Perplexed', in Arthur Ripstein (ed.), *Ronald Dworkin* (New York: Cambridge University Press, 2007), pp. 22-55. Also, see: David Dyzenhaus, 'The Rule of Law as the Rule of Liberal Principle', in Arthur Ripstein (ed.), *Ronald Dworkin* (New York: Cambridge University Press, 2007), pp. 56-81, pp. 56-60.
[603] Following Dworkin, other contemporary scholars of jurisprudence have elaborated on a 'normative theory of adjudication'. For more information in this regard, see: Robert Samuel Summers, *Form and Function in a Legal System: A General Study* (New York: Cambridge University Press, 2006), pp. 3-36. In this regard, for example, see: Michael D. Bayles, *Principles of Law: A Normative Analysis* (Dordrecht: D. Reidel Publishing Company, 1987), pp. 1-17.
[604] Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), p. 22 and 82-84.
[605] In this regard, see Subsection 2.3.1 under Chapter 2 on the Hohfeldian theory of rights.
[606] Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. xi-xv and pp. 90-123.

individual rights are political 'trumps' – meaning advantages or privileges – held by individuals.[607] Therefore, a collective goal is never sufficient to deny individual rights or to impose some loss or injury upon them.[608]

As mentioned above, a normative theory of adjudication distinguishes between arguments of rules, principles, and policy, while defending that judicial decisions based on the arguments of principles are compatible with the democratic principles of a democratic society. Whenever courts face hard cases – meaning legally and politically challenging and controversial cases – judges should first distinguish between rules, principles, and matters of policies. Thereafter, they should give a heavier weight to principles – upon which the community and its values of fraternity were established.[609]

Considering the differentiation between rules and principles within a legal system, combined with the depictions of the theory of rights within legal interpretivism, it is even more important that when the law seems to be 'silent,' 'unclear,' or 'ambiguous,' the Court considers the founding values and principles of the community in interpreting the law. Amongst many values, upon which the EU community is established, we should remember the values of the inviolability of human dignity and the importance of protecting human rights – formulated as fundamental rights under the 2000 EU Charter.

In this regard, Dworkin's theory of legal interpretivism guides us towards the idea that, 'legal reasoning is an exercise in constructive interpretation,'[610] which creates an inseparable link between the law in books and the law in practice. To Dworkin, 'law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.'[611] To elaborate further, he continues, 'once we identify and distinguish the diverse and often competitive dimensions of political value, the one interpretation that makes the law's story better in the whole, than any other can,' we have managed to define the law.[612] Yet, the question is what this 'better conception or story of law' could be. Relying on Dworkin, this 'better conception of law' has its foundations deeply rooted in 'a more general politics of "integrity,"

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[607] Unlike Hohfeld, Dworkin justifies the essential nature of individual rights based on various values these rights serve, which relates to Dworkin's 'rights as trumps' theory as justification of rights against other countervailing considerations. In this regard, see: Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. 308 and 309.
[608] *Ibid*, pp. 90 and 91.
[609] Ronald Dworkin, *Taking Rights Seriously* (London; New York: Bloomsbury Academic, 2013), pp. xii and 84-86.
[610] Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing Ltd, 1998), pp. vii, 52, and 53.
[611] *Ibid*, pp. vii and 176-224.
[612] *Ibid*, pp. vii, viii, and 225-232.

"community," and "fraternity."[613] This is what Dworkin in general terms calls 'law as integrity,' within his theorisation of legal interpretivism.

Applying Dworkin's theory of 'law as integrity' to the decision of the CJEU in the case of *X and X v. Belgium* brings us to this conclusion that Article 18 of the EU Charter has become completely meaningless. The reason for drawing this conclusion is that, in this particular case, the CJEU dismissed the integrity of EU law with regard to protecting human rights as the founding principle of the EU community. If we were to assume that, the case of *X and X v. Belgium* was a 'hard case,' in which the law is absent, contradictory, ambiguous, or unclear,[614] Dworkin's thesis of 'law as integrity' could have been a guiding tool for the CJEU to decide on that case. Instead, the Court avoided providing any answer to the questions and merely repeated what Member States had submitted in their statements. Fourteen EU Member States joined the Belgium Government during the hearing at the Court, and presented their oral arguments supporting the position of Belgium, stating that the issuance of a humanitarian visa is not a matter of EU law and it is strictly within the power and discretion of States. To pressurise the Court further, the Czech Government, for example, warned the CJEU that its judgment to the effect that the Member States are obliged to issue humanitarian visas under Article 25(1)(a) of the Visa Code would cause seriously 'fatal' consequences for the EU and its Member States.[615]

The duty of the CJEU was to decide the case before it, even though it required the extension or adaptation of a principle or the creation of a new law to meet justice. 'Law as integrity' guides us to the point that 'policy considerations will have to be weighed; but the objective of judges is the formulation of principle,' and 'if principle inexorably requires a decision, which entails a degree of policy risk, the court's function is to adjudicate according to [the] principle, leaving policy curtailment to the judgment of the Parliament.'[616] This was not even the case in *X and X v. Belgium*, because a clear law existed on the matter, i.e. Article 25(1)(a) of the EU Visa Code. The CJEU should have started its reasoning from the baseline of the existing EU principles and values, and then, moved towards finding a constructive interpretation; an interpretation of EU law consistent

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[613] *Ibid*, pp. viii and 206-215.
[614] In my humble opinion, which seems to be in line with that of AG Mengozzi asserted in paragraph 170 of his Opinion, the case of *X and X v. Belgium* is not even a hard case. The law is present and quite clear; it is obvious with a literal reading that the EU Visa Act has recognised the existence and necessity of issuing humanitarian visas under Article 25(1)(a).
[615] The opinion of AG Mengozzi in the case C-638/16 PPU, *X and X v. État belge (Belgium)*, paras 5, 7, 8, and 42.
[616] Denise Réaume, 'Is Integrity a Virtue? Dworkin's Theory of Legal Obligation' (1989) 39(4) *The University of Toronto Law Journal*, pp. 380-409, p. 385.

with the principles recognised by the EU community under the Treaties and the Charter. After all, we should keep in mind that the EU is a community, which claims to be constructed, established, and developed based on the shared values of respect for human dignity, human rights, and the claim that its purpose is to promote all these values in its relations with the non-EU World.[617] Are these merely nice words on paper? The EU community might pretend that these values are at the bedrock of its existence; however, the practices of its institutions and Member States tell a rather different story. Considering the competence of EU in the field of asylum and the nature of right to seek asylum as a fundamental right (Article 18 of the Charter), the CJEU had in *X and X v. Belgium* the perfect position – even the duty – to hold Belgium responsible for the material scope and the substance of the right to seek asylum.[618]

In conclusion, even though the right to seek asylum is theoretically a fundamental right based on Article 18 of the EU Charter, the securitisation of immigration in the EU has made this right in practice 'meaningless.' As the ECtHR reiterated before and quoted by AG Mengozzi, '[…] the purpose of the Charter is to protect rights, which are not theoretical or illusory, but real and effective.'[619] The principle of effectiveness – that the law must be practical and effective, not hypothetical, theoretical, or illusory – is a widely accepted legal principle in all legal systems around the World, not only within contemporary legal systems, but also in Roman law. The equivalence of the principle of effectiveness in Roman law is the phrase *lex imperfecta*,[620] which dictates that the effectiveness of law is the 'expressive function of law,'[621] without which the law becomes meaningless – as if it never existed.[622]

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[617] The opinion of AG Mengozzi in the case C-638/16 PPU, *X and X v. État belge* (Belgium), paras 165-168.

[618] Jean-Yves Carlier, 'Conclusion: The Role of the Judge in Controlling the Genuine Enjoyment of the Substance of the Rights', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 367-371, pp. 369-371.

[619] In this regard, see: *Airey v. Ireland*, Application No. 6289/73, European Court of Human Rights, The Chamber Judgment (9 October 1979), para. 24. In this regard, also see: *Soering v. United Kingdom*, Application No. 14038/88, European Court of Human Rights, Plenary Decision (07 July 1989), para. 87. And, see: *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, European Court of Human Rights, Grand Chamber Judgement (12 July 2001), para. 45. Also, see: *Gäfgen v. Germany*, Application No. 22978/05, European Court of Human Rights, Grand Chamber, Decision (1 June 2010), para. 123. Also, see: *Murray v. The Netherlands*, Application No. 10511/10, European Court of Human Rights, Grand Chamber, Decision (26 April 2016), para. 104. In this regard, also see: The opinion of AG Mengozzi in the case C-638/16 PPU, *X and X v. État belge* (Belgium), para. 158.

[620] Thomas A. McGinn, 'The Expressive Function of Law and the *Lex Imperfecta*' (2015) 11 *Roman Legal Tradition*, pp. 19-41.

[621] *Ibid*, pp. 1-19.

[622] Clive Parry, John P. Grant, and J. Craig Barker, *Parry & Grant Encyclopaedic Dictionary of International Law* (New York: Oxford University Press, 2009), p. 177.

Henceforth, the obligation of EU Member States to provide legal paths for asylum seekers to access the asylum procedures is an obligation of means, not one of result. This obligation fits very well within the principle of state sovereignty and respect for the discretion of the state whether to grant international protection or not. Although being a prerequisite to receiving international protection, the right to seek asylum is very different from obtaining refugee status. Therefore, without legal safeguards and channels to seek asylum, no legal regime for protecting refugees would be plausible. The frequent cases of lives lost at sea while seeking to enter EU territory for asylum makes the case for humanitarian visas even more valid.[623] This ironic dilemma is well described by FitzGerald as a 'catch-22' situation for refugees – meaning that rich democracies are sending a very clear message to asylum seekers that, 'we will not kick you out if you come here [because of obligations under *non-refoulement*], but we will not let you reach here.'[624]

4.4. CONCLUSION

In this chapter, I critically studied EU law and practice with regard to the tension between the right to seek asylum and the obligation to safeguard the security of the EU. For that purpose, the EU asylum *acquis* and the approach of the CJEU in the case of *X and X v. Belgium* on Article 18 of the EU Charter were critically examined. This study showed that no real enforcement exists, in practice, for guaranteeing the right to seek asylum under the ambit of Article 18 of the EU Charter. This Article refers to the 1951 Refugee Convention and its Protocol of 1967; however, EU secondary legislation has categorised asylum seekers as 'illegal immigrants.' This is against the provision of 'non-penalisation,' stipulated under Article 31 of the 1951 Refugee Convention and its Protocol. Therefore, the right to seek asylum seems to be a merely theoretical right, when it comes to EU law and practice, especially under the jurisdiction of the CJEU.

The hypothesis in Chapter 4 was that, as the result of the securitisation of immigration in EU law and in the practice of the CJEU, no effective right to seek asylum remains any longer in the EU. In this chapter, I showed that due to a lack of proper legal mechanisms to gain access to EU territory for seeking asylum – which, in itself, is a result of highly securitised immigration in the EU and associating it with transnational crimes such as human trafficking and terrorism – the right to seek asylum appears to have become an impractical right. In

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[623] In this regard, see: Eugenia Relano Pastor, 'EU Initiatives on a European Humanitarian Visa', in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Baden-Baden: Hart Publishing, 2020), pp. 341-365.
[624] David Scott FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (New York: Oxford University Press, 2019), pp. 9 and 10.

addition, both EU legislation and the practice of the CJEU – in the way that it discriminates against undocumented immigrants – is together eroding the fundamental nature of the right to seek asylum. The EU legislator has deliberately securitised a certain category of immigrants and the CJEU judges have decided in the same direction – out of deference to the highly securitised approach of the legislator and Member States. Therefore, securitisation has become the backbone of policymaking, legislation, and judicial reasoning in the EU.

Overall, the EU has securitised immigration and repeats this process continuously by the 'speech-act' at all levels of legislation (primary and secondary) and practice (Member States, policymaking, and judiciary). Not taking the right to seek asylum seriously as a fundamental right is the consequence of this speech-act. When EU law perceives a category of immigrants as a security threat – for example, through associating them with terrorism – it is inevitable that the CJEU would not want to challenge the rule. After all, there are wide national parameters and high stakes for EU Member States to safeguard their national security and the internal security of EU; hence, the national governments would have full power and a wide range of discretion in deciding on their asylum policies and legislation.

The legislating bodies within the EU and its Member States have managed to securitise the EU judiciary. A politician can securitise immigration as their personal or party's political point of view. However, when securitisation becomes the law or finds its way to the court through judicial reasoning, the situation becomes different. This is no longer merely a matter of securitised politics, but rather a serious precedent in creating an *institutionally securitised judiciary*. The law, which is supposed to be interpreted according to the values of the community (referring to Dworkin's theory of legal interpretivism and the integrity of the law), becomes the subject of politics. Accordingly, an issue, which needed attention from an external political body – as was certainly in the case of *X and X v. Belgium* – was instead decided by the Court through recognising the security politics of that body, but not based on the values and principles of the community.

5. THE IMPLICATIONS OF THE SECURITISATION OF IMMIGRATION UPON THE PRINCIPLE OF *NON-REFOULEMENT*

5.1. INTRODUCTION

In this chapter, I address what the securitisation of immigration would mean for the right to seek asylum, when the very foundation of this right, meaning the principle of *non-refoulement*, is under attack. Without any doubt, it would be impossible to imagine the right to seek asylum being crystallised into reality if the principle of *non-refoulement* is not intact. Based on this explanation, Section 5.2 analyses the position of the principle of *non-refoulement* as a customary rule of international law in the current legal framework of protecting refugees. Thereafter, Section 5.3 discusses in great detail how the principle of *non-refoulement*, when combined with the absolute nature of prohibition of torture and other inhuman or degrading treatment or punishment, has elevated the prohibition of *refoulement* to a peremptory norm of customary international law - known as *jus cogens*.

Having these foundations in mind, Section 5.4 encompasses a detailed critical analysis of the securitisation of immigration on the **absolute** and **non-derogable** prohibition of *refoulement* within the jurisprudence of the ECtHR under the ambit of Article 3 of the European Convention on Human Right. The context within which this critical analysis takes are the cases of expulsion to torture or other forms of ill-treatments including inhuman or degrading treatment or punishment. The security pressure of combating terrorism at whatever cost has facilitated the Article 3 expulsions by legitimising the use of diplomatic assurances. At the end, this critical case law analysis poses the important question that, if this continues to circumvent the absolute and non-derogable prohibition of *refoulement* to torture and other inhuman or degrading treatment or punishment, will the right to seek asylum be able to survive this securitisation environment and preserve its position as a real and effective fundamental right.

5.2. THE FORMATION OF THE PRINCIPLE OF *NON-REFOULEMENT AS* A CUSTOMARY NORM OF INTERNATIONAL LAW

In Chapter 2 under Subsection 2.2.2, I elaborated on the formation and creation of the concept of '*refouler*,'[625] within the context of a legal regime on refugee protection. The First World War, together with the Russian Revolution of 1917, and several other wars in Europe (such as the Greek and Armenian Genocides), resulted in the displacement of over seven million people. The social innovation of Nansen in creating identification and travel documents (known as the Nansen Passport) for displaced people and asylum seekers gave a momentary relief to the so-called '*refugee problem*.' After Nansen passed away, the League of Nations decided to adopt the very first international legal agreement or multilateral treaty in the form of a 'Convention,' addressing the issue of refugees, meaning the '1933 Refugee Convention.'[626] For the very first time within the history of international refugee law, the term '*refoulement*' was mentioned under Article 3 of this Convention.[627] According to this provision, none of the parties to the 1933 Refugee Convention could '... remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.' Under the same light, Article 33 of the 1951 Refugee Convention, entitled 'Prohibition of Expulsion or Return ("*Refoulement*"),' in its first paragraph, stipulates:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

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[625] The term '*refouler*' is a French verb, translated in English language as 'to force back,' 'to turn away,' or 'turn back.' With regard to this definition, see: Collins Dictionary, Collins Dictionary, 'refouler', <www.collinsdictionary.com/dictionary/french-english/refouler>. For more information in this regard, also see: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (New York: Oxford University Press, 2007), pp. 201 and 202.

[626] James C. Hathaway, 'Refugees and asylum', in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge; New York: Cambridge University Press, 2012), pp. 177-204, pp. 177 and 178. In this regard, also see: James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33(2) *The International and Comparative Law Quarterly*, pp. 348-380, pp. 348-350.

[627] James C. Hathaway, 'Refugees and asylum', in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge; New York: Cambridge University Press, 2012), pp. 177-204, p. 178.

> threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[628]

As of today, the 1951 Refugee Convention and its 1967 Protocol are the key legal sources for the protection of refugees. With 149 State Parties to either, or both, they define the term 'refugee' and outline the rights of refugees, as well as the legal obligations of Member States to protect them.[629] The very core principle, upon which the 1951 Refugee Convention and its Protocol and all other legal frameworks protecting refugees at international, regional, and national levels, are based, is the principle of *non-refoulement*. According to this principle, a refugee should not be returned to a country where they face serious threats to their life or freedom. This is now considered as a rule of customary international law. The prohibition of *refoulement* – better known as the principle of *non-refoulement* – is not only a matter of treaty law, but is also widely recognised and accepted as a customary norm of international law.[630] Article 38(1) of the Statute of the International Court of Justice (ICJ Statute) enumerates the sources of international law. Accordingly, the function of the International Court of Justice (ICJ) is to decide on disputes that were referred or submitted to it 'in accordance with international law,' with the following sources:

> **a.** international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> **b.** international custom, as evidence of a general practice accepted as law;
>
> **c.** the general principles of law recognized by civilized nations;
>
> **d.** 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.[631]

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[628] In this regard, see: Article 33(1) of the Convention relating to the Status of Refugees and its 1967 Protocol, concluded 28 July 1951, entered into force 22 April 1954, U.N.T.S. Vol. 189, p. 137 (referred to as the '1951 Refugee Convention').

[629] The UN Refugee Agency (UNHCR), 'The 1951 Refugee Convention', <www.unhcr.org/1951-refugee-convention.html>.

[630] *Ibid.* In this regard also, see: Walter Kälin, Martina Caroni, and Lukas Heim, 'Article 33, para. 1 of 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 1327-1395, p. 1395. Also see: Andreas Zimmermann and Philipp Wennholz, 'Article 33, para. 2 of the 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 1397-1423, p. 1411. Also see: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (New York: Oxford University Press, 2007), pp. 345-348. Also, see: Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 87-177, pp. 96 and 140-149.

[631] Article 38 of the Statute of the International Court of Justice, United Nations, 18 April 1946.

Subparagraph 'b' of Article 38(1) is the stipulation of customary norms or the customary rules of international law, with the definition that international customs are '**a general practice accepted as law**' by different actors of the international community. Correspondingly, customary norms or rules of international law have two main constituting and distinguishing characters: the first is the material element of a 'general practice,' and the second is the mental element of 'being accepted as law,' better known as the '*opinio juris*.'[632] General practice refers to material acts performed by states or other international actors. These acts may be in the form of diplomatic correspondences, policy statements, press releases, the opinions of government legal advisors, the official manuals on legal questions, executive decisions and practices, orders issued to military forces, comments by governments on the International Law Commission (ILC) drafts and accompanying commentaries, various forms of legislation, international and national judicial decisions, recitals in treaties, the practice of international organs, and resolutions relating to legal questions in the UN organs (notably, UNGA resolutions).[633]

The phrase '*Opinio juris*' is the shortened form of the Latin expression '*opinio juris sive necessitatis*,' meaning 'an opinion of law or necessity.' A court or tribunal could confer on the existence of *opinio juris* in matters of customary law by referring to the existence of the element of general practice, or from the existence of scholarly consensus, or from its own or other tribunals' previous deliberations in existing decisions.[634] Referring to the well-established jurisprudence of the ICJ with regard to the customary rules of international law, these types of rules have – by their very nature – an equal force on all members of the international community, and therefore, they could not be subjected to unilateral disobediences based on the will of a single member. For example, in the *North Sea Continental Shelf* cases, while deciding on maritime delimitation between Germany and Denmark, on the one hand, and Germany and the

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[632] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, New York: Oxford University Press, 2019), pp. 21 and 22.
[633] *Ibid.* In this regard, also see: Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge; New York: Cambridge University Press, 2017), pp. 53-62. Also, see: Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge: Cambridge University Press, 2010), pp. 6 and 7.
[634] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, New York: Oxford University Press, 2019), pp. 21-25. Also, see: Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge; New York: Cambridge University Press, 2017), pp. 62-66. In this regard, also see: Alain Pellet, 'Article 38', in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, and Christian J. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford: Oxford University Press, 2012), pp. 731-870, pp. 812-832. Also, see: Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge: Cambridge University Press, 2010), pp. 7 and 8.

Netherlands, on the other, the ICJ ruled on the binding nature of the 'principle of equidistance' on the virtue of a customary norm of international law.[635]

Nevertheless, the jurisprudence of the same court has accepted to exclude those members of the international community that, from the very beginning of the formation and adaptation of a particular custom, have objected to its application consistently and persistently. In international law, this particular member of the international community is known as a 'persistent objector.'[636] In this regard, for instance, the ICJ in the case of *Anglo-Norwegian Fisheries* ruled that Norway had been a 'persistent objector,' when it came to the application of the customary ten-mile rule relating to straight base-line to the Norwegian coast; therefore, the UK's claim over the territorial waters of Norway was dismissed.[637]

The principle of *non-refoulement* – as provided for under Article 33(1) of the 1951 Refugee Convention – has been the founding principle of international refugee law and the backbone of the right to seek asylum. This principle has not only shaped the construction of the current refugee legal framework and the right to seek asylum, but it also has had a great influence on the prohibition of forcible and arbitrary returns within the context of extradition law.[638] Extradition is the formal and legally regulated form of transferring an individual suspected or convicted of committing a crime from one country to another. The country that requests deportation is the 'requesting state' and the country within whose jurisdiction the individual is found is the 'sending state.' Within the rules of international law and international relations, this act of transferring through legal channels takes place by signing either bilateral or multilateral treaties known as extradition treaties. Therefore, extradition is a formal transfer

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[635] *Germany v. Denmark and the Netherlands* (*North Sea Continental Shelf*) [1969], Judgments [1969] ICJ 1; ICJ Reports 1969, p 3; [1969] ICJ Rep 3, 20 February 1969 (referred to as the 'North Sea Continental Shelf' cases), paras 70-74.

[636] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, New York: Oxford University Press, 2019), pp. 26 and 27. In this regard, also see: Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59(3) *International and Comparative Law Quarterly*, pp. 779-802, pp. 780-782. For a full account on the criteria of the persistent objector rule, see: James A. Green, *The Persistent Objector Rule in International Law* (New York: Oxford University Press, 2016), pp. 57-185.

[637] *United Kingdom v. Norway* (*Anglo-Norwegian Fisheries*) [1951], Judgments [1951] ICJ 3; ICJ Reports 1951, p 116; [1951] ICJ Rep 116, 18 December 1951 (referred to as the '*Anglo-Norwegian Fisheries*' case). For more information in this regard, see: Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (6th edn, New York: Oxford University Press, 2016), pp. 33, 334, 358-359, and 362.

[638] For more information with regard to the definitional aspects and historical development of extradition law, see the following two sources, respectively: John A. E. Vervaele, 'Rendition, Extraterritorial Abduction, and Extraordinary Rendition', <www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0171.xml>. Also, see: Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions* (Leiden: Martinus Nijhoff Publishers, 2006), pp. 1-11.

procedure governed under the laws of treaties.[639] Within the context of extradition law, not only has there been no state to be recognised as a persistent objector to the principle of *non-refoulement*, but also the consensus over it – as reflected in various legislation and legal instruments – has earned this principle the position of a customary norm of international law. Therefore, all states in the World are bound by this principle, regardless of whether they have signed the 1951 Refugee Convention or any other regional refugee law instruments.[640]

Nonetheless, it is pertinent to mention here that even though the prohibition of *refoulement* has the position of a customary norm of international law, the application of this principle within the ambit of Article 33 of the 1951 Refugee Convention is not absolute. The second paragraph of this Article, meaning Article 33(2), imposes an exception to the applicability of the principle of *non-refoulement* within the context of refugee protection provided under the 1951 Refugee Convention. This paragraph reads:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[641]

As explained in Chapter 3 of this dissertation, considering the ambiguities embedded in the concept of national security, however in practice states do hold, in fact, the upper hand and a wide margin of appreciation in defining what their matters of national security would be. However, it should be noted that since Article 33(2) of the 1951 Refugee Convention is an exceptional clause to the general rule of *non-refoulement*, it should be interpreted very narrowly and by carefully assessing the circumstances of a particular individual case.[642] As some refugee law scholars have advised, the type of danger to national security targeted by Article 33(2) of the 1951 Refugee Convention needs to be of a 'qualified nature,' – in the sense that it should factually and in reality constitute a 'serious, grave, and immediate threat' to the very existence of the country.[643]

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[639] Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions* (Leiden: Martinus Nijhoff Publishers, 2006), pp. 1-11.
[640] Walter Kälin, Martina Caroni, and Lukas Heim, 'Article 33, para. 1 of 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 1327-1395, p. 1395. In this regard, also see: Vincent Chetail, *International Migration Law* (Oxford: Oxford University Press, 2019), pp. 119-124.
[641] Article 33(2) of the 1951 Refugee Convention.
[642] Paul Weis, *Commentary on the 1951 Refugee Convention: The Travaux préparatoires Analysed* (Geneva: UN High Commissioner for Refugees (UNHCR), 1990), pp. 341-343.
[643] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection*

The *travaux préparatoires* of this article reveals that the representatives of some governments such as the UK, France, and Sweden, during their plenipotentiary negotiations on this Convention, had emphasised that the right to seek asylum was a 'sacred right' based on 'humanitarian reasons;' hence, no one should be allowed to 'abuse' this right.[644] In order to achieve this purpose, they suggested that the principle of proportionality should always be applied to cases in which the questions of the protection of asylum seekers and the expulsion of individuals for the matter of national security meet at a junction and clash against each other.[645] In this regard, the proportionality test suggested was to cover the following considerations:

> (a) the seriousness of the danger posed to the security of the country;
>
> (b) the likelihood of that danger being realized and its imminence;
>
> (c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;
>
> (d) the nature and seriousness of the risk to the individual from *refoulement*;
>
> (e) whether other avenues consistent with the prohibition of *refoulement* are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.[646]

Known as an exception to the prohibition of *refoulement* within the context of the Convention's refugee protection system, Article 33(2) of the 1951 Refugee Convention resonates very much with the refugee exclusion clauses stated under Article 1(F) of the same document. According to the latter provision, the protection offered by the 1951 Refugee Convention is not applicable to an applicant, with respect to whom there are **serious reasons** for considering that the person has committed a 'crime against peace,' a 'war crime,' or a 'crime against humanity' as defined in other international instruments.[647] In addition,

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in International Law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), pp. 87-177, pp. 134-138.

[644] Paul Weis, *Commentary on the 1951 Refugee Convention: The Travaux préparatoires Analysed* (Geneva: UN High Commissioner for Refugees (UNHCR), 1990), pp. 343 and 344.

[645] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 87-177, pp. 137 and 138. In this regard, also see: Paul Weis, *Commentary on the 1951 Refugee Convention: The Travaux préparatoires Analysed* (Geneva: UN High Commissioner for Refugees (UNHCR), 1990), pp. 325-337.

[646] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 87-177, pp. 137 and 138. In this regard, also see: Paul Weis, *Commentary on the 1951 Refugee Convention: The Travaux préparatoires Analysed* (Geneva: UN High Commissioner for Refugees (UNHCR), 1990), pp. 343 and 344.

[647] Article 1(F)(a) of the 1951 Refugee Convention.

the same exclusion is imposed on someone who has committed a 'serious non-political crime outside the country of refuge prior to [their] admission to that country as a refugee,'[648] and who has been guilty of acts contrary to the purposes and principles of the United Nations.[649]

In spite of apparent similarities between Article 1(F) and Article 33(2) of the 1951 Refugee Convention in excluding an asylum seeker from 'refugee-hood' or from being granted the 'refugee status,' and notwithstanding the fact that the standards of proof under both Articles meet the same threshold, the grounds for exclusion in these Articles are essentially different.[650] The English version of the 1951 Refugee Convention has used the phrase 'serious reasons' under Article 1(F), on one hand, and the phrase 'reasonable grounds' under Article 33(2), on the other. However, the original version of this instrument, which was written in French, has used exactly the same wordings – '*des raisons sérieuses*'– for the standards of proof under both Articles. Therefore, it is accepted that the standards of proof under both provisions are the same.[651] This difference includes both the scope of application and the criteria, which are required for exempting an individual from refugee protection.[652] In this sense, Article 1(F) of the 1951 Refugee Convention is an **exclusion clause**. This means that to be both *de facto* and *de jure*, a refugee, an applicant must meet all the inclusion criteria mentioned under Article 1(A)(2) of the 1951 Refugee Convention, and at the same time must be excluded from the provisions of Article 1(F) of the same Convention. Therefore, a person, who meets the inclusion criteria under Article 1(A)(2), but holds one of the exclusion criteria under Article 1(F) is not a refugee – neither in a factual nor legal sense. In other words, this individual does not meet the Refugee Convention's *ratione personae* scope of application.

Studying the *travaux préparatoires* of the 1951 Refugee Convention shows that Article 1(F) of the Convention was adopted to set aside non-political crimes or

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[648] *Ibid*, Article 1(F)(b).
[649] *Ibid*, Article 1(F)(c).
[650] James C. Hathaway, 'Refugees and asylum', in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge; New York: Cambridge University Press, 2012), pp. 177-204, p. 190.
[651] Andreas Zimmermann and Philipp Wennholz, 'Article 1 F of the 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 579-610, pp. 579 and 589-591. Also, see: Andreas Zimmermann and Philipp Wennholz, 'Article 33, para. 2 of the 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 1397-1423, pp. 1413-1415.
[652] Andreas Zimmermann and Philipp Wennholz, 'Article 1 F of the 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 579-610, pp. 589-591.

crimes of general nature from political offences, because as a matter of general principle of international law, extradition treaties should not cover offences of a political nature.[653] Nevertheless, in the case of Article 33(2) of 1951 the Refugee Convention, the applicant is *de facto* a refugee – meaning that, in fact, the person is a refugee – but the individual is not *de jure* a refugee – meaning that they cannot benefit from the rights and protections aimed at refugees under this Convention. The reason for not being able to benefit from the legal protection provided under the 1951 Refugee Convention is that the individual falling under Article 33(2) shall be subjected to a return or expulsion, contrary to the prohibition of *refoulement* as stipulated under Article 33(1) of the Convention.

Referring to the European legal system of refugee protection, the 2004 EU Qualification Directive – as the main refugee protection instrument in the EU and an equivalent to the 1951 Refugee Convention – has vastly duplicated all the provisions of the Convention. However, the 2004 EU Qualification Directive has not made any distinction between the exclusion clause and being a threat to the national security of the state as an exceptional ground to the principle of *non-refoulement*. Article 17 of the 2004 EU Qualification Directive, entitled 'Exclusion,' has combined all the items stipulated under both Article 1(F) and Article 33(2) of the 1951 Refugee Convention. Accordingly, once an individual is believed to be a danger to the security of one of the EU Member States based on **serious reasons**, the person is excluded not only from refugee protection, but also from subsidiary protection.

In addition to Article 17, the 2004 EU Qualification Directive in Articles 14, 21, 23, 24, 25, and 26 repeatedly evokes the concepts of 'national security' and 'public order' for exempting a third-country national from any rights that are associated with the right to seek asylum and those rights, which are granted on the basis of one's refugee status. To give an example, if we consider gaining access to the territory of the EU and the prohibition of *refoulement* to be the most essential elements of the right to seek asylum, Article 21(2) of the 2004 EU Qualification Directive conversely asserts that, the Member State may *refouler* an individual on the ground of 'security.' Hence, the securitisation of immigration – in the form of over considering the national security of EU Member States – is highly regarded in the EU legislation on refugee protection and on the rights associated with respect for the right to seek asylum.

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[653] Andreas Zimmermann and Philipp Wennholz, 'Article 1 F of the 1951 Convention', in Andreas Zimmermann, Jonas Dörschner, and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (New York: Oxford University Press, 2011), pp. 579-610, p. 587 and 588. Paul Weis, *Commentary on the 1951 Refugee Convention: The Travaux préparatoires Analysed* (Geneva: UN High Commissioner for Refugees (UNHCR), 1990), p. 334.

5.3. THE PROHIBITION OF *REFOULEMENT* TO TORTURE AND OTHER INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: A *JUS COGENS* NORM

In spite of the fact that the prohibition of *refoulement* under the 1951 Refugee Convention holds no absolute nature, when it comes to returning an individual to torture and other inhuman or degrading treatment or punishment, the principle of *non-refoulement* enjoys the status of a *jus cogens* norm of international law. The *jus cogens* norms of international law are those rules of customary international law that, due to their unique importance to the international community, have been elevated to the position of 'peremptory norms.'[654] In this regard, Article 53 of the 1969 VCLT has explicitly offered a definition on the *jus cogens* norms of international law. According to this Article, a *jus cogens* norm is a 'peremptory norm of general international law,' which 'the international community of States has accepted and recognised as a whole and a norm from which no derogation in whatsoever manner is permitted'.[655]

The one and only one way to modify or to change a *jus cogens* norm is through a subsequent norm of general international law, which holds the exact same character as the targeted *jus cogens* norm.[656] In its Article 64, the 1969 VCLT continues that, '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'[657] The inclusion of the notion of *jus cogens* norms and explicitly reflecting on the supremacy of these norms over other sources of international law in the 1969 VCLT speaks of the fact that there were such principles of importance existing, and that, no actor of the international community is allowed to take them lightly.[658]

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[654] For more information on the formation and the position of *jus cogens* norms as a primary source of international law, see: Alexander Orakhelashvili, 'Audience and Authority – The Merit of the Doctrine of *Jus Cogens*', in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (The Hague: T.M.C. Asser Press, 2016), pp. 115-145.
[655] Article 53 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, U.N.T.S. Vol. 1155, p. 331 (referred to as the '1969 VCLT'), entitled 'Treaties conflicting with a peremptory norm of general international law ("*jus cogens*").
[656] Article 53 of the 1969 VCLT.
[657] *Ibid*, Article 64.
[658] Jean Allain, 'Insisting on the *Jus Cogen* Nature of *Non-Refoulement*', in Joanne van Selm, Khoti Kamanga, John Morrison, Sanja Spoljar-Vrzina, and Aninia Nadig (eds), *The Refugee Convention at Fifty: A View from Forced Migration Studies* (Lanham, Maryland: Lexington Books 2003), pp. 81-95, pp. 82 and 83. In this regard, also see: Maarten den Heijer and Harmen van der Wilt, '*Jus Cogens* and the Humanization and Fragmentation of International Law', in Maarten den Heijer and Harmen van

In order to prove that the prohibition of *refoulement* to torture and other inhuman or degrading treatment or punishment is a *jus cogens* norm of international law, I first need to establish that the prohibition of torture, *per se*, is a *jus cogens* norm. By doing so, I then will argue that the prohibition of torture not only means a negative human right obligation of not to torture, but also it puts a heavy positive legal obligation with a due diligence character on the shoulders of the state.

The prohibition of torture and other inhuman and degrading treatment or punishment in international law has deep roots in both treaty law and customary international law. This prohibition is so grave that, in international law, a single convention with over 170 Member Parties is entirely dedicated to the subject.[659] Besides defining torture in Article 1(1) and leaving this definition open to inclusion of further instances in Article 1(2), the United Nations Convention against Torture adopted in 1984 (1984 CAT) in Article 2(2) and (3) puts an 'absolute' and 'non-derogable' prohibition on any acts of torture. This type of prohibition means that torture can never be justified on any grounds or under any circumstances whatsoever.

To clarify further, depending on the nature and level of the obligation they impose and depending on the circumstances in which they are applied, human rights norms are divided into two categories of 'absolute as opposed to non-absolute rights,' one the one hand, and 'derogable as opposed to non-derogable rights,' on the other. 'Absolute' and 'non-derogable' human rights are not the same thing and they do not necessarily correspond to each other. 'Absolute, but derogable' rights are human rights that cannot be violated in emergencies, but some limitations may be imposed upon them if some other interests are involved. In order to be able to withdraw the obligation from a derogable human right, the authority in charge must exercise a 'balancing act,' encompassing a four-level test of (a) legality, (b) legitimacy, (c) necessity, and (d) proportionality.[660] An example of an 'absolute, but derogable' right, is the rights

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der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (The Hague: T.M.C. Asser Press, 2016), pp. 3-21.

[659] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted and opened for signature, ratification and accession by General Assembly resolution 39/46, 10 December 1984, U.N.T.S. Vol. 1465, p. 85 (referred to as the '1984 CAT').

[660] Bernadette Rainey, Pamela McCormick, and Clare Ovey, *Jacobs, White, and Ovey: the European Convention on Human Rights* (8th edn, Oxford: Oxford University Press, 2020), pp. 114-123. In this regard, also see: Cees Flinterman, 'Derogation from the Rights and Freedoms in Time of Emergency', in Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Antwerp: Intersentia, 2018), pp. 1053-1075, pp. 1053-1068. In this regard, also see: Samantha Besson, 'Human Rights in Relation: A Critical Reading of the ECtHR's Approach to Conflicts of Rights', in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: Oxford University

to freedom of opinion and expression stipulated under Article 19(1) and (2) of the ICCPR, respectively. These rights shall be permissibly limited by conducting a balancing act as provided under the third paragraph of the same Article. A 'non-derogable, but not an absolute' right is a right, which cannot be waived in emergencies, but can be waived by 'the order of law.' An example of this is the right to life under which even war cannot justify taking the lives of civilians; however, taking the life of a human as a punishment for a serious crime is possible (capital punishment or the death penalty is not yet abolished in many countries of the World).

One of the very rare rights that is simultaneously 'absolute and non-derogable' is the freedom from torture and other inhuman or degrading treatment or punishment. This means that neither a public emergency, nor any interests of balancing acts or even an order of the law, could be used to limit or violate this right.[661] This prohibition is a repetition, continuation, and reaffirmation of the prohibition of torture explicitly stipulated in the international and regional human rights legal instruments that preceded the 1984 CAT. In this regard, we could refer to Article 5 of UDHR, Article 3 of ECHR, Article 7 of ICCPR, Article 5 of ACHR,[662] the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[663] and Article 5 of Banjul Charter on Human and Peoples' Rights.[664] In turn, the 1984 CAT has inspired more specialised human rights instruments on the prohibition of torture at the regional level of human rights protection. In this regard, for example, we could refer to the 1985 Inter-American Convention to Prevent and Punish Torture[665] and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[666] Moreover, Article 8 of the 2004 Arab Charter on Human

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Press, 2017), pp. 23-37. For information on derogation of human rights under other international human rights treaties besides the ECHR, see: Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Leiden: Martinus Nijhoff Publishers, 2012) pp. 241-253.

661 Manfred Nowak, Moritz Birk, and Giuliana Monina, 'Introduction', in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd edn, New York: Oxford University Press, 2019), pp. 1-20, pp. 1-3.

662 The American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, 22 November 1969 (referred to as the '1969 ACHR').

663 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly Resolution A/RES/3452(XXX) on 9 December 1975.

664 The African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

665 The Inter-American Convention to Prevent and Punish Torture, 9 December 1985, entry into force on 28 February 1987, The Organization of American States (OAS) Treaty Series No. 67.

666 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted by the Council of Europe on 26 November 1987, European Treaty Series No. 126.

Rights has followed the same path in including the absolute prohibition of torture or other cruel, degrading, humiliating or inhuman treatment.[667]

Besides treaty law, the decisions and practices of international tribunals and committees have testified to the *jus cogens* nature of the prohibition of torture and other inhuman or degrading treatment or punishment. For instance, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in its 1998 judgement on the case of *Prosecutor v. Anto Furundžija*, ruled that, 'the prohibition of torture is a *jus cogens* or peremptory norm of international law; therefore, no agreement against this rule at any level is legally permitted.'[668] Furthermore, the Human Rights Committee, in its General Comment No. 24 regarding reservations to the 1966 ICCPR, reiterated that, 'no reservation is allowed against the prohibition of torture, because as a peremptory norm of international law, this prohibition holds an absolute and non-derogable stand in the relation between states'.[669]

After firmly establishing the absolute and non-derogable prohibition of torture and other inhuman or degrading treatment or punishment as a *jus cogens* norm of international law, it is time to analyse the nature of the prohibition of *refoulement* to torture. In this regard, the ICTY in the case of *Furundžija*, stated that, 'one of the consequences of prohibition of torture being a *jus cogens* norm is that, [...] torture may not be covered by a statute of limitations and must not be excluded from extradition under any political offence exemption.'[670] This part of the decision of the ICTY is in direct compliance with Article 3 of the 1984 CAT, which very explicitly has set a blanket prohibition on any kind of returning a person to torture. According to the first paragraph of Article 3 of CAT, '[n]o State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'[671] Moreover, the ILC in its commentary on Article 26 of the Draft Articles regarding the 'Responsibility of States for Internationally Wrongful Acts' has rendered that where there is an apparent conflict between primary obligations, one of which arises for a state directly under a peremptory

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[667] The Arab Charter on Human Rights, adopted by the League of Arab States on 22 May 2004, entered into force on 15 March 2008.
[668] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, ICTY Trial Chamber Judgment, 10 December 1998, paras 144 and 153-155.
[669] The CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994, UN Doc. No. CCPR/C/21/Rev.1/Add.6.
[670] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, ICTY Trial Chamber Judgment, 10 December 1998, para. 156.
[671] Article 3(1) of the 1984 CAT.

norm of general international law, it is evident that such an obligation must prevail.[672]

Alongside the same line of argument, former UN Special Rapporteur on Torture (2004-2010) Manfred Nowak has rigorously emphasised that Article 3 of the 1984 CAT covers all forms of obligatory deportations of an alien, including any ordinary or extraordinary renditions, which have commonly being practiced by some CAT Member States under the premise of the so-called 'global war on terror.'[673] The term 'rendition' as used by Special Rapporteur Nowak means that whenever the transfer or return of a person, who is convicted of a crime or is standing a trial, is not regulated through extradition treaties, the requesting state would employ some forceful measures to return the individual to its jurisdiction. Depending on whether these measures are arranged and coordinated with the sending state, and if an arrest warrant was issued by a court of law to respect due process in justice together with securing the human rights of the detainee, renditions are divided into two categories of 'ordinary renditions' and 'extraordinary renditions.' Ordinary renditions are the return measures that are coordinated between the requesting and sending states, and that the requesting state has already provided arrest warrants and other court or legal documents to secure the human rights of the transferee.[674] However, if the acts of arrest, transfer, and return of individuals are performed unilaterally by the agents of requesting state without meeting the court's arrest warrant and other judicial due process requirements, these kinds of transfers are known as 'extraordinary renditions.'[675] The secret abduction and transfer of Adolf Eichmann by Mossad from Argentina to Israel in 1960 is one of the first examples of this practice, which not only caused damages to the diplomatic

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[672] The Commentary of the ILC on Article 26 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session and submitted to the General Assembly in 2001, UN Doc. No. A/56/10.

[673] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted to the UN General Assembly on 5 February 2010, UN Doc. No. A/HRC/13/39/Add.5, paras 27, 244, and 245. Also, see: Manfred Nowak, "Extraordinary Renditions', Diplomatic Assurances and the Principle of *Non-Refoulement*', in Walter Kälin, Robert Kolb, Christoph Spenlé, and Maurice Voyame (eds), *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs* (Leiden: Brill Nijhoff, 2010), pp. 107-134, pp. 117-119.

[674] Manfred Nowak, "Extraordinary Renditions', Diplomatic Assurances and the Principle of *Non-Refoulement*', in Walter Kälin, Robert Kolb, Christoph Spenlé, and Maurice Voyame (eds), *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs* (Leiden: Brill Nijhoff, 2010), pp. 107-134.

[675] *Ibid.* In this regard also see: Arianna Vedaschi, 'Extraordinary Renditions: A Practice beyond Traditional Justice', in Elspeth Guild, Didier Bigo, and Mark Gibney (eds), *Extraordinary Rendition: Addressing the Challenges of Accountability* (Oxford; New York: Routledge, 2018), pp. 89-121.

relations between the two countries, but it also led to profound challenges for the rule of law and human rights protection.[676]

Besides the explicit prohibition of *refoulement* to torture and other inhuman or degrading treatment or punishment under Article 3 of the 1984 CAT, Article 3 of the 1950 ECHR encompasses a positive obligation on Member States in expulsion to torture. In the following part of this chapter (Section 5.4) through case studies, I will demonstrate how the securitisation of immigration in Europe – especially within the context of the so-called 'war on terror' and combating terrorism – threatens to undermine the absolute and non-derogable nature of the principle of *non-refoulement* as a *jus cogens* norm. Undermining the position of the principle of *non-refoulement* means directing an attack on the realisation of the right to seek asylum as a real and practical fundamental right. These case analyses include the relevant case law within the jurisprudence of the ECtHR under Article 3 of the Convention and using diplomatic assurances (an effort to expel unwanted or undesirable individuals), while justifying the expulsion against the absolute and non-derogable prohibition of *refoulement* as established under Article 3.

5.4. THE IMPLICATIONS OF THE SECURITISATION OF IMMIGRATION UPON THE PRINCIPLE OF *NON-REFOULEMENT*: THE USE OF DIPLOMATIC ASSURANCES IN TORTURE-EXPULSION CASES

Being the second essential element of the right to seek asylum as a fundamental right, the principle of *non-refoulement* constitutes the backbone of this right. Therefore, to complement the discussion on the implications of securitising immigration on the right to seek asylum, I have to address the prohibition of *refoulement*, especially within the context of returning an individual to torture and other inhuman or degrading treatment or punishment. In this section, through ECtHR case studies, I illustrate how the securitisation of immigration is putting the foundation of the right to seek asylum, meaning the principle of *non-refoulement*, to an extreme test. When it comes to this principle, the

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[676] John A. E. Vervaele, 'Rendition, Extraterritorial Abduction, and Extraordinary Rendition', <www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0171.xml>. Also, see: Arianna Vedaschi, 'Extraordinary Renditions: A Practice beyond Traditional Justice', in Elspeth Guild, Didier Bigo, and Mark Gibney (eds), *Extraordinary Rendition: Addressing the Challenges of Accountability* (Oxford; New York: Routledge, 2018), pp. 89-121. Also, see: Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, Cambridge: Cambridge University Press, 2015), pp. 778-845. And, see: Manfred Nowak, "Extraordinary Renditions', Diplomatic Assurances and the Principle of *Non-Refoulement*', in Walter Kälin, Robert Kolb, Christoph Spenlé, and Maurice Voyame (eds), *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs* (Leiden: Brill Nijhoff, 2010), pp. 107-134.

securitisation of immigration in the EU has shown itself in the form of some – legally speaking – controversial practices such as the use of diplomatic assurances in torture-expulsion cases.

These case analyses shed light on this very important concern that if complying with the principle of *non-refoulement* to torture and other inhuman or degrading treatment or punishment depends on the choice of States by considering merely their national interests, the position of this principle could diminish to something less than a *jus cogens* norm. In other words, once the backbone of the right to seek asylum, i.e. the principle of *non-refoulement* cracks, there is the danger of reaching a point where this principle is replaced by some questionable practices such as expulsions based on assurances. The worrying aspect here is that if States continue to repeat these practices (the element of practice) and start forming an opinion in favour of it (the element of *opinio juris*), there may come a day when the securitised policies gradually assume the customary character of the principle of *non-refoulement*, and renditions based on assurances become the new norm. In the context of renditions or transferring a person from one State to another, the UNHCR has defined diplomatic assurances as:

> '[…] an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.'[677]

These agreements include some human rights safeguards to facilitate and legitimise the removal, expulsion, or extradition to the third State of non-nationals who are at risk of torture and other cruel, inhuman or degrading treatment or punishment.[678] Hence, these assurances impose some conditions by the sending State on the receiving State to ensure that the deportation of those suspected of terrorism and those considered as threats to national security, does not violate the rules of human rights law.[679] Despite the existence of a definition by the UNHCR, the history of creating assurances in international law is not very clear. In spite of the fact that the number of assurances associated with renditions has increased significantly in the years following the 9/11

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[677] The UN Refugee Agency, 'UNHCR Note on Diplomatic Assurances and International Refugee Protection' (2006), available at: <www.refworld.org/pdfid/44dc81164.pdf>, p. 2.

[678] Nina Larsaeus, 'The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment', *Oxford University Working Paper Series, Refugees Studies Centre (RSC) Working Paper No. 32* (2006), p. 3. Also see: Gregor Noll, 'Diplomatic Assurances and the Silence of Human Rights Law', 7 *Melbourne Journal of International Law* (2006), pp. 104-126, at p. 104. In this regard, also see: 'Human Rights Watch Questions and Answers on "Diplomatic Assurances" against Torture', p. 1, <www.hrw.org/sites/default/files/related_material/ecaqna1106web.pdf>.

[679] The UN Refugee Agency, 'UNHCR Note on Diplomatic Assurances and International Refugee Protection' (2006), available at: <www.refworld.org/pdfid/44dc81164.pdf>, p. 2.

attacks, diplomatic assurances actually played a determining role in international relations and the foreign policy of many States long before the 9/11 attacks. An early instance of this practice had happened already in 1876, when Lord Derby of the UK rejected the extradition of a forgery suspect to the US.[680] The reason for the refusal of the removal by the UK was that the US Government had failed to provide an assurance on not to try the suspect for any other offences.[681] Some records show that since the beginning of the Cold War, the US, some European States, China, and the Soviet Union have rendered individuals in whom they were interested for political reasons.[682] In addition, European countries have had extensive experience in utilising diplomatic assurances, mainly in order to prevent the death penalty in the context of extradition for common crimes.[683]

Nevertheless, the use of diplomatic assurances in torture-expulsion cases is legally more challenging than the use of assurances in death-penalty expulsions. The jurisprudence of the ECtHR indicates that assurances in death-penalty expulsions have a lower threshold for the 'legality' test compared to the cases of expulsion to torture and other inhuman or degrading treatment or punishment.[684] The reason for this difference is that the factual circumstances of committing torture are different from executing a death penalty.[685] The death penalty is a punishment usually assigned for serious crimes such as murder (in countries where capital punishment is yet to be abolished); whereas, torture occurs against those individuals accused of alleged terrorism-related crimes. When the authorities of the receiving country believe that the returnee is connected to a terrorist network, the officials prefer the suspect not to die; instead, prefer to impose – notoriously termed – 'enhanced interrogation

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[680] Eric Metcalfe, 'The False Promise of Assurances against Torture' (2009) 6(1) *Justice Journal*, pp. 63-92, p. 64.
[681] *Ibid*, pp. 64 and 65.
[682] John F. Murphy, 'Cold War', in Rodney Carlisle (ed.), *Encyclopedia of Intelligence and Counterintelligence* (Oxford; New York: Routledge, 2015), pp. 149-152, p. 149. In this regard, also see: Ray S. Cline, *The CIA under Reagan, Bush & Casey: The Evolution of the Agency from Roosevelt to Reagan* (Washington D.C.: Acropolis Books, 1981), p. 139.
[683] Human Rights Watch, 'Still at Risk: Diplomatic Assurances No Safeguard against Torture' (2005) Vol. 17, No. 4(D), available at: <www.hrw.org/sites/default/files/reports/eca0405.pdf>, pp. 57-79. In this regard, also see: Human Rights Watch, 'Empty Promises: Diplomatic Assurances No Safeguard against Torture' (2004) Vol. 16, No. 4, available at: <www.hrw.org/reports/2004/un0404/diplomatic0404.pdf>, pp. 21-36.
[684] In this regard, see, for example the decision of the ECtHR Chamber on the admissibility in following case: *Ira Samuel Einhorn v. France*, Application no. 71555/01, European Court of Human Rights, Final Decision of Chamber as to the Admissibility (16 October 2001).
[685] William Anthony Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), pp. 195 and 196.

techniques'[686] in order to obtain information on the alleged affiliated group and its members.

In the aftermath of the 9/11 attacks, the signing and exchange of diplomatic assurances in renditions have been one of the most common practices in the context of the 'war on terror.'[687] The adoption of Resolution 1373(2001) by the UN Security Council urged many States around the World to include 'promises not to torture' in their renditions, while many national courts failed to recognise the illegality of assurances and renditions based on those assurances. Considering the *jus cogens* nature of the prohibition of *refoulement* to torture, the use of diplomatic assurances in the cases of expulsion to torture has resulted in many controversies about the legality of this practice. One criticisms is that, diplomatic assurances have a secret nature, and they lack formalities and enforcement mechanisms that strengthen treaties; therefore, they do not hold the same legal status as treaties.[688] Even if assumed that they had a binding legal status like treaties, they would still be void, because they are agreed against the principle of *non-refoulement* to torture – a *jus cogens* norm in international law.[689] In this regard, some human rights activists and organisations, together with mainstream human rights watchdog INGOs such as Human Rights Watch, have unanimously criticised the use of diplomatic assurances in torture-expulsion cases mainly for the very reason that any agreement against *jus cogens* norms is legally invalid, and thus void.[690]

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[686] In this regard, see: Gloria Gaggioli and Pavle Kilibarda, 'Unmasking the Challenges: Interrogation and International Law', in Steven J. Barela, Mark Fallon, Gloria Gaggioli, and Jens David Ohlin (eds), *Interrogation and Torture: Integrating Efficacy with Law and Morality* (New York: Oxford University Press, 2020), pp. 359-391.

[687] Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge; Malden, Massachusetts: Polity Press, 2009), pp. 96 and 97. In this regard, also see: Mariagiulia Giuffré, 'Access to Protection: Negotiating Rights and Diplomatic Assurances under Memoranda of Understanding', in Jean-Pierre Gauci, Mariagiulia Giuffré, and Evangelia (Lilian) Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Leiden: Brill, 2015), pp. 50-89, p. 51 and 52.

[688] Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, New York: Cambridge University Press, 2013), pp. 28-35 and 40-50.

[689] This point that no agreement against the *jus cogens* norms of international law is valid was extensively elaborated in the previous part of this chapter, under Section 5.3.

[690] The examples of objections against the use of diplomatic assurances in torture-expulsion cases are beyond the page limit of this research, so I shall refer to only one of them here. In this regard, for instance, Louise Arbour, the fifth United Nations High Commissioner on Human Rights, has vigorously opposed employing assurances in the cases of expulsion to torture, because according to her, this practice would impair the universal ban on torture and cruel, inhuman or degrading treatment. In this regard, see: Louise Arbour, 'In Our Name and On Our Behalf' (2006) 55(3) *The International and Comparative Law Quarterly*, pp. 511-526, pp. 517-522.

In this regard, for example, the Swedish Government, in the cases of *Agiza v. Sweden*[691] and *Alzery v. Sweden*,[692] not only excluded the applicants from international protection, but it also extradited the applicants to Egypt – based on the secret information and the aid it had received from the CIA. In both cases, the UN human rights monitoring bodies, the HRC and the CAT Commit., held the Government of Sweden accountable for the alleged violation of Articles 3 and 7 of the CAT and the ICCPR, respectively. The CAT Commit. in the case of *Agiza v. Sweden* asserted that, 'under no circumstances must diplomatic assurances be used as a safeguard against torture where there are substantial grounds for believing that a person would be in danger of being subjected to torture upon return.'[693] This is similar to the approach and practice of the HRC in the case of *Alzery v. Sweden*. This case concerns the complaint of Mr. Alzery against the Government of Sweden under Article 7 of the 1966 ICCPR with regard to the allegedly unlawful expulsion of the complainant to Egypt. The HRC concluded that Sweden had failed in this case to demonstrate that diplomatic assurances were sufficient to eliminate all risks of torture and ill-treatment to a level consistent with the requirements set under Article 7 of the 1966 ICCPR.[694]

Dealing with asylum seekers subjected to Article 33(2) of the 1951 Refugee Convention creates a 'legal limbo,' which makes it challenging for the country of refuge to deal with – not only legally, but also in a diplomatic sense. As explained in Section 5.2, on the one hand, these individuals are *de facto* refugees under Article 33(1) of the Refugee Convention; therefore, based on the general rule of *non-refoulement*, they should not be returned to their countries of origin. However, in accordance with the rule of Article 33(2) of the same Convention, they are not *de jure* refugees. Therefore, they cannot be granted refugee status, and consequently, they will remain with no protection offered by the Refugee Convention. In such situations, the option of 'extradition' or 'removal' is available to the country in question. In the cases of alleged terrorism, nevertheless, there are high chances that the returnee would be subjected to torture and other inhuman or degrading treatment or punishment; therefore, the *jus cogens* norm of the prohibition of *refoulement* to torture legally prevents the State from extraditing the individual. In this chaos, the State faces an

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691 *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, UN Committee against Torture (CAT): Communication No. 233/2003, 24 May 2005, UN Doc No. CAT/C/34/D/233/2003.
692 *Mohammed Alzery v. Sweden*, UN Human Rights Committee (HRC): Communication No. 1416/2005, 10 November 2006, UN Doc No. CCPR/C/88/D/1416/2005.
693 The Committee against Torture, 'Consideration of the report of Spain', <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15905&LangID=E>.
694 *Mohammed Alzery v. Sweden*, UN Human Rights Committee (HRC): Communication No. 1416/2005, 10 November 2006, UN Doc No. CCPR/C/88/D/1416/2005.

individual who cannot be protected as a refugee, but also cannot be sent back to the country of origin. The only option left is to prosecute the person based on the general principle of *aut dedere aut judicare* available in criminal law.[695] This principle – translated into an 'obligation to extradite or prosecute' – is the obligation of the State, under whose custody an alleged offender is, to extradite that person to stand trial in another State. If failing to do so, then that State itself should prosecute the person in question. The underlying rationale of this principle is that no crime should go unpunished, and that, no alleged criminal would find a 'safe haven' for serious crimes they have committed.[696] In international criminal law, a universal jurisdiction is recognised for the State within whose territory suspects of terrorism are found.[697]

The 'legal limbo' in this situation occurs because the burden of proof in criminal trials (including investigating and prosecuting terrorist-related crimes) fails to match with its counterpart within the RSD procedures.[698] In criminal investigations, the burden of proof is on the State prosecuting the crime with the highest standard of proof – meaning 'beyond reasonable doubt.'[699] However, in RSD procedures, the standard of proof under Article 33(2) of the 1951 Refugee Convention for being a danger to national security is 'reasonable grounds,' which is a lower standard of proof compared to beyond reasonable doubt. Because of this difference in the standards of proof, the individual is neither a criminal punishable by the rule of law, nor a refugee deserving protection under the Refugee Convention. This is a grey legal zone: no refugee status, no eligibility

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[695] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute* (New York: Oxford University Press, 2018), pp. 28 and 29.

[696] With regard to the applicability of the principle of '*aut dedere aut judicare*' to the crime of terrorism, see: Michael A. Newton, 'Terrorist Crimes and the *aut dedere aut judicare* Obligation', in Larissa J. Herik, Larissa van den Herik, and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013), pp. 68-92, pp. 84-92. In this regard, also see: Raphaël van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9(5) *Journal of International Criminal Justice*, pp. 1089-1116, pp. 1095-1113.

[697] Kimberley N. Trapp, 'Jurisdiction and State Responsibility', in Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (New York: Oxford University Press, 2019), pp. 356-380, pp. 358-364. Also, see: Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Cheltenham: Edward Elgar Publishing Limited, 2012), p. 262.

[698] Mariagiulia Giuffré, 'Access to Protection: Negotiating Rights and Diplomatic Assurances under Memoranda of Understanding', in Jean-Pierre Gauci, Mariagiulia Giuffré, and Evangelia (Lilian) Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Leiden: Brill, 2015), pp. 50-89, p. 51-53. Also, see: Mehrnoosh Farzamfar, 'Diplomatic Assurances in Cases of Expulsion to Torture: A Critical Analysis' (2018) 24 *Finnish Yearbook of International Law*, pp. 51-74, pp. 64-66.

[699] Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (13th edn, New York: Oxford University Press, 2020), pp. 84-86. Also, see: Andrew L-T Choo, *Evidence* (5th edn, New York: Oxford University Press, 2018), pp. 44-47. Also, see: Richard Glover, *Murphy on Evidence* (15th edn, New York: Oxford University Press, 2017), pp. 100-102.

for subsidiary protection, and no grounds necessary for long detention (not proven guilty of terrorism). Simultaneously, the person becomes 'undesirable' due to security fears, and hence, cannot be granted a residence permit. Here is where diplomatic assurances come to the picture. As a 'pragmatic' solution to put an end to this legal limbo, while enforcing their sovereignty, assurances enable States to remove 'undesirable' and 'threatening non-citizens' from their territories, without violating the rules of international law in general, and their human rights obligations, specifically.[700] Figure 5 below illustrates the implication of securitising immigration upon the *jus cogens* norm of *non-refoulement* to torture and other forms of ill-treatment by using diplomatic assurances in torture-expulsion cases.

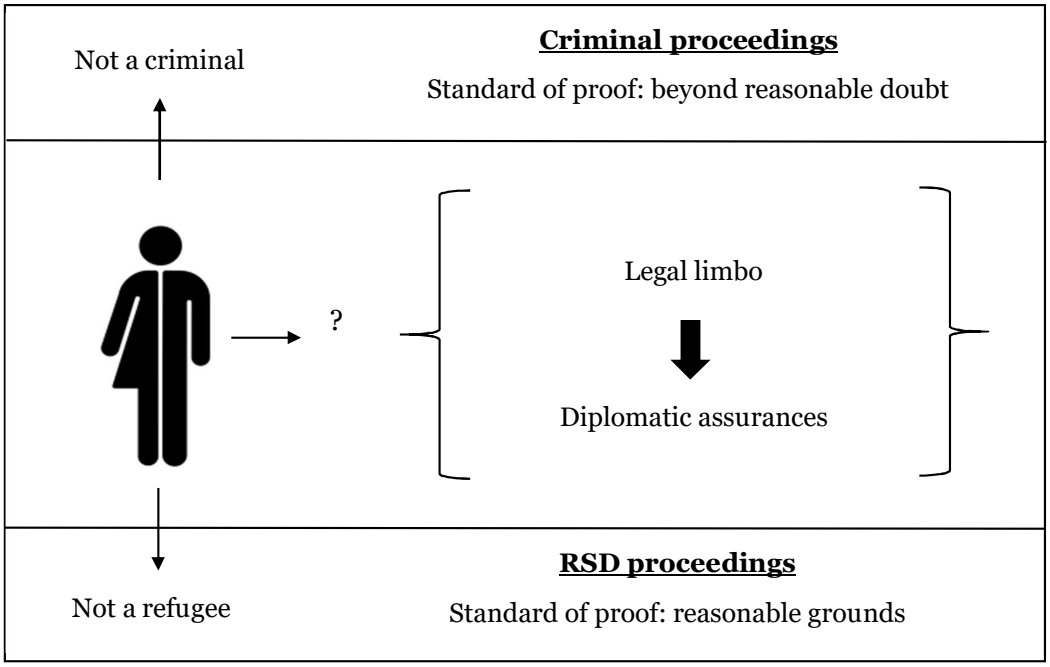

Figure 5. The creation of diplomatic assurances due to the legal limbo created by the securitisation of immigration.

As follows, I demonstrate how the ECtHR has recently adopted a favourable approach towards the use of diplomatic assurances in torture-expulsion cases. This is against the earlier jurisprudence of the Court, in which it rigorously

[700] Elspeth Guild, 'Asymmetrical Sovereignty and the Refugee: Diplomatic Assurances and the Failure of Due Process, *Agiza v. Sweden* and *Alzery v. Sweden*', in James C. Simeon (ed.), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (Cambridge; New York: Cambridge University Press, 2010), pp. 119-142, pp. 119-124.

opposed any mitigations on the absolute prohibition of *refoulement* under Article 3 of the ECHR.[701] Starting from the case of *Chahal v. the U.K.* (1996),[702] the ECtHR changed its language in addressing the *jus cogens* norm of *non-refoulement* under Article 3 of the Convection. Instead of emphasising the absolute and non-derogable nature of this prohibition, the Court confirms that the Contracting States to the Convention have the right – as a matter of a well-established principle of international law, i.e. the principle of State sovereignty and subject to their treaty obligations including the Convention – to control the entry, residence, and expulsion of aliens.[703] Since the 9/11 attacks, the relationship between the ECtHR and European States on protecting asylum seekers, especially those with an Islamist profile, has grown to become extremely tense. The ECtHR opened itself to the idea of using diplomatic assurances in torture-expulsions by taking into account the dimension of 'torture-risk assessment,' the peak of which could be seen in the case of *Othman (Abu Qatada) v. the United Kingdom*. This is the first case within the jurisprudence of the Court, where it ruled that no violation of Article 3 of the Convention had occurred, giving the reason that the assurances had removed the risk of torture and other forms of ill-treatment.[704]

Based on its high number of cases, the ECtHR has developed a well-established jurisprudence with regard to the use of diplomatic assurances in the cases of expulsion to torture or other forms of ill-treatment. One of the very early cases evaluating diplomatic assurances is the landmark case of *Soering v. the United Kingdom*.[705] This case concerns the expulsion of Mr. Jens Soering, a German national, from the UK to the US, in order to face charges of murder in the Commonwealth of Virginia.[706] Due to the nature of the crimes committed by Mr. Soering in Virginia before escaping to the UK, he was indicted of charges of multiple murders in the Circuit Court of Bedford County.[707]

Upon expulsion to the US to face trial, there was a high chance that the applicant would be convicted of multiple murders and thus sentenced to the death

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[701] In this regard, we could mention, for example, the landmark case of *Soering v. the United Kingdom*, Application No. 14038/88, European Court of Human Rights, Plenary Chamber Final Judgment (07 July 1989).
[702] *Chahal v. the United Kingdom*, Application No. 22414/93, European Court of Human Rights, Grand Chamber Judgment (15 November 1996).
[703] *Ibid*, para. 73.
[704] *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, European Court of Human Rights, Final Chamber Judgment (17 January 2012).
[705] *Soering v. the United Kingdom*, Application No. 14038/88, European Court of Human Rights, Plenary Chamber Final Judgment (07 July 1989).
[706] *Ibid*, para. 11.
[707] *Ibid*, para. 13.

penalty.[708] As a result, the applicant complained that his extradition to the US would put him in danger of a phenomenon common in the US prisons known as the 'death row' – an unnecessarily prolonged waiting-time, with the resulting human distress, for those waiting execution. When Mr. Soering was supposed to be expelled from the UK to the U.S., the average time between a trial and execution in the State of Virginia was from six to eight years. The delays happened due to a strategy used by some convicted prisoners to prolong the appeal proceedings as much as possible. At that time, the US Supreme Court had yet to consider the 'death row phenomenon' fall foul of the prohibition of 'cruel and unusual punishment' under the Eighth Amendment to the US Constitution.[709]

The main issue in front of the ECtHR in this case was to decide whether the expulsion of Mr. Soering to the US and the possibility of being subject to the death penalty was in violation of Article 3 of the 1950 ECHR. The argument of the Court was that, since no exception or derogation is allowed under Article 3, it would be incompatible with the underlying values of the Convention if a Contracting State could knowingly surrender a fugitive to another State where there were substantial grounds for believing that the individual would be in danger of torture or ill-treatment.[710] Receiving a death penalty as a final sentence to a crime in Virginia automatically meant that the convicted person would be subjected to death row. According to the ECtHR, this was an example of inhuman or degrading treatment or punishment prohibited under Article 3 of the Convention.[711] Therefore, the Court established a positive obligation on the Member States in Article 3 expulsion-cases.

Amid addressing the violation of Article 3 of the ECHR because of extraditing Mr. Soering to the US, the ECtHR discussed the issuance of diplomatic assurances between the Governments for removing the risk of the 'death row' phenomenon. In this regard, the Court ruled that the existence and use of diplomatic assurances, by no means, would remove the risk of being subjected to the inhuman treatment associated with death row.[712] In this assessment, the decisive test was not the existence or lack of assurances itself, but rather that, according to the Court, the diplomatic assurances were inadequate in altering the risk of being subjected to 'death row'; therefore, the assurances would not

[708] *Ibid*, paras 39-41.
[709] *Ibid*, paras 25, 56, 61, and 63-68.
[710] *Ibid*, para. 88.
[711] *Ibid*, paras 92 and 93.
[712] *Ibid*, paras 94-99.

remove the danger of violating the individual's right under Article 3 of the ECHR.

Another landmark case within the jurisprudence of the ECtHR with regard to expulsion to torture is *Chahal v. the United Kingdom*.[713] This case concerns the deportation of Mr. Singh Chahal, a Sikh separatist, together with his family members (his wife and their two children) from the UK to the State of Punjab in India.[714] One of the main issues in front of the Court was whether the expulsion of the applicant would be in breach of the UK's obligations under Article 3 of the ECHR. This question needed to be answered by considering the fact that diplomatic assurances were signed and exchanged between the two Governments of the UK and India.[715]

Similar to its decision in the case of *Soering*, the ECtHR primarily emphasised the absolute nature of the prohibition rendered under Article 3 of the Convention.[716] Thereafter, the Court reiterated that even supposing that the Government of India had given assurances in good faith and in accordance with its obligations under international human rights treaties, Indian Government could have neither in practice or in reality adequate or effective control over the security forces established in the Indian province of Punjab. The Court asserted that it was 'persuaded [by evidence submitted by the 1994 National Human Rights Commission's report on Punjab] that, until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab.'[717]

The final decision of the Court with regard to the diplomatic assurances and the alleged violation of Article 3 of the ECHR in this case was that in addition to the existence of specific and explicit assurances, the general situation in the receiving country must have been also taken into consideration.[718] A very important part of this consideration is the approval and the acceptance of diplomatic assurances by the local authorities,[719] in addition to the criterion that the assurances should come from the highest-ranking officials of a Government.[720]

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[713] *Chahal v. the United Kingdom*, Application No. 22414/93, European Court of Human Rights, Grand Chamber Judgment (15 November 1996).
[714] *Ibid*, paras 12 and 13.
[715] *Ibid*, para. 105.
[716] *Ibid*, paras 37 and 92-94.
[717] *Ibid*, paras 99 and 100.
[718] *Ibid*, paras 97-107.
[719] *Ibid*, para. 98.
[720] *Ibid*, para. 105.

In 2005, the Grand Chamber case of *Mamatkulov and Askarov v. Turkey* raised an alleged violation of Article 3 in the case of issuing diplomatic assurances.[721] This case concerned the expulsion of two Uzbek nationals, Mr. Rustam Sultanovich Mamatkulov and Mr. Zainiddin Abdurasulovich Askarov (hereinafter, referred to as the 'applicants' or 'the first' or 'the second applicant') on 11 and 22 March 1999, respectively, from Turkey to the Republic of Uzbekistan.[722] The Government of Uzbekistan had charged the applicants for being terrorists because of their membership in *Erk*, an opposition party in Uzbekistan.[723]

On 27 March 1999, the Turkish Government extradited both applicants to Uzbekistan, despite the fact that about ten days before that the ECtHR had indicated an *interim* measure to Turkey under Rule 39 of the Rules of the Court, not to extradite the individuals prior to the Chamber's final judgement.[724] In its letter to the Court, the Turkish Government submitted that the extradition was carried out based on the existing extradition treaty between Turkey and Uzbekistan and by relying on assurances obtained via the Uzbek Embassy in Ankara conveying memoranda of understandings issued by the Ministry of Foreign Affairs and the Public Prosecutor of Uzbekistan.[725] These assurances included provisions on the commitment of the Uzbek Government to its human rights obligations under the 1984 CAT and that the trials would be held in public with the possibility for Turkish authorities to attend the trial sessions and to visit the applicants in custody. At the end, the first applicant was convicted of murder and terrorism and sentenced to twenty years imprisonment, while the second applicant was convicted of murder and sentenced to eleven years in prison.[726]

In its assessment on whether the extradition of the applicants by relying on the assurances obtained from the Government of Uzbekistan was in violation of Article 3 of the Convention, the Grand Chamber ruled that since the individual was already extradited before the inception of the ECtHR, only a violation of Article 34 of the Convention could be concluded. To rule on Article 3, the Court relied on the reports obtained from the authorities of Turkey on the compliance of the Uzbek Government with the terms of the assurances. In its deliberation on Article 3, the Court frequently referred to the test of 'torture-risk assessment,' which it had applied in the cases of *Soering* and *Chahal*. Accordingly, the Court

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[721] *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, European Court of Human Rights, Grand Chamber Judgment (4 February 2005).
[722] *Ibid*, paras 1 and 3.
[723] *Ibid*, paras 11 and 12-23.
[724] *Ibid*, paras 24-27.
[725] *Ibid*, paras 28 and 29.
[726] *Ibid*, para 32.

evaluated whether there were substantial grounds for believing that the individuals would be subjected to torture and other ill-treatment if retuned by relying on the assurances given.[727] In spite of torture-risk assessment, the Court failed to establish the violation of Article 3, due to the biased position of Turkey to report in favour of Uzbekistan on the question of complying with the terms of the assurances. In this regard, the Court asserted:

> In the light of the material before it, the Court is not able to conclude that substantial grounds existed at the aforementioned date for believing that the applicants faced a real risk of treatment proscribed by Article 3. Turkey's failure to comply with the indication given under Rule 39, which prevented the Court from assessing whether a real risk existed in the manner it considered appropriate in the circumstances of the case, must be examined below under Article 34. Consequently, no violation of Article 3 of the Convention can be found.[728]

As opposed to *Mamatkulov and Askarov v. Turkey*, but as an analogous to the two cases of *Soering v. the U.K.* and *Chahal v. the U.K.*, the ECtHR in its subsequent Grand Chamber case of *Saadi v. Italy*,[729] carefully examined the adequacy of diplomatic assurances in removing the real risk of torture and ill-treatment within the ambit of Article 3 of the 1950 ECHR. In this landmark case, the Court held that the risk of ill-treatment was not abolished by the guarantees of the Government of Tunisia, because these assurances solely stated that the Tunisian Government would be bound and behave in accordance with its commitments under international human rights instruments.[730] According to the ECtHR, the quality of assurances matter, particularly their detailed content should project sufficient and explicit guarantees against the violation of Article 3 of the ECHR.[731] In addition, the guarantees could not only refer to general human rights obligations, but they should specify to which treaties and conventions and to which provisions they are referring.[732] One wonders why in the case of *Mamatkulov and Askarov v. Turkey*, the Court decided not to criticise the quality of assurances that had merely in general terms included the human rights obligations of Uzbekistan.

From its famous judgement in *Saadi* until the landmark case of *Othman (Abu Qatada) v. the UK* in 2012, the Court addressed a series of torture-expulsion cases by relying on diplomatic assurances. In this regard, the following cases

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[727] *Ibid*, paras 66-78.
[728] *Ibid*, para. 77.
[729] *Saadi v. Italy*, Application No. 37201/06, European Court of Human Rights, Grand Chamber Judgement (28 February 2008).
[730] *Ibid*, paras 147-149.
[731] *Ibid.*
[732] *Ibid.*

could be named: *Garabayev v. Russia*,[733] *Ryabikin v. Russia*,[734] *Ismoilov and Others v. Russia*,[735] *Ben Khemais v. Italy*,[736] *Baysakov and Others v. Ukraine*,[737] *Yuldashev v. Russia*,[738] *Klein v. Russia*,[739] *Khaydarov v. Russia*,[740] and *Auad v. Bulgaria*.[741] In spite of some factual differences, such as the countries of applicants' nationalities or the places where they were to be expelled, the circumstances of expulsion in all the above-mentioned cases are similar in the sense that the assurances were exchanged between the requesting and sending States for expelling the applicants. With regard to the decision of the Court, what all these cases have in common is that the ECtHR gave no legal weight to the assurances. Instead, it placed emphasis on the absolute and non-derogable nature of the prohibition of *refoulement* under Article 3 of the Convention. Therefore, the Court held Member States responsible for the alleged violation of Article 3 if the applicants were to be expelled.

The torture-risk assessment established in *Saadi*, which had been developed based on the *Soering* and *Chahal* criteria and continued in the chain of cases as mentioned above, provided a very strong empirical and experimental ground for the ECtHR to build its jurisprudence with regard to deciding whether diplomatic assurances could remove the risk of torture.[742] Meanwhile, in 2011, the ECtHR in the Grand Chamber case of *M.S.S. v. Belgium and Greece*,[743] once again reinforced the absolute and non-derogable prohibition of *refoulement* under

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[733] *Garabayev v. Russia*, Application No. 38411/02, European Court of Human rights, Final Judgment of the Chamber (30 January 2008). As a side not, I should mention that the judgement of the Court in this case was issued less than one month before the case of *Saadi*.
[734] *Ryabikin v. Russia*, Application No. 8320/04, European Court of Human Rights, Final Judgement of the Chamber (19 September 2008).
[735] *Ismoilov and Others v. Russia*, Application No. 2947/06, European Court of Human Rights, Final Judgement of the Chamber (1 December 2008).
[736] *Ben Khemais v. Italy*, Application No. 246/07, European Court of Human Rights, Final Judgment of the Chamber (6 July 2009).
[737] *Baysakov and Others v. Ukraine*, Application No. 54131/08, European Court of Human Rights, Final Judgment of the Chamber (18 May 2010).
[738] *Yuldashev v. Russia*, Application No. 1248/09, European Court of Human Rights, Final Judgement of the Chamber (8 July 2010).
[739] *Klein v. Russia*, Application No. 24268/08, European Court of Human Rights, Final Judgment of the Chamber (4 October 2010).
[740] *Khaydarov v. Russia*, Application No. 21055/09, European Court of Human Rights, Final Judgment of the Chamber (4 October 2010).
[741] *Auad v. Bulgaria*, Application No. 46390/10, European Court of Human Rights, Final Chamber Decision (11 January 2012).
[742] With regard to the ECtHR using its own case law in building a body of jurisprudence, see: Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42(2) *British Journal of Political Science*, pp. 413-439.
[743] *M.S.S. v. Belgium and Greece*, Application No. 30696/09, European Court of Human Rights, Grand Chamber Judgement (21 January 2011).

Article 3 of the Convention, while referring to the *Soering*, *Chahal*, and *Saadi* assessment criteria.[744]

The difference between the case of *M.S.S. v. Belgium and Greece* and the previously-discussed cases is that the former dealt with an expulsion procedure within EU law, known as the 'Dublin return'; meaning that the case concerned the deportation of an applicant from one Member State to another.[745] In this case, the Grand Chamber clearly established that the fact that a person is removed from one Contracting Party to another does not remove the positive obligation of the sending State on conducting torture-risk assessment for preventing the violation of *refoulement* under Article 3 of the Convention.[746] In this case, the Court ruled that Belgium had indeed violated its obligations under Article 3 by returning the applicant to Greece (a Dublin transfer). The reasons for this decision was that the deportation of the applicant to Greece had resulted in exposing him to ill-treatment, including deteriorating detention conditions and an inhumane life situation (in the Court's terms, 'the deficiencies in asylum procedure') together with considering that no guarantees indicated that the applicant would not be returned to his country of origin, Afghanistan.[747] In this regard, the ECtHR considered the general assurances given by Greece to Belgium – issued under the Dublin Regulation – totally irrelevant and unreliable in providing adequate protection for the applicant against violation of his human rights under Article 3 of the Convention.[748]

What we could conclude from the risk-evaluation tests applied by the ECtHR is that diplomatic assurances – when formulated in general terms such as the receiving State would act in accordance with its human rights obligations – do not remove the real risk of torture or other forms of inhumane or degrading treatment and punishments. What removes the real risk of torture upon expulsion is something beyond mere general guarantees. Assurances need to be detailed – formulated based on the circumstances of the case – and to contain

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[744] *M.S.S. v. Belgium and Greece*, Application No. 30696/09, European Court of Human Rights, Grand Chamber Judgement (21 January 2011), paras 353, 359, 365, and 409. In this regard also, see the concurring opinion of Judge Villiger, attached to this case as separate opinions.
[745] *M.S.S. v. Belgium and Greece*, Application No. 30696/09, European Court of Human Rights, Grand Chamber Judgement (21 January 2011), paras 323, 353, and 368. For more analysis on the cases, in which the removal is done from one ECHR Member State to another, see: Fanny de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Leiden: Brill, 2017), pp. 322-326.
[746] *M.S.S. v. Belgium and Greece*, Application No. 30696/09, European Court of Human Rights, Grand Chamber Judgement (21 January 2011), paras 323, 353, and 368.
[747] *Ibid*, paras 341-368.
[748] *Ibid*, para. 354.

adequate and effective enforcement and monitoring mechanisms. Henceforth, the tests that the ECtHR has applied in torture-risk assessment under Article 3 of the 1950 ECHR and the Court's acceptance of diplomatic assurances in torture-expulsion have evolved over time through the 'trial and error' of State-level actors.

As mentioned above, the practice of the ECtHR in torture-real risk evaluation started in the late 1980s with the case of *Soering*. This practice continued to the landmark case of *Othman (Abu Qatada) v. the United Kingdom*, which is the most important case within the jurisprudence of the ECtHR on the question of diplomatic assurances and expulsion to torture under Article 3 of the Convention.[749] The reason for the importance of this case is that, for the very first time, the ECtHR – instead of merely assessing the alleged violation of Article 3 of the Convention in torture-expulsion cases – addressed this question also under Article 6 of the Convention on the right to a fair trial. In fact, as we will see in the case analysis in the following pages of this chapter, for the very first time, the use of diplomatic assurances in torture-expulsion cases was ruled to be removing the responsibility of the State under Article 3 of the ECHR, but a violation of Article 6 of the Convention was found.

The applicant in this case was Mr. Omar Mahmoud Othman – also known as, Abu Qatada al-Filistini – Jordanian cleric, born in 1960, near Bethlehem – then administered as part of the Kingdom of Jordan.[750] In 1993, he arrived in the UK and immediately filed an asylum application on the grounds that, the Jordanian authorities had detained and tortured him in 1988, 1990, and 1991.[751] Subsequently, he was recognised as a refugee in 1994 and was granted the leave to remain until June 1998.[752] On 8 May 1998, the applicant applied for the indefinite leave to remain in the UK, and while this application was pending, he was arrested and detained under UK counterterrorism law, i.e. the Anti-Terrorism, Crime, and Security Act of 2001. When this Act was repealed in March 2005 on the grounds of being discriminatory,[753] Mr. Othman was released on bail subjected to a 'control order' under the UK's amended

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[749] *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, European Court of Human Rights, Final Chamber Judgment (17 January 2012).
[750] *Ibid*, para. 7.
[751] The reasons or grounds based on which the applicant was granted asylum in the UK was not disclosed in the case by the Secretary of State. In this regard, see: *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, European Court of Human Rights, Final Chamber Judgment (17 January 2012), para. 7.
[752] *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, European Court of Human Rights, Final Chamber Judgment (17 January 2012), paras 7 and 8.
[753] Later, the Prevention of Terrorism Act 2005 was replaced by the Terrorism Prevention and Investigation Measures Act (14 December 2011).

counterterrorism law, the Prevention of Terrorism Act 2005. In August 2005, while his appeal against the control order was still in process, he received a 'notice of intention' from the UK Secretary of State to be deported to Jordan.[754] For the purpose of this deportation, the Foreign and Commonwealth Office had already advised the British Government and the State Secretary that Article 3 of the 1950 ECHR prohibited the expulsion of individuals who were suspected of committing crimes such as terrorism to counties where they would be in danger of torture or torture-like treatment. Consequently, the UK Government decided to obtain diplomatic assurances from the Jordanian Government promising not to torture Mr. Othman.

On 10 August 2005, the representatives of the two Governments (the UK and Jordan) signed a memorandum of understanding. The Secretary of State also certified that the decision to deport the applicant was taken in the interests of UK national security.[755] The applicant appealed against this deportation decision, as the deportation was related to his conviction in Jordan *in absentia* for the alleged involvement in two of al-Qaeda's terrorist attacks against Western and Israeli targets in 1999 and 2000. It was alleged by the Jordanian authorities that the applicant had inspired and encouraged his followers to plant the bombs.[756] Mr Othman, however, claimed that, if deported, he would be retried in Jordan, which would put him at a high risk of torture, lengthy pre-trial detention, and a grossly unfair trial based on evidence obtained through torturing his co-defendants, which would result in the violation of Articles 3 and 6 of the 1950 ECHR.[757]

The Special Immigration Appeals Commission of the UK (SIAC) dismissed his appeal, holding that Mr. Othman would be protected against torture and ill-treatment based on the agreement negotiated between the UK and Jordan Governments.[758] The SIAC also found that the retrial would not be in total denial of the applicant's right to a fair trial.[759] At the appeal instance against the decision of SIAC, the Court of Appeal partially agreed and partially disagreed with Mr. Othman's complaint. According to the Court of Appeal, the assurances had removed the risk of torture against the applicant; therefore, there was no violation of Article 3 of the Convention.[760] However, a real risk remained that

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[754] *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, European Court of Human Rights, Final Chamber Judgment (17 January 2012), para. 8.
[755] *Ibid*, para. 25.
[756] *Ibid*, paras 18-20.
[757] *Ibid*, para. 25.
[758] *Ibid*, paras 25-39.
[759] *Ibid*, paras 42-47.
[760] *Ibid*, paras 48, 49, and 51.

torture-obtained evidences would be used against him if the applicant were to be deported to Jordan and stand a trial there. In the opinion of the Court of Appeals, this would violate the international prohibition on torture, resulting in a 'flagrant denial of justice' in breach of Article 6 of the 1950 ECHR.[761]

In the highest appeal instance, on 18 February 2009, the House of Lords upheld the findings of the SIAC and the deportation order. In other words, the Lords found that there was no violation of Article 3 of the Convention, because the signed diplomatic assurances would protect Mr. Othman from being tortured.[762] The Lords also ruled that the risk that the evidence obtained through torture would be used against the applicant in criminal proceedings in Jordan would not amount to a 'flagrant denial of justice;' hence, no violation of Article 6 of the ECHR was found, either.[763] On appeal against the decision of the House of Lords, the ECtHR unanimously ruled that the Lords were correct in their assessment that diplomatic assurances would remove any danger of torture and mistreatment under Article 3 of the 1950 ECHR, and therefore, no violation of that Article was found.[764]

With regard to the alleged violation of Article 6 of the 1950 ECHR, the European Court dismissed the ruling of the House of Lords. It, instead, ruled that, undeterred by the fact that the UK Government could lawfully deport the applicant to Jordan, the UK still could be held liable for a 'flagrant denial of justice' by virtue of Article 6 of the Convention. The assurances, according to the Court, had removed the risk of torture, but failed to ensure that the evidence obtained under torture would not be used against him.[765]

What is of direct interest for the purpose of my thesis is that the securitisation of immigration urged the judges at both national and ECtHR levels to conduct a torture-risk assessment test in addressing the claims under Article 3 of the 1950 ECHR. This securitisation leaves a certain margin of appreciation to the States – even under a *jus cogens* norm such as the prohibition of Article 3 of the ECHR. In this respect, we saw that the language of judgements in early cases was different in the way of favouring the absolute and non-derogable prohibition of Article 3. However, in the case of *Othman (Abu Qatada) v. the UK*, the judgement started with an introduction to the importance of the 'war on terror' and protecting the national security of Member States; thus, the necessity and

[761] *Ibid*, paras 50-52.
[762] *Ibid*, paras 54-57.
[763] *Ibid*, paras 59-66.
[764] *Ibid*, para. 207.
[765] *Ibid*, para. 287.

need to examine closely the assurances in torture-expulsion cases. In this regard, the ECtHR stated:

> [...] as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. [... and that ...] [i]t is not part of the ECtHR's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his or her rights under the Convention.[766]

Thereafter, the ECtHR applied an extensive evaluation test, established within its jurisprudence in the previous cases, such as *Chahal* and *Saadi*, in addressing not only the existence, but also the quality and adequacy of assurances. While applying the torture-risk assessment test, the Strasbourg Court referred to the assessments applied by the UK national judges and developed a jurisprudence based on the arguments of national judges. In this regard, for example, the SIAC had previously ruled that the assurances given by Jordan in relation to Mr. Othman with regard to Article 3 of the Convention could be relied because of the following reasons:

1. **First,** Jordan was willing and able to fulfil its undertakings;
2. **Second,** the applicant would be protected by his high profile; and
3. **Third,** there would be monitoring by a human rights NGO called the 'Adaleh Centre.'[767]

In opposition to this argument, the main issue raised by the applicant during the appeal instance was that, the assurances could not be relied upon when there were consistent patterns of human rights violations in Jordan, accompanied with impunity for the Jordanian General Intelligence Directorate (GID) agents. In the House of Lords, Lord Phillips responded to this claim by employing the practice of the ECtHR within its jurisprudence in former cases, stating that, it would suffice to remove the risk of torture by relying on the mere fact that assurances exist in a torture-expulsion case.[768] For instance, in the cases of *Ismoilov and Others v. Russia*[769] and *Ryabikin v. Russia*,[770] the ECtHR had emphasised the need for diplomatic assurances to ensure adequate protection against the risk of ill-treatment contrary to Article 3 of the Convention. However, what Lord Philips failed to consider was that the jurisprudence of the ECtHR had not yet been developed with regard to the appraisal of diplomatic

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[766] *Ibid*, para. 184.
[767] *Ibid*, para. 163.
[768] *Ibid*, paras 141-145, 184, 188, and 189.
[769] *Ismoilov and Others v. Russia*, Application No. 2947/06, European Court of Human Rights, Final Judgement of the Chamber (1 December 2008), paras 96-100.
[770] *Ryabikin v. Russia*, Application No. 8320/04, European Court of Human Rights, Final Judgement of the Chamber (19 September 2008), para. 119.

assurances *per se*, as part of torture real-risk assessment. In addition, Lord Hope relied on the findings of the ECtHR in the case of *Saadi v. Italy* that, the burden of proof was on the Government of Italy to dismiss any doubt about the non-reliability of the assurances. However, Lord Hope also missed the fact that, in *Saadi*, the ECtHR had ruled on 'no balancing act whatsoever' in assessing the alleged violation of Article 3 of the Convention.[771]

The Lords, ultimately, followed the risk-assessment test that the SIAC had conducted on Article 3, and unanimously ruled that the assurances between the Governments of Jordan and the UK could successfully remove any doubt on the existence of torture and ill-treatment, should the applicant be expelled to Jordan. In doing so, the Law Lords repeated the torture and ill-treatment real-risk assessment test performed by the SIAC, which consisted of the following four items and eventually concluded that the assurances would be sufficient in the current case:[772]

1. **First,** the terms of the assurances had been such that, if fulfilled, the person returned would not be subjected to treatment contrary to Article 3;
2. **Second,** the assurances had been given in good faith;
3. **Third,** there had to be a sound objective basis for believing that the assurances would be fulfilled;
4. **Fourth,** the fulfilment of the assurances had to be capable of being verified.[773]

Beyond mirroring the opinions of the Law Lords, the ECtHR developed the torture-risk assessment that the SIAC had applied, and added **seven** more items to the above-mentioned evaluation criteria. In this regard, the Court emphasised that, in the light of the practice of the receiving State, it needs to be established whether the assurances could be relied upon or not. In this sense, an assessment of the human rights situation in the receiving State and the conformity of the Government of Jordan with its human rights obligations was evoked. Accordingly, the Court regarded the following factors in its assessment of the assurances within the context of Article 3 of the 1950 ECHR:

1. **Transparency:** whether the terms of the assurances have been disclosed to the Court;
2. **Specificity:** whether the assurances are specific or are general and vague;

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[771] *Saadi v. Italy*, Application No. 37201/06, European Court of Human Rights, Grand Chamber Judgement (28 February 2008), para. 129.
[772] *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, European Court of Human Rights, Final Chamber Judgment (17 January 2012), paras 73-75.
[773] *Ibid*, para. 73.

3. **Authoritatively given:** who has given the assurances and whether that person can bind the receiving State;
4. **An effective control:** if the assurances have been issued by the central government of the receiving State, and whether local authorities can be expected to abide by them;
5. **The legal status of treatment:** whether the assurances concern treatment, which is legal or illegal in the receiving State;
6. **Authoritatively given and legally binding:** whether they have been given by a Contracting State;
7. **The quality of inter-State relations:** the length and strength of bilateral relations between the sending and receiving States, including the receiving State's records in complying with similar assurances;
8. **Verifiability in practice:** whether compliance with the assurances can be objectively verified via diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
9. **Monitoring mechanisms and acceptance of international monitoring:** whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms – including human rights NGOs – and whether it is willing to investigate allegations of torture and to punish those responsible;
10. **The history of ill-treatment against the requested person:** whether the applicant has previously been ill-treated in the receiving State, and;
11. **Domestic judicial appraisal reliability:** whether the reliability of the assurances has been examined by the domestic courts of the sending Contracting State.[774]

In response to the applicant and to the third parties' interventions about the general human rights situation in Jordan, the ECtHR stated that, only in rare cases, the general situation in a country would mean that no weight at all should be given to the assurances.[775] Thereafter, the Court asserted that although the Jordanian criminal justice system evidently lacked many of the common human rights standards, it has internationally recognised safeguards to prevent torture and punish its perpetrators.[776] Hereof, this is how the ECtHR judges deferred to the UK national judges and agreed with the 'Catch-22' situation, mentioned by

[774] *Ibid*, para. 189.
[775] *Ibid*, para. 188.
[776] *Ibid*, para. 191.

Lord Phillips at the final domestic appeal instance.[777] By way of explanation, the Court defended the position of the UK Government and followed the opinion of the Law Lords on diplomatic assurances, noting that the UK certainly knows and is well aware of human rights situation in Jordan, because otherwise there would have been no need to sign the assurances in the first place.[778]

As some commentators have articulated, the ECtHR has taken a 'pragmatic' and 'utilitarian' approach towards the use of diplomatic assurances in torture-expulsion cases, since these measures could practically provide a timely, efficient and legally justifiable method of reconciliation and recalibration of States' positive obligations in multi-lateral and bilateral inter-state relations.[779] As some have asserted, entirely in opposition to the idea that States are avoiding their obligation of *non-refoulement* to torture, the employment of diplomatic assurances are an extension of the on-going development of the positive anti-torture obligations of States. The ECtHR demonstrated this approach in the case of *Othman (Abu Qatada) v. the U.K.*, and thereby, concluded that returning Mr. Othman to Jordan would not expose him to a real risk of torture and ill-treatment; hence, no violation of Article 3 of the Convention was found. The opinions of national judges at both the SIAC and House of Lords, in addition to the evaluation of ECtHR judges in *Soering*, *Chahal*, *Saadi*, and *Othman (Abu Qatada)* suggest that signing and exchanging diplomatic assurances in torture-expulsion cases does not circumvent *non-refoulement* obligations.[780]

A first glance at Article 3 of the 1950 ECHR suggests that the Member States of this Convention bear a negative obligation with regard to neither torture not deporting individuals to face torture. However, within the context of *non-refoulement* to torture, the jurisprudence of the ECtHR has illustrated that there is not only a negative obligation, but also they hold a positive obligation.[781] Within the jurisprudence of the ECtHR in many torture-claim cases, the Court has held that a State's responsibility under Article 3 can be engaged by its failure to provide methods, through which protection against torture and inhuman and

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[777] *Ibid*, para. 57.
[778] *Ibid*, paras 35, 165, 195, and 196.
[779] Fiona de Londras, 'Shannon, Saadi and Ireland's Reliance on Diplomatic Assurances', 2 *Irish Yearbook of International Law* (2009), pp. 79-90, pp. 80 and 81. In this regard, also see: Rumyana Grozdanova, 'The United Kingdom and Diplomatic Assurances: A Minimalist Approach towards the Anti-Torture Norm', 15 *International Criminal Law Review* (2015), pp. 517-543, pp. 519-521.
[780] Rumyana Grozdanova, 'The United Kingdom and Diplomatic Assurances: A Minimalist Approach towards the Anti-Torture Norm', (2015) 15 *International Criminal Law Review*, pp. 517-543.
[781] For analysis of the Member States' positive obligations to predict anti-torture protective measures and to investigate torture allegations, see: Alistair R. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford; Portland, Oregon: Bloomsbury Publishing, 2004), pp. 43-65.

degrading treatment or punishment could be ensured, and under which incidents of torture, inhuman and degrading treatment could be proven.[782] Accordingly, Member States to the ECHR are supposed to undertake *direct measures* and *act affirmatively* to protect individuals from torture through all means.[783]

Correspondingly, what we could conclude from the reasoning of the ECtHR in *Othman* and its precedent cases is that torture-risk assessment is inherent in the application of the principle of *non-refoulement* to torture under Article 3 of the 1950 ECHR.[784] Once national security interests enter into legislation (the process of securitisation), there will be a certain margin of appreciation granted to States to exercise power of discretion in assessing the rights of asylum seekers, as opposed to national interests in torture-expulsion cases under Article 3 of the ECHR. However, the margin of appreciation may be tighter, compared to other Convention rights. Article 15 of the ECHR has introduced the possibility of derogation from most Convention rights in emergencies by applying a balancing act. The elements of the balancing act are legality, legitimacy, necessity, and proportionality. The exceptions for derogation are Articles 2 (except for deaths resulting from lawful acts of war), 3, 4(1), and 7 of the Convention. However, this margin of appreciation still exists in the form of torture-risk assessment, which is embedded inherently in the applicability of Article 3 of the Convention.[785] What, in fact, needs to be assessed is whether the alleged inflicted act of torture is severe enough to constitute torture or whether the assurances given are sufficient in preventing torture from happening in future.

The main reason for the creation and use of diplomatic assurances and continuous strengthening of them through time, as shown in the jurisprudence of the ECtHR, is not only a solution to social and political needs, which in this case is safeguarding the national security of sending States. Whereas it is also

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[782] For more detailed analysis of case laws, which have established the positive obligation of the Member States under Article 3 of the Convention, see: Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, New York: Oxford University Press, 2017), pp. 191-196. In this regard, also see: Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, Oxford: Oxford University Press, 2012), pp. 145 and 158-161.

[783] Debra Long, Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights (Geneva: Association for the Prevention of Torture, 2002), p. 20.

[784] Michael John Garcia, 'Renditions: Constraints Imposed by Laws on Torture', in Brenden M. Zimmer (ed.), *Extradition and Rendition: Background and Issues* (New York: Nova Science Publishers Inc., 2011), pp. 135-169, at p. 142.

[785] The 'torture risk assessment' is not explicitly mentioned under Article 3 of the ECHR, but it is under Article 3(2) of the 1984 CAT.

part of the role of lawyers and judges in choosing how to apply existing law to the facts of new hard cases. The lawyers working for the sending and receiving States and judges at different judicial stances are well aware of the inherent ambiguity in different aspects of the concept of torture. That is why they managed to come up with the creation and use of diplomatic assurances in the cases of expulsion to torture.

Nonetheless, the more the nexus between immigration and the security concerns of State intensifies, the more European States, national courts, and the ECtHR are willing to challenge the *jus cogens* nature of *non-refoulement* under Article 3 of the Convention. Another case relevant to this discussion is the case of *Babar Ahmad and Others v. the UK*.[786] This case concerns the complaints of six individuals on the alleged violation of their human rights under Article 3 of the Convention in the case of extradition from the UK to the US to stand trials for criminal charges related to radical Islamic terrorism. In this regard, the applicants complained that, in the US, they would be detained at the Penitentiary, Administrative Maximum Facility (ADX Florence), while being subjected to Special Administrative Measures (SAMS).[787] The SAMS is a process, through which the US Attorney General may direct the United States Bureau of Prisons to use special administrative measures on the correspondence and visitors of specific inmates. It includes prisoners either awaiting or under trial proceedings as well as those convicted, when it is alleged that there is a 'substantial risk that a prisoner's communications or contacts could result in death or serious bodily injury to persons or substantial damage to property that would entail the risk of death or serious bodily injury to persons.'[788] Such measures are used to prevent acts of violence or terrorism or disclosure of classified information. The applicants submitted that the conditions of detention at ADX Florence – whether alone or in conjunction with SAMS – would violate their human rights under Article 3 of the Convention. In addition, the applicants complained that, if convicted, they would face sentences of life imprisonment without parole, which is, in itself, a violation of Article 3 of the Convention.[789] In this case, several diplomatic assurances were signed and exchanged between the two Governments, including promises on behalf of the

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[786] *Babar Ahmad and Others v. the United Kingdom*, Applications Nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09, European Court of Human Rights, Final Judgement of the Chamber (24 September 2012).
[787] *Ibid*, para. 158.
[788] Title 9 of Chapter 24 of the US National Security Act; Prevention of Acts of Violence and Terrorism, 28 CFR 501.3 (31 October 2001) on Requests for Special Confinement Conditions.
[789] *Babar Ahmad and Others v. the United Kingdom*, Applications Nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09, European Court of Human Rights, Final Judgement of the Chamber (24 September 2012), para. 158.

US Government that no death penalty would be imposed on any of the applicants; neither would they be subjected to extraordinary renditions to offshore US military bases.[790]

This case is a highly complex 'hard case' involving multiple human rights questions not only concerning the prohibition of torture and ill-treatment and extraditing to torture, but also the right to a fair trial and the admissibility of evidence together with other evidential matters. Notwithstanding this multi-facetedness, what makes this case extremely controversial – particularly with regard to the *jus cogens* nature of *non-refoulement* under Article 3 of the Convention – is that the Court engaged actively in an argument, which had been initiated earlier by the House of Lords on taking a 'relativist approach' to the scope of application of Article 3 in expulsion cases. This approach was previously established by the majority of Lordships at the House of Lords in the case of *R (on the application of Wellington) (FC) v. Secretary of State for the Home Department* (Wellington).[791] A relativist approach in this context means that there should be a distinction between expulsion to torture, as opposed to other inhuman or degrading treatment or punishment (ill-treatment) in Article 3 expulsion cases. The Lords claimed that this distinction came from the case of *Soering*, in which the Court had stated that evaluating diplomatic assurances '[…] must be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.'[792] A majority of Their Lordships, meaning Lord Hoffmann, Baroness Hale, and Lord Carswell found that, based on this paragraph, in the extradition context, a distinction had to be drawn between torture and lesser forms of ill-treatment. When there was a real risk of torture, the prohibition on extradition was absolute, which leaves no room for a balancing exercise; however, insofar as Article 3 is applied to inhuman and degrading treatment, the prohibition is applicable only in a 'relativistic format' in extradition cases.[793] Lord Hoffmann, in this regard, asserted:

> A relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function. For example, the Court of Session has decided in *Napier v Scottish Ministers* (2005) SC 229 that in Scotland the practice of 'slopping out' (requiring a prisoner to use a chamber pot in his cell and empty it in the morning)

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[790] *Ibid*, paras 20-61.
[791] *R (on the application of Wellington) (FC) v. Secretary of State for the Home Department (SSHD)*, [2008] UKHL 72 on appeal from: [2007] EWHC 1109(Admin) (referred to as 'Wellington').
[792] *Soering v. the United Kingdom*, Application No. 14038/88, European Court of Human Rights, Final Judgment of the Plenary Chamber (07 July 1989), para 89.
[793] *Babar Ahmad and Others v. the United Kingdom*, Applications Nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09, European Court of Human Rights, Final Judgement of the Chamber (24 September 2012), para. 66 and 67.

> may cause an infringement of article 3. Whether, even in a domestic context, this attains the necessary level of severity is a point on which I would wish to reserve my opinion. If, however, it were applied in the context of extradition, it would prevent anyone being extradited to many countries, poorer than Scotland, where people who are not in prison often have to make do without flush lavatories."[794]

Although not in complete agreement with the exact version of the relativist approach invoked by the House of Lords, ultimately the ECtHR formulated its own version of *relativism* towards the application of Article 3 of the Convention in torture and ill-treatment expulsion cases.[795] In this regard, the Court reiterated that although Article 3 conveys an absolute prohibition for both torture and ill-treatment (other inhuman or degrading treatment or punishment), what constitutes torture or ill-treatment at assessment phase is a matter of ***relativist speculation***.[796] For example, whether a specific type of punishment or imprisonment such as solitary confinement is ill-treatment, is a matter of assessment. Assessment is a relative exercise based on many objective and subjective factors such as the general attitude of the society towards the alleged crime and its punishment, the individual attributions of the applicant, their mental health, and their level of vulnerability and disabilities.[797]

Besides, in the phase of applying Article 3 prohibition to expulsion cases in an extra-territorial context, this relativism in assessment becomes a determining factor in the sense that the absolute nature of Article 3 would not mean that 'any form of ill-treatment will act as a bar to removal from a Contracting State'. To support this argument, the Court, thereafter, referred to its recent jurisprudence, in the Grand Chamber case of *Al-Skeini and Others v. the United Kingdom* on the issue of the extra-territorial applicability of the ECHR, and stated that, the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. Based on these lines of reasoning, the Court in *Babar Ahmad and Others v. the UK* opined that:

> This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of

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[794] *Ibid*, para. 68.
[795] Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK' (2013) 76(3) *The Modern Law Review*, pp. 589-619, p. 598-601.
[796] *Babar Ahmad and Others v. the United Kingdom*, Applications Nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09, European Court of Human Rights, Final Judgement of the Chamber (24 September 2012), paras 200-203.
[797] *Ibid*, paras 204-215.

> Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment for HIV/AIDS in *Aleksanyan v. Russia*, no. 46468/06, §§ 145–158, 22 December 2008 with *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008).[798]

In its conclusion, the Court, without feeling a need to apply the *Othman* criteria on evaluating the quality and adequacy of diplomatic assurances, ruled that, there had been no violation of Article 3, since the removal is to '[…] a State which had a long history of respect of democracy, human rights and the rule of law'.[799] A question I would like to pose against this conclusion is why did the Court ignore the long decade of human rights abuse and gross violations by the US Government in its counterterrorism policies and activities all over the World during the so called 'war on terror'.[800] If horrific off-shore detention sites such as Guantanamo Bay,[801] extraordinary renditions,[802] solitary confinement, and the torturous conditions of maximum-security prisons in the US[803] are insufficient to compel judges to act with greater scrutiny in their handling of Article 3 violations, I have no idea what could possibly awaken the moral conscience of the Court.

The absurd twist of the ECtHR in this case[804] – meaning that it suddenly considered a *relativist approach* to distinct domestic from extra-territorial contexts in assessing a minimum level of severity under Article 3 – is extremely

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[798] *Ibid*, para. 177.
[799] *Ibid*, para. 179.
[800] For more information with regard to the role of the European countries in aiding the US counterterrorism activities, see: Sergio Carrera, Elspeth Guild, João Soares da Silva, and Anja Wiesbrock, *The Results of Inquiries into the CIA's Programme of Extraordinary Rendition and Secret Prisons in European States in Light of the New Legal Framework following the Lisbon Treaty* (Brussels: European Parliament, Policy Department C – Citizens' Rights and Constitutional Affairs, 2012). With regard to the debate on holding the European countries accountable for their aid to the US illegal counterterrorism activities, see: Didier Bigo, Sergio Carrera, Elspeth Guild, and Raluca Radescu, *A Quest for Accountability? EU and Member State Inquiries into the CIA Rendition and Secret Detention Programme* (Brussels: European Union Policy Department on Citizens' Rights and Constitutional Affairs, 2015).
[801] Amnesty International, 'USA: Right the Wrong, Decision Time on Guantanamo', <www.amnesty.org/download/Documents/AMR5134742021ENGLISH.PDF>. Also see: Human Rights Watch, 'US: CIA Torture is Unfinished Business', <www.hrw.org/news/2015/12/01/us-cia-torture-unfinished-business>.
[802] Amnesty International, '"Rendition" and Secret Detention: A Global System of Human Rights Violations', <www.amnesty.org/download/Documents/80000/pol300032006en.pdf>.
[803] Amnesty International, 'USA: Prisoners held in extreme solitary confinement in breach of international law', <www.amnesty.org/en/latest/news/2014/07/usa-prisoners-held-extreme-solitary-confinement-breach-international-law/>.
[804] For further critical analysis of the decision of the ECtHR in this case, see: Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK' (2013) 76(3) *The Modern Law Review*, pp. 589-619.

alarming and disturbing.[805] This approach has the potential to pave the way for shattering the very foundation of the right to seek asylum, i.e. the principle of *non-refoulement*. After all, this prohibition is not only a matter of ECHR rule or EU law,[806] but also a universal prohibition based on its position as a customary norm of international law. The prohibition of *refoulement* in the cases of expulsion to torture and ill-treatment finds a more fundamental importance, due to being a *jus cogens* norm in international law. Once more, referring to Dworkin, if law derives its meaning through practice and by taking rights seriously, and if we wish that Article 3 of the Convention to be 'practical and effective, and not theoretical and illusory,'[807] attacking the absolute and non-derogable nature of this prohibition is definitely not an appropriate path to follow.

To conclude, putting everything in the context of securitisation hoping to find some answers to the contemporary challenges facing our World might seem to be an easy solution. However, doing so blinds us to the dangers of undermining our very few universal principles such as the prohibition of torture and other forms of ill-treatment or *refoulement* to them. While concluding this dissertation in next chapter, I will discuss more implications of securitising immigration on the right to seek asylum by examining the collective expulsion of immigrants.

5.5. CONCLUSION

In this chapter, I provided more answers to the main research question of this dissertation. By analysing the formation and use of diplomatic assurances as another example of the securitisation of immigration, I have shown that the absolute and non-derogable nature of the principle of *non-refoulement*, which is in itself the foundation of the right to seek asylum, is prone to uncertainty and scepticism.

Besides torture, Article 3 of the ECHR prohibits any expulsion to other inhuman or degrading treatment or punishment. I critically analysed the formation and use of diplomatic assurances in torture and ill-treatment expulsion cases, and

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[805] Scott Poynting, 'Entitled to be a Radical? Counter-Terrorism and Travesty of Human Rights in the Case of Babar Ahmad' (2016) 5(2) *State Crime*, pp. 204-219.
[806] Article 19(2) of the 2000 EU Charter of Fundamental Rights.
[807] *Airey v. Ireland*, Application No. 6289/73, European Court of Human Rights, Chamber Judgment (9 October 1979), para. 24. Also, see: *Soering v. United Kingdom*, Application No. 14038/88, European Court of Human Rights, Plenary Decision (07 July 1989), para. 87. And, see: *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, European Court of Human Rights, Grand Chamber Judgement (12 July 2001), para. 45. Also, see: *Gäfgen v. Germany*, Application No. 22978/05, European Court of Human Rights, Grand Chamber, Decision (1 June 2010), para. 123. Also, see: *Murray v. The Netherlands*, Application No. 10511/10, European Court of Human Rights, Grand Chamber, Decision (26 April 2016), para. 104.

legally scrutinised these cases for challenging the absolute and non-derogable nature of *non-refoulement* under Article 3 of the ECHR. The scrutinising analysis of this practice clearly demonstrated how the securitisation of immigration, in practice, is making the right to seek asylum 'meaningless,' and therefore, degrading this right to a *not* real, *nor* an effective human right – as envisaged by those who drafted and ratified the Convention.

Referring back to Dworkin, if we want to take a right seriously, in practice we need to keep to the founding principles of the law and the legal system in which the law was adopted. In the case of taking the right to seek asylum seriously, primarily, we need to keep to the founding principle of this right, meaning the principle of *non-refoulement*, otherwise the very existence of this right as a fundamental and basic human right falls apart.

6. DISCUSSION AND CONCLUDING REMARKS

6.1. INTRODUCTION

In Chapter 4, I addressed the implications of the securitisation of immigration in the EU on the right to seek asylum as a fundamental right within the jurisprudence of the CJEU under Article 18 of the EU Charter of Fundamental Rights. After that, in Chapter 5, I analysed another implication of the securitisation of immigration under the jurisprudence of the ECtHR within the ambit of Article 3 of the ECHR and its absolute and non-derogable prohibition of *refoulement* to torture and other forms of ill-treatment. As argued extensively in Chapter 5, Article 3 of the ECHR is the statement of the principle of *non-refoulement* to torture and other inhuman and degrading treatment or punishment as a *jus cogens* norm, against which absolutely no derogation is allowed. The securitisation of immigration manifests itself in the form of signing diplomatic assurances in the cases of Article 3 expulsions.

In this chapter, I will first present the main findings of my research and the answers to the main research question posed in this dissertation (Subsection 6.2.1). Thereafter, I will elaborate on the contribution of this study to existing knowledge, while diagnosing the gap in literature and research on the link between migration law and security (Subsection 6.2.2). In Subsection 6.2.3, I then express some concerns with regard to the controversial debates on the nexus between securitising immigration in the EU, on the one hand, and protecting the human rights of asylum seekers, on the other. These concerns are mainly due to the ambiguities and highly securitised language of the EU New Pact on Migration and Asylum proposed by the EU Commission in late 2020.

In Section 6.3, I will conclude the discussion on the implications of the securitisation of immigration in the EU on the right to seek asylum as a fundamental human right. In this regard, I first address and analyse another practice emerging from the securitisation of immigration in the EU, namely the collective expulsion of immigrants (Subsection 6.3.1). A critical analysis of this practice scrutinises how, in spite of bluntly contradicting with the right to seek asylum and the principle of *non-refoulement*, this practice has found a legitimate space in immigration management policies of the EU at controlling its external borders. By critically analysing one of the recent cases in this regard within the jurisprudence of the ECtHR – the case of *N.D. and N.T. v. Spain* (2020) – I extract and thereafter explore the idea of protecting the security of EU as a 'meta' or 'collective right.' By considering the security of EU as a 'meta right,' I demonstrate how a right to 'collective security' or 'security for all' is fundamentally at odds with the rationale behind the current international and

EU systems of refugee protection, which is substantially based on the individual assessment of subjective persecution. By this, I mean that the EU and its Member States have positioned collective security over and above individual security and the protection of those in need of asylum protection – mainly coming from the Global South. Therefore, the question I answer here is that how safeguarding the security of EU in practice has affected the prohibition on the collective expulsion of aliens, and therefore the enjoyment of the right to seek asylum and relevant rights such as the right to an effective remedy.

With regard to the jurisprudence of the ECtHR on the prohibition of the collective expulsion of aliens, a subject of Article 4 of Protocol No. 4, I analyse the most recent case and the dissenting opinion of Judge Koskelo annexed to the decision of the Grand Chamber in the case of *N.D. and N.T. v. Spain* (2020). In this case, the Grand Chamber agreed with the responding Government that the applicants had *abused* their right to *non-refoulement* and the prohibition of collective expulsion of aliens. The abuse of this right is one basis for policy-making with regard to the right to seek asylum. To explain, if we think of the right to seek asylum as a legal path for individuals to personal security, as a corresponding right to that, the members of the host State have a right to collective security. In this regard, the primary function of the State is to protect the collective security of society. Therefore, if someone uses the right to seek asylum as a tool to undermine or harm the 'collective security' of the host society, it becomes a clear misuse of the right to seek asylum. The Grand Chamber judges of the ECtHR in the case of *N.D. and N.T. v. Spain* (2020) have taken this exact line of argument, acting as the advocates of the securitised immigration policies of the EU, instead of being the guardian of the rights guaranteed under the Convention.

At the end, without any intention to over-generalise the conclusion of this study, I show that the securitisation of immigration in the EU – both at normative and practical levels – has reduced the status of the right to seek asylum to less than that of a fundamental right. I argue that the prohibition of mass expulsion is a necessary precondition for the realisation of the right to seek asylum. Departing from the opinion of Judge Koskelo on collective security prevailing over the rights of individuals to security, in Subsection 6.3.2, I argue that protecting all other fundamental rights of asylum seekers depends on respecting the right to seek asylum through the prohibition of all practices violating this right such as the collective expulsion of immigrants. The right to seek asylum is so fundamental in the realisation of other human rights – by the way of making an asylum seeker a subject recognised by law – that to me, this right resembles to

the perception Hannah Arendt had of the 'right to have rights.'[808] For this reason, I consider the right to seek asylum to be the mother of all other human rights, particularly in the case of asylum seekers.

The ultimate destructive effect of the securitisation of immigration in the EU on the right to seek asylum is to make a certain category of humans 'illegal.' Under this scenario, the very social and legal existence of some people falls outside the realm of the 'Law's Empire.'[809] After all, depending on the law alone, or on the language of rights, as such, does not suffice in the tangible realisation of the right to seek asylum. In addition to the inherent incapability and inability of law in solving the issue of the 'illegality' of some humans, this approach limits us to the rigidity of a 'legalistic dogma.'[810] This rigidity in thinking ignores the political, social, cultural, and civil contexts, within which human rights in general, and the right to seek asylum particularly, have been formulated and found real meaning over time.[811]

In conclusion, instead of understanding the right to seek asylum from a purely legalistic approach, I propose that we should show due regard also to the 'political processes,' which give real meaning to this right. After all, human rights are not merely matters of legal dogmatic discourse. Whereas, the political, social, cultural, and even economic contexts, within which human rights form and dismantle, should carefully and critically be studied to understand how we could give a second life to the right to seek asylum in the EU.

6.2. WHAT DOES THE SECURITISATION OF IMMIGRATION IN THE EU MEAN FOR THE RIGHT TO SEEK ASYLUM AS A FUNDAMENTAL RIGHT?

6.2.1. RESEARCH OBJECTIVES AND THE SUMMARY OF RESEARCH FINDINGS

In this doctoral thesis, I studied part of the tense relationship between protecting the human rights of immigrants as opposed to safeguarding the

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[808] Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), pp. 267-302.
[809] I have borrowed the phrase 'Law's Empire' from the title of one of Dworkin's books: Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing Ltd, 1998).
[810] Richard Ashby Wilson, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law', in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge; New York: Cambridge University Press, 2007), pp. 342-369, pp. 360-363.
[811] *Ibid.* In this regard, also see: Jean Grugel and Nicola Piper, *Critical Perspectives on Global Governance: Rights and Regulation in Governing Regimes* (New York: Routledge, 2007), pp. 18-21.

national security of host states.[812] The main goal of investigation was to identify, analyse, and challenge the affects that the securitisation of immigration in the EU has on the enjoyment of the right to seek asylum as a basic and fundamental human right. In other words, is there an effective right to seek asylum in the EU today? The guiding hypothesis running through the whole research, connecting the pieces of the puzzle was that the securitisation of immigration in the EU both at law and practice levels has negatively affected the right to seek asylum in the way that this right has become less effective in practice.

In order to test the hypothesis and provide possible answers to the main research question of this thesis, first, I analysed the nature of the right to seek asylum as a fundamental human right and its essential composing elements, which are inviolable (Chapter 2). Then, in Chapter 3, I explained what the theory of the securitisation of immigration in the EU means in the context of counterterrorism. In Chapters 4 and 5, through a critical discursive analysis of the case law within the jurisprudence of the CJEU and the ECtHR, I demonstrated that the right to seek asylum is becoming less than that of a fundamental human right, because the securitisation of immigration attacks directly at the very essence of this right.

In Chapter 2, I discussed that, in spite of the fact that the practice of asylum seeking is as old as humanity itself, the formation of the right to seek asylum, as a fundamental human right is actually only a recent normative development – the history of which dates back to the post-war era. In the aftermath of WWII, the 1948 UDHR, in its Article 14, for the very first time recognised a human right to seek asylum as an international human right. Even though this right is not mentioned explicitly in the 1951 Refugee Convention, the principle of *non-refoulement*, the backbone of the legal system of refugee protection and the founding principle of the right to seek asylum, comes under Article 33(1) of this Convention.

Together with the principle of *non-refoulement*, as the humanitarian principle for forming an international legal regime of refugee protection, the principle of state sovereignty is another pillar, upon which this legal system rests. Therefore, the interests of the host States are an integral part of implementing the right to

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[812] Valeria Bello, International Migration and International Security: Why Prejudice Is a Global Security Threat (New York; Oxford: Routledge, 2017), pp. 51-69. Also, see: Philip Alston and Ryan Goodman, International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals: Text and Materials (Oxford: Oxford University Press, 2013), pp. 383-486. Also, see: Philippe Bourbeau, The Securitization of Migration: A Study of Movement and Order (New York; Oxford: Routledge, 2011), pp. 11-48. Also, see: Edward Newman, 'Refugees, International Security, and Human Vulnerability: Introduction and Survey', in Edward Newman and Joanne Van Selm (eds), Refugees and Forced Displacement: International Security, Human Vulnerability, and the State (Tokyo; New York: United Nations University Press, 2003), pp. 3-30.

seek asylum. Accordingly, similar to many other human rights, which are not absolute, and therefore, derogable, the right to seek asylum could be subjected to some exceptions or limitations under certain circumstances if there are concerns of national security or public safety. However, the nature of the right to seek asylum being a fundamental human right means that there are certain essential elements inherent at the core of this right, derogation from which under no circumstances should be allowed. These essential elements are first, allowing asylum seekers to gain entry to the territory of host States for accessing asylum claim procedures and secondly, the prohibition of *refoulement*. Derogating from these two essential elements means attacking directly at the core of this right as a fundamental human right, making it both illusionary and ineffective.

Accordingly, what is of particular importance here is that the right to seek asylum as a right encompassing the elements of both procedural and substantial human rights is based on individual assessment of every asylum application. Therefore, through analysing the procedural and substantial elements of the right to seek asylum through the lenses of Hohfeldian and Alexy's theory of rights, no security concern as such could prevent an individual from gaining access to the asylum application procedures. The same applies to the associated substantial human rights such as the right to life and personal security through prohibition of *refoulement*. Despite this, in practice the dominance of the official security narratives in the EU over immigration has detrimentally affected the enjoyment of the right to seek asylum in the form of preventing asylum seekers from even gaining access to RSD procedures. The dominance of security narratives in the immigration discourse is theorised as the *securitisation of immigration*.

As a response to the theory of the securitisation of immigration, and in order to pave the way to offering an answer to the main research question, I sought assistance from theories developed beyond securitisation, meaning the school of critical security studies. The theory of securitisation applied to immigration remains at the phase of speech-act, without providing any insights into the implications of this process and the damage done to the real-life situation of immigrants and their enjoyment of basic and fundamental human rights. In contrast to the theory of securitisation, the critical school of security studies invites us to move beyond the mere process of securitisation and pay attention to the negative impacts this could have on the lives and rights of those subject to securitisation.

This is exactly what I did in this doctoral thesis. Instead of answering to the question whether immigrants are, in fact, a matter of national security, I scrutinised the impacts and implications of asking these kinds of questions or

even trying to answering them. By focusing solely on answering whether immigration is or not a matter of security, we actually create, produce and reproduce the process of securitisation through questioning. We should be well aware that as academics, policymakers, judges, other officials and actors, or any other immigration stakeholders, our speech-acts have real consequences on the reality of daily life for immigrants and the enjoyment of their basic and fundamental human rights.

In order to test the hypothesis of this research, I collected relevant empirical data on the practice of duty holders of the right to seek asylum meaning European States and Courts. What exactly I studied was the implementation of Article 18 of the EU Charter on the right to seek asylum and Article 3 within the jurisprudences of the CJEU and the ECtHR, respectively. For further analysis to provide answers to the main research question, I investigated the EU legislation, both primary and secondary sources of EU law.

Analysing the decision of the CJEU in the case of *X and X v. Belgium* showed that a lack of proper legal mechanisms to gain entry to the EU to seek asylum – because of securitising immigration and associating it with transnational crimes such as human trafficking and terrorism – has made the right to seek asylum both impractical and ineffective. In addition, EU legislation and the practice of the CJEU, due to the securitisation of immigration and especially the treatment of undocumented migrants, is eroding the position of the right to seek asylum as a fundamental human right. In the case of asylum, the EU legislator has deliberately securitised a certain category of immigrants and the judges at the CJEU magnified the same attitude in their decisions and closely followed this general idea; therefore, the securitisation of immigration has constructed the backbone of policymaking, legislation, and judicial reasoning in the EU.

In order to inspect the implications of securitising immigration in the EU, I applied Dworkin's theory of legal interpretivism to analyse the tension between fulfilling the right to seek asylum, on the one hand, and safeguarding national security, on the other, as the difference between matters of principle and policy, respectively. In this regard, Dworkin offers a tool for interpretation known as the 'law as integrity', based on which deciding about asylum cases, as a matter of constitutional and fundamental human right, must be in full compliance with the values and principles upon which the community is established.

Therefore, the interpretation of the right to seek asylum, as a matter of constitutional and fundamental law, against the security concerns of States, as matter of policy, must rely on the principles of 'human dignity' and 'political equality'. Not taking these essential elements of the right to seek asylum seriously, thus constitutes grave 'injustice' if matters of social policy or efficiency

infringes this right. This mode of interpretation could have been applied to the case of *X and X v. Belgium*. In this case, the judges of the CJEU had the duty to interpret Article 18 of the EU Charter, as a fundamental human right, and in line with the principle of human dignity and other values, upon which the EU community was established.

Furthermore, by analysing the jurisprudence of the ECtHR under Article 3 of the ECHR, I concluded that the use of diplomatic assurances in torture-expulsion cases might endanger the *jus cogens* nature of the principle of *non-refoulement* to torture and other forms of ill-treatment. Referring again to Dworkin, if we want to take a right seriously, in practice, we need to keep to the founding principles of our laws and the legal system in which those laws were adopted. In the case of taking the right to seek asylum seriously, we need to keep primarily to the essential founding principle of this right, meaning the principle of *non-refoulement*; otherwise, the very existence of this right, as a fundamental and basic human right, falls apart. This analysis suggested that the *non-entrée* policy of the EU is replacing the principle of *non-refoulement*, as a customary norm of international law. In the same direction, the prevalence of security policies in the EU is seriously marginalising the right to seek asylum at the margin; as if, this right was not a fundamental or constitutional human right.

6.2.2. CONTRIBUTION TO THE EXISTING KNOWLEDGE

As mentioned in Chapter 1, this research is part of the ongoing debates and discussions on the tension between protecting the human rights of immigrants, as opposed to safeguarding the national security of host States.[813] The most recently published bodies of research available on this topic have covered a wide range of issues including criminalising immigration to Europe,[814] the criminalisation of the acts of solidarity in favour of undocumented

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[813] Valeria Bello, *International Migration and International Security: Why Prejudice Is a Global Security Threat* (New York; Oxford: Routledge, 2017), pp. 51-69. Also, see: Philip Alston and Ryan Goodman, International Human Rights: *The Successor to International Human Rights in Context: Law, Politics and Morals: Text and Materials* (Oxford: Oxford University Press, 2013), pp. 383-486. Also see: Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order* (New York; Oxford: Routledge, 2011), pp. 11-48. Also, see: Edward Newman, 'Refugees, International Security, and Human Vulnerability: Introduction and Survey', in Edward Newman and Joanne Van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo; New York: United Nations University Press, 2003), pp. 3-30.

[814] Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (London: Springer, 2015). Also, see: Magdalena Kmak, 'Migration Law as a State (Re)producing Mechanism', in Margaret Franz, Kumarini Silva (eds), *Migration, Identity, and Belonging: Defining Borders and Boundaries of the Homeland* (New York; Oxford: Routledge, 2020), pp. 35-42.

immigrants,[815] the externalisation of European border control,[816] and the arbitrary detention of asylum seekers.[817]

Within the official narrative of EU States, those assisting asylum seekers on the path to reach Europe even on a charity basis are allegedly human smugglers.[818] However, no work has touched upon the normative implications of the securitisation of immigration in Europe on the right to seek asylum as a fundamental right. Comparing this claim with a book chapter written by Ardalan, the latter could possibly be the closest academic work to my dissertation in general terms of topic and conclusion. In her book chapter, Ardalan has conducted a qualitative research on restrictive border practices at the US-Mexico border and compared them with policies and practices at the EU-Moroccan border.[819]

In addition, I must mention another recent book edited by James C. Simeon, with the title of 'Terrorism and Asylum', which covers the normative construction of excluding asylum seekers because of terrorism and its national dimensions.[820] Against this literature, one of the novel aspects of my research is that first, I highlighted the methodological constraints of the theory of securitisation in studying the nexus between migration law and security. Thereafter, I exclusively analysed the implications of the securitisation of

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[815] Chiara Maria Ricci, 'Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the 'Facilitators' Package", in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Leiden: Brill Publishers, 2020), pp. 34-56.

[816] Daniela Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond', in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Leiden: Brill Publishers, 2020), pp. 130-166.

[817] Magdalena Kmak, 'Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention' (2018) 15 *No Foundations: An Interdisciplinary Journal of Law and Justice*, pp. 1-22. For further accounts on country-specific studies of immigration detention, see different chapters in the following edited book: Amy Nethery and Stephanie J Silverman (eds), *Immigration Detention: The Migration of a Policy and its Human Impact* (Oxford; New York: Routledge, 2015). Also see: Vladislava Stoyanova, "Recasting' Detention of Asylum Seekers: Human Rights Law, EU Law and Its Application in Bulgaria', in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Leiden: Brill Publishers, 2020), pp. 319-338.

[818] In this regard, for example, see: The Guardian, 'Refugee rescuers charged in Italy with complicity in people smuggling', <https://www.theguardian.com/global-development/2021/mar/04/refugee-rescuers-charged-in-italy-with-complicity-in-people-smuggling>. In this regard, also see: The Guardian, "Help and you are a criminal': the fight to defend refugee rights at Europe's borders, <www.theguardian.com/global-development/2021/mar/01/help-and-you-are-a-criminal-the-fight-to-defend-refugee-rights-at-europes-borders>.

[819] Sabrineh Ardalan, 'EU and US Border Policy: Externalisation of Migration Control and Violation of the Right to Asylum', in Valsamis Mitsilegas, Violeta Moreno-Lax, and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Leiden: Brill Publishers, 2020), pp. 282-318.

[820] James C. Simeon, 'Introduction: Terrorism, Asylum, and Exclusion from International Protection', in James C. Simeon (ed.), *Terrorism and Asylum* (Leiden; Boston: Koninklijke Brill NV, 2020), pp. 1-37.

immigration in the EU upon the right to seek asylum as a basic and fundamental human right by applying a multidisciplinary method, combining critical legal analysis and critical security analysis through the tool of critical discourse analysis to provide answers to the main research question of this thesis. Accordingly, I first presented that the current practice of the EU Member States and the deference of the CJEU in dealing with the issue of humanitarian visas have rendered the right to seek asylum, as a fundamental right under Article 18 of the EU Charter, practically ineffective.

Secondly, in Chapter 5 of this thesis, I argued that under the pretext of safeguarding national security, the Member States of the Council of Europe have employed *quasi*-legal ways to circumvent their positive obligation under the principle of *non-refoulement* in general and the absolute and non-derogable prohibition of *refoulement* to torture and other forms of ill-treatments, specifically. Customary norms of international law form through the elements of general practice and *opinio juris*. Therefore, I expressed a concern that if the current practices against *non-refoulement* continue to persist and a general opinion forms that security concerns could justify *refoulement*, in practice, the principle of *non-refoulement* loses its *jus cogens* character and further its customary-norm status in international law and will be dismantled by *non-entrée* policies.

6.2.3. RECOMMENDATIONS AND IDEAS FOR FUTURE RESEARCH

This research exposed the fallacies of ongoing *quasi*-legal 'solutions' to the problem of asylum seekers in Europe. In this research, I argued strongly that asylum seekers are not a problem to the EU, whereas the real problem lays in the highly securitised European asylum laws and practices. The securitisation of immigration in Europe has resulted in excluding a group of human beings, who are in desperate need of individual security and protection themselves, from existing in the eyes of the law. Excluding asylum seekers from the domain of law shows the depth of the hypocrisy that exists today in the EU – seeing human rights as the founding value of the EU as an 'area of freedom, security, and justice'. This irony fully reflects itself in the practice of the European States and Courts in not finding pragmatic ways to allow asylum seekers to gain access to a fair and effective asylum application procedure.

I might have exposed this fallacy, but I have yet to address in depth what we could do next to bring more effectiveness to the right to seek asylum in Europe. To take the right to seek asylum more seriously as a fundamental human right, the first step would perhaps be the de-securitisation of immigration at a normative level. However, the path to this goal is, indeed, far more complex and depends on many factors. One of the most influential factors in this regard is the

willingness and the political direction that the EU takes with regard to the amendment of existing legislation. The starting point, however, does not seem too promising. In November 2019, Ursula von der Leyen, just before being elected as the President of the European Commission (December 2019-current), announced the creation of a new Commissioner during her upcoming presidency, with the title 'The European Commissioner for Promoting the European Way of Life'.[821] The role of this new Commissioner is assigning the EU political will and direction (or policy-making) in the area of migration, amongst other areas such as health, security, rule of law, etc.[822]

Ever since, this portfolio has provoked serious concerns over the real meaning of 'the European Way of Life,' and on how this would affect the new EU policies on immigration.[823] For instance, Andrew Stroehlein, the media director for Human Rights Watch, expressed worries that, '[p]utting migration under a portfolio named "protecting our European way of life" is another example of just how much mainstream politicians in Europe are adopting the framing of the far right.'[824] As another example, Jean-Claude Juncker, the predecessor of von der Leyen, asserted, 'I don't like the idea that the European way of life is opposed to migration. Accepting those that come from far away is part of the European way of life.'[825]

Despite all criticisms, in September 2020, the EU Commissioner for Promoting the European Way of Life proposed an amendment for EU legislation on migration, called the 'New Pact on Migration and Asylum'. This document claims its main aim to be creating more efficient and fairer migration processes, reducing unsafe and irregular routes, and promoting sustainable and safe legal

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[821] European Commission, 'Promoting our European way of life: Protecting our citizens and our values', <ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life_en>.
[822] *Ibid*. In this regard, also see: European Parliament, 'Parliamentary Hearings of the Commissioners-Designate: An Analysis of the Portfolios of the von der Leyen Commission' (Brussels: European Union, the European Parliamentary Research Service, 2019), pp. 55-58.
[823] Hugo Balnaves, Eduardo Monteiro Burkle, Jasmine Erkan, and David Fischer, 'European Populism in the European Union: Results and Human Rights Impacts of the 2019 Parliamentary Elections' (2020) 4 *Global Campus Human Rights Journal*, pp. 176-200. Also, see: The New York Times, 'Protecting Our European Way of Life'? Outrage Follows New E.U. Role, <www.nytimes.com/2019/09/12/world/europe/eu-ursula-von-der-leyen-migration.html>. Moreover, see: Euronews: 'Disagreement over "Protecting our European Way of Life" portfolio', <www.euronews.com/2019/09/12/exclusive-juncker-tells-euronews-portfolio-title-protecting-our-european-way-of-life-must>. Also, see: Reuters, 'New EU post to protect European Way of Life slammed as "grotesque"', <www.reuters.com/article/uk-eu-jobs-life/new-eu-post-to-protect-european-way-of-life-slammed-as-grotesque-idUKKCN1VV26N?edition-redirect=uk>.
[824] The New York Times, 'Protecting Our European Way of Life'? Outrage Follows New E.U. Role, <www.nytimes.com/2019/09/12/world/europe/eu-ursula-von-der-leyen-migration.html>.
[825] Euronews: 'Disagreement over "Protecting our European Way of Life" portfolio', <www.euronews.com/2019/09/12/exclusive-juncker-tells-euronews-portfolio-title-protecting-our-european-way-of-life-must>.

pathways to those in need of protection.[826] The aims of this proposal might seem noble on the surface, but the main concern involves how much the upcoming legislation amendments are going to take a human rights-based approach, in the direction of not only protecting the right to seek asylum, but also giving an agency to asylum seekers.

Applying the lenses of critical discourse analysis against the text of the 'New Pact on Migration and Asylum,' the language of securitisation prevails in the light of predominantly focusing on external border security and border-control management.[827] Therefore, the question remains why the EU is not willing to abide with its normative human rights obligations related to the right to seek asylum. Is it perhaps because these obligations cost money and welcoming outsiders means spending more? Is it perhaps because there is only a *single* 'European Way of Life,' that requires being 'white' and 'Christian'? Are these not rather the same narratives of the populist and far-right politicians to justify closing EU borders? Perhaps, after all, it is simply more convenient to blame 'others,' especially 'outsiders' for the problems we face in society.

6.3. FINAL WORD: WHEN SECURITISED IMMIGRATION LAW MAKES HUMANS 'ILLEGAL'

6.3.1. THE PROHIBITION OF THE COLLECTIVE EXPULSION OF ALIENS AND ENSURING THE RIGHT TO SEEK ASYLUM

At the crossroad between protecting the human rights of asylum seekers, against safeguarding the national security of host States, one of the common practices that can currently be witnessed at EU external borders is the 'collective expulsion of aliens.' Recently, we have heard of this practice happening at the external Schengen borders more frequently than ever before. This practice results in preventing asylum seekers from entering the EU and submitting their asylum applications. The practice of collective expulsion of aliens, not only on the scale of number of returnees, but also in the use of excessively forceful measures employed against immigrants, is unprecedented.[828] The excessive use

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[826] European Commission, 'New Pact on Migration and Asylum: A fresh start on migration in Europe', <ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en>.
[827] The European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 23 September 2020, COM(2020) 609 final, pp. 11-26.
[828] Ruben Andersson, 'Rescued and Caught: The Humanitarian-Security Nexus at Europe's Frontiers', in Nicholas De Genova (ed.), *The Borders of "Europe": Anatomy of Migration, Tactics of Bordering* (Durham; London: Duke University Press, 2017), 64-94, pp. 64 and 65.

of force has been so far documented by numerous journalists, human rights activists (both individuals and organisations), and even on the cameras of mobile phones or other recording devices by immigrants themselves or various passers-by.[829]

Various international and regional human rights instruments have explicitly prohibited the practice of collective expulsion of aliens. In this regard, the most important instruments are: Article 22(1) of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 4 of Protocol No. 4 of the ECHR, Article 19 of the EU Charter,[830] Article 22(9) of the American Convention on Human Rights, and Article 12(5) of the Banjul Charter. The 1966 ICCPR, however, does not explicitly prohibit the collective expulsion of aliens when addressing the issue of expulsions under Article 13. Nevertheless, in its General Comment No. 15 on the position of aliens under the ICCPR, the Human Rights Committee (HRC) has rendered that the collective expulsion of aliens is contrary to the procedural guarantees anticipated for protecting individuals against arbitrary and unlawful expulsions.[831]

According to paragraph 10 of this General Comment, Article 13 of the ICCPR is the statement of the procedural and due process rights of individuals in accessing legal procedures to address their immigration cases. Therefore, the collective or mass expulsion of aliens violates the prohibition of arbitrary expulsion under Article 13 of the 1966 ICCPR. The reason is that the collective expulsion of aliens prevents non-nationals from receiving an individual decision with regard to immigration cases and deprives the individual of demanding remedies to compensate against expulsions.

Moreover, based on the principle of non-discrimination, the prohibition of the collective expulsion of aliens does not depend on whether the group of aliens have lawfully arrived in or are residing in the territory of the state that expels them. In other words, the immigration status of aliens could never be a justification for collectively expelling a group of asylum seekers, or those found within the territory without possessing valid travel or identification documents.

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[829] José Palazón: "Que no le quepa la más mínima duda al ministro de que hay más imágenes", <www.eldiario.es/desalambre/Jose-Palazon-minima-ministro-imagenes_0_357315277.html>; 'Refugee and Migrant Exclusion in Europe: Spain's Push-Back Practice (Melilla)', <www.youtube.com/watch?time_continue=6&v=amyEP7LIDF0&feature=emb_logo>; 'Melilla: the Spanish enclave that has become the backdoor to Europe', <www.youtube.com/watch?v=ZHj58hYdhMg>.

[830] Article 19(1) of the EU Charter, entitled 'Protection in the event of removal, expulsion or extradition', explicitly reinforces that the collective expulsions are prohibited.

[831] General Comment No. 15: The Position of Aliens under the Covenant adopted at the twenty-seventh session of the Human Rights Committee, 11 April 1986, para. 10.

In addition, the rule on the prohibition of collective expulsion encompasses a positive and due diligence obligation, according to which States are bound by the rule of law to provide accessible 'judicial and/or administrative mechanisms' for immigrants to challenge the expulsion decisions issued against them. In other words, the members of a group of immigrants should not be expelled in a mass manner, without the consideration of their individual cases. Moreover, each individual should have effective access to the legal channels, including the 'administrative and/or judicial appeal instances,' to challenge the return decisions made against them.

The starting point of discussion on the prohibition of mass expulsion is that this prohibition is a necessary precondition for the realisation of the right to seek asylum. In addition, other fundamental human rights of asylum seekers such as the right to life and the right to an effective remedy (as a pertinent component of the right to a fair trial and subjects of Articles 13 and 6 of the ECHR, respectively), are highly dependent on the respect for the prohibition of the collective expulsion of aliens. Therefore, the question I answer here is that how safeguarding the internal security of EU, in practice, has affected the prohibition on the collective expulsion of aliens and the enjoyment of the right to seek asylum and its derivatives such as the right to life and the right to an effective remedy.

Within the EU, technically speaking, national security is equivalent to internal security, which guarantees the protection of the national security of every EU Member State and those residing 'legally' within their territories. When it comes to the practice of the collective expulsion of immigrants, the ECtHR has produced the latest judiciary jurisprudence. For example, the recent deliberation of the Grand Chamber of the ECtHR in the case of *N.D. and N.T. v. Spain* (2020) shows that the bottom-line argument with regard to detangling the tension between safeguarding the national security *versus* protecting the human rights of immigrants is adherence to the idea of a 'collective right to security.'[832] This collective right is the right of the 'citizens of the European Community' and other 'legal' residents of the EU – an 'area of freedom, security, and justice' – to security.

The concept of EU, as an 'area of freedom, security, and justice' derives from Title V of the TFEU. The basic idea for creating EU as an 'area of freedom, security, and justice' was to ensure the 'freedom of movement of persons,' and to offer a 'high level of protection, safety, and security to its citizens.' In this

[832] Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System', in Neil Walker (ed.), *Europe's Area of Freedom, Security, and Justice* (New York: Oxford University Press, 2004), pp. 89-142, p. 97.

regard, paragraph 1 of Article 67 of the TFEU stipulates that the EU 'shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.' According to Pastore, the EU's area of security is 'an expression of a general evolutionary trend for growth in international security and control regime.'[833] At the same time, security regimes have a strong tendency towards expanding and covering more and more areas – even those beyond the physical territories of a State.[834] The most important aspect of policies guaranteeing EU security is the 'management of the European Union's external borders.' At the core of these 'security and border-control management policies' lie the 'EU's asylum and immigration policies,' with repeating some slogans such as the 'fight against different crimes, more specifically crimes related to population movement and immigration such as terrorism, trafficking in human beings, illegal drug trafficking, and human smuggling.'[835]

A noticeable shift in the thinking of EU policymakers has been visible in the aftermath of the 9/11 attacks; a shift from protecting human rights of all individuals subjected to States' jurisdiction towards protecting the EU as an area of 'freedom, security, and justice.' This indicates a change in the approach of policymakers, legislators, and judicial decision-makers in the EU. For example, referring to Article 77 of the TFEU, in order to have an area of freedom of movement, there is a necessity or an urgent need to get rid of any possible internal border checks within the EU. At the same time, in order to safeguard the safety and security of this area, it is pertinent to construct an immensely strong and highly effective system of external border control.

Consequently, the EU has created much legislation on border surveillance and external European border control. Amongst this legislation, most importantly we could refer to the 2016 Schengen Borders Code and the 2008 EU Return Directive. According to Article 13 of the 2016 Schengen Borders Code, the main purpose of border surveillance shall be 'to prevent unauthorised border crossings, to counter cross-border criminality, and to take measures against persons who have crossed the border illegally.' This Article continues that a person, who has crossed a border illegally and has no right to stay in the territory of the Member State concerned, shall be apprehended subject to return procedures respecting the 2008 EU Return Directive.

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[833] Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System', in Neil Walker (ed.), *Europe's Area of Freedom, Security, and Justice* (New York: Oxford University Press, 2004), 89-142, p. 97

[834] *Ibid*, p. 128.

[835] Article 79 of the Treaty on the Functioning of the European Union (TFEU).

With regard to expelling immigrants in a collective manner, the ECtHR case of *N.D. and N.T. v. Spain* (2020) has established a controversial precedent. This case concerns the complaint of two applicants, Mr. N.D. and Mr. N.T., who are the nationals of sub-Saharan African countries of Mali and *Côte d'Ivoire*, respectively. The respondent State in this case is the Kingdom of Spain (hereinafter, referred to as 'Spain' or 'the Government'). Prior to engaging in a critical analysis of this case, it is important to have a thorough picture of the factual background to this case and the relevant events leading the applicants to lodge a complaint against the Government of Spain at the ECtHR. First, it is important to describe the border area between Morocco and Melilla, and to understand the legal regime governing this region.

Melilla is an autonomous city, which together with the city of Ceuta, officially belongs to the Kingdom of Spain – a fact highly disputed by Morocco. The autonomous city of Melilla is a Spanish enclave of 12 sq. km located on the North coast of Africa and surrounded by Moroccan territory. The area separating the cities of Melilla and Ceuta from the African country of Morocco is the only land border area between the two continents of Africa and Europe.[836] This border area lies on the immigration route from the Northern and sub-Saharan Africa to Europe, which not only Africans, but also Syrians and other Middle Eastern immigrants use. The border between Melilla and Morocco is an external border of the Schengen border area and thus, it provides access to the EU territory. As a result, this area is subjected to particularly intense migratory pressure, especially in the aftermath of the 9/11 attacks and after the so-called '2015-2016 EU refugee crises.'[837]

Henceforth, since 2014, the Spanish authorities have been building and constantly maintaining a complex barrier, comprising of three parallel fences, along the 13 km border separating Melilla from Morocco. The aim for constructing this heavy infrastructure is to prevent irregular immigrants from accessing Spanish territory and eventually from entering the EU. This border barrier consists of the following physical components:

1. **The outer fence:** a six-metre-high, slightly concave fence;
2. **The middle fence:** a three-dimensional network of cables followed by a second, three-metre-high fence; and,

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[836] BBC News, 'Ceuta and Melilla: Spain's enclaves in North Africa', <www.bbc.com/news/world-africa-57305882>. Also: BBC News, 'Ceuta, Melilla profile', <www.bbc.com/news/world-africa-14114627>.
[837] Nicholas De Genova, 'Introduction: The Borders of "Europe" and the European Question', in Nicholas De Genova (ed.), *The Borders of "Europe": Anatomy of Migration, Tactics of Bordering* (Durham; London: Duke University Press, 2017), pp. 1-35, p. 27.

3. **The third or the inner fence:** another six-metre-high fence on the opposite side of a patrol road.

Most of the fences are equipped with anti-climbing grids. Therefore, to provide access between, several gates are built into the fences at regular intervals. A sophisticated CCTV system, including infrared cameras combined with movement sensors, has been installed along the fences.[838] There are four land border-crossing points between Morocco and Spain located along the fences. Between these crossings, on the Spanish side, the *Guardia Civil* (Spanish law enforcement agency) has the task of patrolling the land border and the coast of Melilla to prevent illegal entries to Spain. Mass attempts to breach the border fences are organised on a regular basis. Groups generally comprising of several hundred immigrants – many of whom from sub-Saharan Africa – attempt to enter Spanish territory through these fences. They frequently operate at night in order to produce a 'surprise effect' and to 'increase their chances of success,' due to lack of visibility. Those immigrants, who do not manage to evade the *Guardia Civil* and whom the officials succeed in persuading to come down of their own accord by using ladders, are taken back immediately to Morocco and are handed over to the Moroccan authorities, unless they are in need of urgent medical treatment.[839]

The facts leading to the incidents of this case is that, on 13 August 2014, two attempts took place to cross the border, both of which being organised by smuggling networks: one at 4:42 a.m. involving 600 people and another at 6:25 a.m. involving 30 people. The applicants stated that they had taken part in the first of these attempts. They had left the Mountain Gurugu camp on the same day and tried to enter Spain together with their group by scaling the outer fence. According to the respondent (the Government of Spain), the Moroccan police prevented around 500 immigrants from scaling the outer fence, but around a hundred of them, nevertheless, succeeded. Approximately 75 immigrants managed to reach the top of the inner fence, but only a few came down the other side and landed on Spanish soil, where the members of the *Guardia Civil* confronted them. The others remained sitting on top of the inner fence for many hours. The *Guardia Civil* officials helped them to climb down with the aid of ladders before handcuffing, arresting, and escorting them back to the Moroccan territory on the other side of the border through the gates between the fences, and handed them over to the Moroccan authorities.[840]

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[838] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), para. 16.
[839] *Ibid*, paras 17 and 18.
[840] *Ibid*, paras 24-27.

The applicants alleged that they had not undergone any identification procedures and had no opportunity to explain their personal circumstances or be assisted by lawyers or any interpreters. The applicants complained of their immediate return to Morocco and the lack of an effective remedy in that regard. They submitted that they had been subjected to the illegal practice of 'collective expulsion,' meaning that they had absolutely no opportunity to be identified or to explain their individual circumstances. In addition, they alleged that by their immediate expulsion to Morocco, they were exposed to the risk of inhuman and ill-treatment upon return – as well as not being given any chance to challenge their return decision by the means of a remedy with a suspensive effect.[841] Therefore, based on the facts, the applicants raised an alleged violation of the ECHR, Articles 3, 4 of Protocol No. 4, and Article 13 in conjunction with both Articles 3 and 4 of Protocol No. 4.

As elaborated in Chapter 5, Article 3 of the ECHR stipulates the absolute prohibition of torture and other inhuman or degrading treatment or punishment. Under the ECHR, there is no article on the right to seek asylum. However, Article 3 of this Convention is the backbone of asylum and refugee protection in the EU – in the same manner that this Article is the declaration of and an equivalent to the principle of *non-refoulement* to torture and other ill-treatment as a *jus cogens* norm of international law. What Article 13 of the ECHR protects is the right to an effective remedy. This right is one of the constituting elements of the right to a fair trial and due process under Article 6 of the Convention as a basic human right, which also guarantees the right to seek asylum. The foundation of Article 13 of the ECHR is therefore the right to a fair trial, which is enshrined in Article 10 of the 1948 UDHR, Article 14 of the 1966 ICCPR, and Article 6 of the ECHR. According to Article 13 of the ECHR, every individual whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. As can be seen from the wording of Article 13 of the ECHR, the right to an effective remedy is a dependent right. This means that the violation of this right does not stand alone, whereas, it always attaches to the violation of other substantial human rights as envisaged in the Convention.[842]

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[841] *Ibid*, para. 123. The 'suspensive effect' is a consequence of an appeal, which delays the enforceability of the challenged decision, allowing the appellant to remain in the host country, while the outcome of the trial is still pending. Regarding this definition, see: <ec.europa.eu/home-affairs/content/suspensive-effect-0_en>.

[842] For detailed analysis on the dependency of applicability of Article 13 on violation of other substantial rights mentioned in the Convention, see: Bernadette Rainey, Pamela McCormick, and Clare Ovey, *Jacobs, White, and Ovey: the European Convention on Human Rights* (8th edn, Oxford: Oxford University Press, 2020), pp. 135-144.

The most relevant article of the ECHR to current discussion is Article 4 of Protocol No. 4 on the prohibition of the collective expulsion of aliens. This is an umbrella prohibition covering any acts of returning aliens, which could be categorised or labelled as 'collective;' hence, this Article in no way regulates the individual expulsion of aliens.[843] Based on this limited scope, the effectiveness of Article 4 of Protocol No. 4 highly depends on the interpretation of the term 'collective.'[844] One interpretive question is whether this term includes at least a certain number of people, or if it includes the members of a group who share an intrinsic characteristic that brings them together (such as being members of a family or a group like the Romani people). If we define the practice of the collective expulsion of aliens as 'measures that force a group of non-nationals to leave the country, without a reasonable and objective examination of particular circumstances of each individual case,' then, the expulsion of a group of individuals who have the same nationality does not breach the prohibition of this type of expulsion.[845]

The Explanatory Report issued by the Council of Europe on the preparatory work of Protocol No. 4 reveals that the Committee of Experts did not intend to impose any restrictions on the prohibition of collectively expelling aliens, except for what Article 15 of the Convention had already assigned on derogation from Convention duties in time of emergency. As a matter of fact, the Assembly Draft of Protocol No. 4 had suggested that Article 4 of Protocol No. 4 should contain the legal grounds for allowing the expulsion of an alien considered to be a 'danger to national security,' or whose existence is offensive to the 'public order and morality' of the host State. However, the Committee of Experts did not approve this suggestion of the Parliamentary Assembly of the Council of Europe, and instead, the Committee proposed a general prohibition on the collective expulsion of aliens under Article 4 of Protocol No. 4, especially since the Convention was silent on this matter. At the end, the Committee decided not to include explicitly the expulsion of individuals in the main text, because this topic already was within the ambit of Article 3 of the ECHR under the absolute

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[843] Bernadette Rainey, Pamela McCormick, and Clare Ovey, *Jacobs, White, and Ovey: the European Convention on Human Rights* (8th edn, Oxford: Oxford University Press, 2020), p. 624. Also, see: Julia Wojnowska-Radzińska, *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law* (Leiden; Boston: Brill Nijhoff, 2015), p. 19.

[844] Jeroen Schokkenbroek, 'Prohibition of Collective Expulsion of Aliens (Article 4 of Protocol No. 4)', in Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Antwerp; Oxford: Intersentia, 2006), pp. 953-957.

[845] Eeva Nykänen, *Fragmented State Power and Forced Migration: A Study on Non-State Actors in Refugee Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2012), pp. 48 and 49.

prohibition of *refoulement* to torture and other inhuman or degrading treatment or punishment.[846]

In September 2005, the Committee of Ministers of the Council of Europe adopted a set of guidelines, including twenty items on the forced return of aliens from the territories of the Member States of the Council of Europe. Guideline No. 3 of this document provides for the prohibition of collective expulsion stipulating that, 'a removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned and it shall take into account the circumstances specific to each case.'[847] Prior to the adoption of these guidelines, the ECtHR in its admissibility decision in the case of *Vedran Andric v. Sweden* had already defined the collective expulsion of aliens, as follows:

> [...] any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.[848]

Accordingly, the fact that a number of aliens receive similar decisions at the same time does not necessarily mean that the collective expulsion has occurred if each applicant had a separate and individual opportunity to lodge a complaint against the expulsion decision to the competent authorities. Assessing whether a case is an instance of collective expulsion, the ECtHR in the case of *Čonka v. Belgium* ruled that the State should consider both expulsion measures and the facts and circumstances of a particular case such as the background of the expulsion decision, the COI, etc.[849]

Against the above-mentioned case law background, on 3 October 2017, the ECtHR at the Chamber level delivered its ruling in the case of *N.D. and N.T. v. Spain*, agreeing with the arguments of the applicants and hitherto ruled that there had been a violation of Article 4 of Protocol No. 4 of the Convention.[850] Subsequently, the violation of Article 13 of the same Convention, connected with Article 4 of Protocol No. 4, was ruled.[851] The ECtHR Chamber judges noted that the removals had taken place in the absence of any prior administrative or

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[846] The Explanatory Report issued by the Council of Europe on the preparatory work of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, European Treaty Series No. 46, Strasbourg, 16.IX.1963, ECHR, paras 31-34.
[847] Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, September 2005, Guideline 3 on the Prohibition of Collective Expulsion.
[848] *Vedran Andric v. Sweden*, Application No. 45917/99, European Court of Human Rights, Chamber Decision as to the Admissibility (23 February 1999), para. 1.
[849] *Čonka v. Belgium*, Application No. 51564/99, European Court of Human Rights (third section), Final Judgement of the Chamber (5 February 2002), paras 59-63.
[850] *N.D. and N.T. v. Spain,* Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), paras 114-121.
[851] *Ibid*, para. 122.

judicial decisions. Consequently, there had been no assessment of each individual situation or any identification procedures. The Court, therefore, concluded that, in those circumstances, the removals amounted to an instance of collective expulsion, and therefore, a violation of Article 4 of Protocol No. 4 of the Convention.

The Court in this case reinforced that, 'it understands the States' sovereignty, which gives the power to host States to determine their immigration policy.' However, when it comes to 'managing migratory flows – as part of the States' migratory plans and policies – it is pertinent that none of these plans and practices is in contradiction with the duties of Member States under the ECHR or its Protocols.'[852]

The decisions of the ECtHR in the cases of *Hirsi Jamaa and Others v. Italy*[853] and *Sharifi and Others v. Italy and Greece*[854] were mentioned to reiterate that the European States could not justify practices in violation of human rights duties by using the principle of state sovereignty and safeguarding national security, or the internal security of EU.[855] Meanwhile, the Court recognised migration management and controlling the movement of people to Europe in irregular manners as 'new challenges' for European States. The Court, however, reminded that these challenges were the result of the ongoing worldwide economic crisis and recent social and political changes, which have had a significant adverse impact on certain regions of Africa and the Middle East.[856]

In addition, the Court noted that the applicants had no access to interpreters or legal assistance for informing them of the relevant provisions of asylum law or procedures available to them to challenge their expulsion decision. In the view of their immediate expulsion, the ECtHR Chamber considered that the applicants had been deprived of accessing an effective domestic remedy. Therefore, the ECtHR also found a violation of Article 13 taken into account with Article 4 of Protocol No. 4 of the Convention.[857] However, the Court both at the Chamber and Grand Chamber levels did not find any violation with regard to Article 3 of the ECHR. The reason for this conclusion was that the return of the

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[852] *Ibid*, paras 83 and 101.
[853] *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, Grand Chamber, Decision (23 February 2012), para. 190. Also, see the concurring opinion of Judge Pinto de Albuquerque annexed to the same case.
[854] *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, European Court of Human Rights, Judgement (21 October 2014), paras 60 and 100.
[855] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), para. 101.
[856] *Ibid*, para. 83.
[857] *Ibid*, paras 109-122.

applicants, in the Court's opinion, did not result in putting the applicants in danger of inhuman or degrading treatment in Morocco.[858]

The primary issue challenged by the Government of Spain was the State's jurisdiction over the practice of the mass expulsion of immigrants. The main question was whether Spain had jurisdiction for returning a group of immigrants to be liable under Article 1 of the ECHR.[859] In this regard, the representatives of the Spanish Government argued that the incidents in this case – meaning the arrest and pushback of the applicants – had happened outside the physical territory of Spain, and therefore, outside the jurisdiction of the Spanish Government. The reason the representatives of Spain forwarded this claim was that the applicants did not manage to cross the third border fence.[860]

In the continuation, the Spanish representatives added that, even if accepted that these activities had occurred within the physical territory of Spain, the applicability of the ECHR could not be invoked, because the expulsion had happened in order to protect the territorial integrity of Spain. This augment is in line with the premise that the prevalence of protection of borders is within the State's legal rights based on the well-established principle of State sovereignty. Spain argued that, in fact, its law enforcement officials had an *obligation* and *duty* to prevent the applicants from crossing the border and subsequently, from entering the Spanish territory.[861]

In response to this argument, the advocates for the applicants asserted that, the fact that the Spanish law enforcement officials had the legal authority to arrest and return the applicants indicated that, Spain **did, in fact, have** an 'effective control' over the border area between Morocco and Melilla. To strengthen their argument on the issue of jurisdiction, the applicants additionally referred to the third-party intervention, submitted by Mr. Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe. In his submission, Mr. Muižnieks referred, in particular, to the statement, which Ms. Soledad Becerril, the Spanish Ombudsperson, had published on her official website in 2014.[862] According to this statement, the Government of Spain, since the time of the construction of Melilla border, has been exercising its jurisdiction in the territories between the three-layer fences built at the border-crossing points. Therefore, the

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[858] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), paras 201 and 206.
[859] Article 1 of the Convention is about establishing the scope of the jurisdiction of the Convention and thereafter the jurisdiction of the ECtHR in a case referred to it.
[860] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), paras 91-93.
[861] *Ibid*, para. 94.
[862] *Ibid*, paras 38-40 and para. 99.

Government of Spain has been effectively exercising its sovereign power over the individuals located in this area and not just over the lands beyond the border structures.[863]

In addition to this argument, a statement was submitted by other interveners, including the Centre for Advice on Individual Rights in Europe, Amnesty International, the European Council for Refugees and Exiles, and the International Commission of Jurists. This submission referred to the ECtHR's decision in the landmark case of *Hirsi Jamaa and Others v. Italy* on establishing the States' extraterritorial jurisdiction. This case is about the interception of immigrants' boats on the high seas, in which the ECtHR ruled:

> The removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.[864]

Based on this judgement, it is reasonable to deduce that when States do have jurisdiction in their interception activities on the high seas (an area not belonging to the territory of any State), they *a fortiori* do have jurisdiction for their activities conducted at their border-crossing points. In addition to the case of *Hirsi Jamaa and Others v. Italy*, the above-mentioned intervening NGOs referred to the case of *Sharifi and Others v. Italy and Greece* in arguing that the jurisdiction of a Member State under Article 1 of the ECHR applies when persons arrive unlawfully in a country were refused entry.[865] In other words, the jurisdiction of a Member State is applicable even in cases, in which no border crossing has happened. Therefore, again, *a fortiori* the jurisdiction of Spain shall be established in the case of *N.D. and N.T. v. Spain*, in which the applicants had *de facto* passed the border infrastructures.

The Court, in the case of *N.D. and N.T. v. Spain*, with regard to the subject of State jurisdiction placed emphasis on the principle of the 'territoriality' of jurisdiction as established within its jurisprudence in the case of *Banković and*

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[863] The third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, para. 3, of the European Convention on Human Rights Applications No. 8675/15 and No. 8697/15 *N.D. v. Spain and N.T. v. Spain*, CoE Doc No. CommDH (2015)27, 9 November 2015, paras 27-33.
[864] *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, Grand Chamber, Decision (23 February 2012), para. 180.
[865] *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, European Court of Human Rights, Judgement (21 October 2014), para. 212.

Others v. Belgium and Others.[866] In this case, the ECtHR admitted that, since the principle of territoriality of jurisdiction is a primary rule in international law, in order to expand the jurisdiction of States to areas outside their territories, the alleged violations of the ECHR must be a 'direct result of the action' of the State and its 'effective control over the subjects.'[867] This reasoning has expanded the jurisdiction of the ECHR and its Member States to the regions outside the actual physical territories of the Contracting States. That is why the Court voted for the establishment of the jurisdiction of Italy in intercepting the immigrants' boats on the high seas of the Mediterranean Sea in the case of *Hirsi Jamaa and Others v. Italy*. By referring to the *Banković* criteria, the ECtHR, in *Hirsi Jamaa and Others v. Italy*, ruled that when a State, through its agents outside its territory, exercises 'control' and 'authority' over an individual, it is under an obligation to secure to that individual all the rights and freedoms guaranteed under Section I of the Convention.[868]

In other cases involving the question of jurisdiction such as *Al-Skeini and Others v. the UK*,[869] *Hassan v. the UK*,[870] and *Al-Jedda v. the UK*,[871] the ECtHR demonstrated a tendency towards accepting the extraterritorial applicability of the Convention. Therefore, the judges at the ECtHR in *N.D. and N.T. v. Spain* agreed on the opinion that, similar to the position of the Court in its precedent, whenever there is an 'effective control' over the individual, the jurisdiction of the State for the purpose of the applicability of the Convention under Article 1 shall be established. Therefore, the jurisdictional applicability of the Convention is regardless of whether State authorities have acted 'within' or 'outside' the State's physical territory or exactly at the border-crossing points. The main defence of the respondent State in this regard was that the events of the incidents had happened outside the territory of Spain. In the Court's assessment, both the Chamber and the Grand Chamber levels, judges rejected the Spanish Government's view that the events had occurred outside Spain's jurisdiction. The Court considered it unnecessary to establish whether the border fences

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[866] *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), paras 49-51.
[867] *Banković and Others v. Belgium and 16 Other Contracting States*, Application no. 52207/99, European Court of Human Rights, Grand Chamber Decision as to the admissibility (12 December 2001), para. 70.
[868] *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, Grand Chamber Judgement (23 February 2012), para. 74.
[869] *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, European Court of Human Rights, Grand Chamber, Decision (7 July 2011).
[870] *Hassan v. the United Kingdom*, Application No. 29750/09, European Court of Human Rights, Grand Chamber, Decision (16 September 2014).
[871] *Al-Jedda v. the United Kingdom*, Application No. 27021/08, European Court of Human Rights, Grand Chamber, Decision (7 July 2011).

erected between Morocco and Spain were in Spain. In the Court's view, from the moment that the applicants climbed down any of the barriers, they were under the 'continuous and exclusive control' of the Spanish authorities and thus, fell under its jurisdiction.[872] Therefore, in the Court's conclusion, once the applicants had climbed the first fence (only one of the three fences), they fell under the 'effective control' of Spanish border authorities and thus under the jurisdiction of the Government of Spain. As can be seen from this opinion, deciding on the issue of State's jurisdiction is a matter of facts, rather than a question of law. Therefore, all we need to pay attention to is assessing the moment from which the State's authorities have 'effective control' over individuals.

According to the literature available on the practices of transnational courts such as the ECtHR, there are three models for assessing the jurisdiction of a State with regard to the applicability of their human rights obligations.[873] The first criterion is the principle of the 'territoriality of jurisdiction.' The second one is establishing 'effective control' over the subjects. The third model is assessing the jurisdiction based on the 'nature of human rights obligations,' i.e. positive or negative obligations.[874] In the case of *N.D. and N.T. v. Spain*, in fact, all of these three models apply in order to establish the jurisdiction of Spain with regard to the expulsion of the applicants at the Melilla-Moroccan border crossing points.

On the alleged violation of Article 4 of Protocol No. 4, Spain not only denied the charges of summary expulsion, but also shortly after the events of this case, it amended its relevant national law; the law that had made immediate expulsions lawful – meaning 'The Institutional Law on the Rights and Freedoms of Aliens and their Social Integration.'[875] According to the reports submitted by some human right organisations and activists, the Spanish border authorities do not document expulsions in any way, and these returns are administered without

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[872] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), paras 90 and 102-111.

[873] With regard to the principles of extraterritorial applicability of human rights instruments, see Marko Milanovic, 'Extraterritoriality and Human Rights: Prospects and Challenges', in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Oxford; New York: Routledge, 2017), pp. 53-77. Also, see Marko Milanovic, 'The Spatial Dimension: Treaties and Territory', in Christian J. Tams, Antonios Tzanakopoulos, Andreas Zimmermann, and Athene E. Richford (eds), *Research Handbook on the Law of Treaties* (Cheltenham; Northampton: Edward Elgar, 2014), pp. 184-221.

[874] Marko Milanovic, 'Extraterritoriality and Human Rights: Prospects and Challenges', in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Oxford; New York: Routledge, 2017), pp. 53-77.

[875] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), para. 59.

subjecting immigrants to any identification procedure, nor gathering any information regarding their personal circumstances.[876] In this regard, the legally binding EU secondary legislation applicable to border control and expulsion of aliens consists of the 2016 Schengen Borders Code[877] and the 2008 EU Return Directive.[878] According to Article 13(1) of the 2016 Schengen Borders Code on the topic of 'border surveillance,' the legislator admits that the main purpose of EU border surveillance is to protect the EU and the Schengen area from 'illegal migrants' and to prevent 'unauthorised border crossings.' This is a preventive mechanism to counter cross-border criminality and to take measures against persons, who have crossed the border 'illegally.'[879] The same provision holds that whoever has crossed an EU external border illegally and who has no right to stay on the territory of Member State concerned, shall be apprehended and made subject to procedures respecting Directive 2008/115/EC (the '2008 EU Return Directive'). Article 1 of this Directive determines the goals and objectives of this legislation as a scale to set out common standards and procedures in all Member States. The goal of the Directive is to return third-country nationals staying illegally in the EU in accordance with fundamental rights, as general principles of Community law, as well as in accordance with international law, including refugee protection and human rights obligations.[880]

Moreover, Article 12(1) of the 2008 Return Directive subjects the return decisions to some **formal administrative procedures**, according to which, all return decisions and, if issued, all entry-ban decisions and other decisions on removal shall be in writing and reasons of fact and law, as well as information about available legal remedies. In the case of a return decision made against a third-country national, there are detailed procedural guarantees predicted further in Article 13(1) of the 2008 EU Return Directive. Referring to this Article, the individual concerned shall be offered an effective remedy to appeal against or seek review of decisions related to their return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body, composed of members who are impartial and who enjoy safeguards of independence.

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[876] *Ibid*, para. 64. Alao, see: *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), paras 81 and 82.
[877] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJL 77, 23 March 2016, pp. 1-52 (referred to as 'the 2016 Schengen Borders Code').
[878] Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, OJL 348, 24 December 2008, pp. 98-107 (referred to as 'the 2008 EU Return Directive').
[879] *Ibid*, paras 8, 9, and 12.
[880] *Ibid*, Article 1.

Article 13(2) of the 2008 EU Return Directive continues that the authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of suspending their enforcement, unless a temporary suspension is already applicable under the national legislation. In addition, according to subparagraphs 3 and 4 of the same Article, the third-country national concerned shall have the possibility to obtain legal advice, legal representation, and wherever necessary, linguistic assistance. Furthermore, Member States shall ensure that the necessary linguistic and legal assistance and/or representation is available to the returnee upon their request free of charge and in accordance with relevant national legislation or rules regarding legal aid.[881] Such free legal assistance and/or representation is, however, subject to conditions, as set out in Articles 19-21 under Chapter II of the 2013 EU Asylum Procedures Directive.[882]

As explained in Chapter 4 on the matter of interpreting secondary sources of EU law, we should refer to the jurisprudence of the CJEU.[883] This Court, in the case of *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* (case C-249/13), on the interpretation of the provisions of the 2008 EU Directive established that returnees have a 'right to be heard' before a competent judicial or administrative authority or a competent body composed of members who are impartial and enjoy safeguards of independence.[884] In this case, the CJEU ruled that the aliens must have an opportunity to present their arguments against their removal from the EU even though the 2008 EU Return Directive does not explicitly provide returnees with a 'right to be heard.'[885] This decision was derived contextually from other parts of EU law – most importantly Articles 41, 47, and 48 of the EU Charter of Fundamental Rights.[886] In this case, the CJEU interpreted that 'the right to be heard in the case of expulsion' encompasses the following elements:

1. Guaranteeing to every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision affecting his or her interests adversely.[887]
2. Enabling the competent authority effectively to take into account all relevant information to pay due attention to the observations submitted by

[881] *Ibid*, Articles 10 and 12.
[882] Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), OJL 180, 29 June 2013, p. 60-95 (referred to as 'the 2013 EU Asylum Procedures Directive').
[883] In this regard, see Section 4.2 under Chapter 4 of this dissertation.
[884] Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, Judgement of the Court (Fifth Chamber), ECLI:EU:C:2014:2431, 11 December 2014, paras 28-35.
[885] *Ibid*, paras 28-36.
[886] *Ibid*, paras 31 and 39.
[887] *Ibid*, para. 36.

> the person concerned, and thus to give a detailed statement of reasons for its decision.[888]

Thereafter, the ECtHR in the case of *Khlaifia and Others v. Italy* verified the opinion of the CJEU and adhered to the practice of this Court as established in the case of *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*.[889] In the case of *Khlaifia and Others v. Italy*, the ECtHR employed the interpretation of the CJEU on the right to be heard in the cases of summary expulsions. However, the ECtHR put an exceptional condition on when the failure of a Member States to comply with this right would result in annulment of the return decision. This condition is that only if it were not because of this infringement, the outcome of the procedure would have been different.[890] Accordingly, the ECtHR has recognised in *Khlaifia and Others v. Italy* that the right to be heard could be subjected to restrictions, provided that these restrictions corresponded to the objectives of general interests and did not involve, with regard to the objective pursued, a disproportionate and intolerable interference which infringed the very substance of the right guaranteed.[891]

The ECtHR, in the case of *N.D. and N.T. v. Spain* (Chamber Judgement of 2017), has defined collective expulsion as, 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.'[892] This definition is based on the existing jurisprudence of the Court, as provided in the 2014 case of *Georgia v. Russia (I)*[893] and the 2016 case of *Khlaifia and Others v. Italy*.[894] However, it is noticeable that the Court, in the case of *N.D. and N.T. v. Spain*, gives the weight not only to the issuance of the expulsion orders, but also to the execution of these orders, as they play a determining role in deciding on the compliance with Article 4 of Protocol No. 4 of the Convention.[895]

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[888] *Ibid*, paras 37-40.
[889] *Khlaifia and Others v. Italy*, Application No. 16483/12, European Court of Human Rights, Grand Chamber, Decision (15 December 2016), paras 42-45.
[890] *Ibid*, paras 42-44.
[891] *Ibid*, paras 44 and 45.
[892] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), para. 98.
[893] *Georgia v. Russia (I)*, Application No. 13255/07, European Court of Human Rights, Grand Chamber, Judgment on merits (3 July 2014), para. 167.
[894] *Khlaifia and Others v. Italy*, Application No. 16483/12, European Court of Human Rights, Grand Chamber, Decision (15 December 2016), paras 237-239.
[895] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), para. 98. In this regard, also see *Georgia v. Russia (I)*, Application No. 13255/07, European Court of Human Rights, Grand Chamber, Judgment on merits (3 July 2014), para. 167.

With regard to the practice of the mass or collective expulsion of immigrants, the International Law Commission (ILC) issued the Draft Articles on the Expulsion of Aliens, which was adopted by the UN General Assembly in 2014, additionally providing international law standards.[896] Despite being a soft-law amongst the sources of international law, this document plays an important role in understanding the practice of mass expulsion by defining terms and interpreting them, and through setting some standards at international level based on the recognised norms and rules of international human rights law. The ILC Draft Articles define the term 'expulsion' as, 'a formal act or conduct attributable to a State, by which an individual is compelled to leave the territory of that State.'[897] In addition, the term 'alien' is defined as, 'an individual, who does not have the nationality of the State, in whose territory that individual, is present.'[898] In other words, aliens are those non-nationals existing or residing within the territory of the State regardless of the legality of their residency.

The ILC Draft Articles recognises the State's right to expel aliens based on the principle of State sovereignty. However, according to this document, the expulsion of an alien must be based on a 'ground, which is explicitly provided by the law.'[899] The decision about these expulsions must be taken in 'good faith' and with respect for human dignity, and should be as reasonable as possible, in the light of all the circumstances of the case and by considering all the available relevant facts.[900] This individual consideration of the case must also include assessing the existence of any risk against the life and other basic and fundamental human rights of individuals upon return, while complying with the rules of international law and the obligations of the State under this field of law.[901]

The ILC Draft Articles on the Expulsion of Aliens has also regulated against the practice of collective or mass expulsion by explicitly prohibiting it. According to this document, the expulsion of members of a group is possible **only and only** after the individual assessment of the case for each member of the group.[902] As mentioned above, the ILC Draft Articles corresponds and juxtaposes the right of

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[896] Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission at its sixty-sixth session in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10).
[897] *Ibid*, Article 2(a).
[898] *Ibid*, Article 2(b).
[899] *Ibid*, Articles 4 and 5.
[900] *Ibid*, Article 5(3).
[901] *Ibid*, Articles 5(4), 6, 7, and their commentaries in Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission at its sixty-sixth session in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10).
[902] *Ibid*, Article 9 and its commentary in the Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission at its sixty-sixth session in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10).

States to expel non-nationals against the duty of State to respect for human dignity and the basic and fundamental human rights of the aliens subjected to expulsion. Therefore, all individuals, who are subjected to an expulsion decision, shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion and return process. Now, we should determine what the basic and fundamental human rights are for those aliens subjected to an expulsion decision. These rights encompass a range of both 'substantial and procedural human rights,' which are all recognised in international human rights law, including the prohibition of torture or cruel, inhuman or degrading treatment or punishment, respect for the right to life, the right to a fair trial, and the right to an effective remedy in situations where these rights are violated.

That is why, following his visit to Melilla and Madrid in 2015, to address the issues of irregular migration and mass expulsion of aliens, Mr. Nils Muižnieks, the Council of Europe Commissioner for Human Rights, admitted that migration for sure is a very complex and multi-faceted issue, which requires a swift and concrete response from the EU. However, the Commissioner emphasised that this fact did not exempt individual European States from their human rights obligations.[903] In other words, although the European States have the right to establish their own immigration and border management policies, they should, simultaneously, be aware of their international and European human rights responsibilities and uphold them, especially those normative obligations established under the ECHR and the 1951 Refugee Convention.[904] Regarding the practice of pushbacks of immigrants by EU States from the external Schengen borders, the Commissioner asserted that, 'pushbacks must stop and should be replaced by a practice, which reconciles border control and human rights.' According to the Commissioner, this is not 'mission impossible,' considering the fact that migration flows in Melilla currently remain at a manageable level.[905]

By referring to the facts of the case in *N.D. and N.T. v. Spain*, the Court at the Chamber level pointed that the expulsion of applicants was in absence of any prior administrative or judicial decisions, and at no stages of the removal (from arrest to deportation) the applicants were given the chance to access any administrative or judiciary procedures. Moreover, the absence of any

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[903] Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, para. 3 of the European Convention on Human Rights, Applications No. 8675/15 and No. 8697/15 *N.D. v. Spain and N.T. v. Spain*. CoE Doc No. CommDH (2018)11, 22 March 2018, paras 11 and 12.
[904] *Ibid*, para. 12.
[905] *Ibid*, para. 11.

registration or identification procedures by the Spanish border authorities showed that the personal circumstances of the applicants had not been taken individually into account.[906]

In the light of these circumstances, the Court at the Chamber instance considered that the removal procedures, followed by the arrest of the applicants, proved the collective nature of expulsions performed in this case; therefore, a violation of Article 4 of Protocol No. 4 of the ECHR was found. Even though the Court at the Chamber level ruled on the violation of Article 4 of Protocol No. 4, Judge Dedov of the Russian Federation in his partly dissenting opinion criticised the Chamber's judgement, in the following manner:

> I have just one concern as regards this case and numerous other similar cases examined by the Court, namely the fact that the Court, in a situation of unlawful conduct or even violence, maintains (*albeit* not in all cases) the high standards it requires of the authorities. I can imagine how shocked the Spanish border guards must have been by this *invasion*, during which the applicants, together with numerous other migrants, launched an *assault* on the border. We think that State agents should remain calm and impartial in all circumstances because they are trained to deal with any "standard" situation. But they are people like you and I who have emotions; they also deserve our respect, and we should take that into consideration. We should therefore ask ourselves who was in the more *vulnerable* position in the present case.[907] [Emphasis added.]

Thereafter, at the Grand Chamber level, the French, Italian, and Belgian Governments joined the case by providing legal support for Spain, as third-party interveners in the appeal instance. The reasoning forwarded and submitted by these Governments could be summarised as the following:

1. **Self-defence on the side of Spain and on behalf of the EU to protect the safety and security of Europe:**[908] Spain has acted completely legally in this case according to Article 51 of the UN Charter, which articulates States' inherent right of 'individual or collective self-defence' if an armed attack occurs against a Member State. Accordingly, 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence

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[906] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment (3 October 2017), para. 107
[907] *Ibid*, The partly dissenting opinion of Judge Dedov annexed to the Judgement.
[908] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber Decision (13 February 2020), paras 60 and 126.

shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'[909]

2. **No expulsion, but prevention of illegal entry:** The applicants could have entered Spain lawfully. They could have submitted asylum applications at the Spanish Embassy or at the Spanish Consulates located in, for example, Morocco or in the transit countries through which they had travelled. Alternatively, they could have applied for asylum at the authorised border crossing point at Beni Enzar or could have secured contracts to work in Spain and obtain work permits from their countries of origin.[910]
3. **Expulsion as the result of illegal conduct of the applicant:** In the Government's opinion, there was no violation of the provisions of the Convention, where the lack of an individual expulsion decision was attributed to the 'culpable conduct' of the person concerned.[911]

With regard to the first and the second reasoning, the Government of Spain asserted that, the whole idea behind constructing the three-layer fences at the border between Morocco and Melilla was to comply with Article 13 of the 2016 Schengen Borders Code on border surveillance. According to this Article, the main purpose of border surveillance at the EU external borders shall be to 'prevent unauthorised border crossings, to counter cross-border criminality, and to take measures against those who have managed to cross EU external borders illegally.' In addition, Article 13(1) of the same piece of legislation gives a discretion to Member States to apprehend (meaning arrest and detain) those who have crossed EU external borders illegally or those staying in the EU territory with no legal grounds, and to expel them following the rules and procedures of the 2008 EU Return Directive. On the merits of Article 4 of Protocol No. 4, Spain referred to the Convention as a living instrument, accepting that within the jurisprudence of the ECtHR, it had been established to interpret the Convention in a dynamic and evolutionary manner to give a practical and effective, and not just a theoretical or illusory effect to the Convention.[912]

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[909] Charter of the United Nations (UN Charter) signed on 26 June 1945 in San Francisco, Article 51.
[910] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), paras 129-132.
[911] *Ibid*, para. 134.
[912] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Judgment of the third section of Chamber (3 October 2017), para. 69.

On the other hand, the Government argued that the dynamic and evolutionary interpretation should not create new rights, which have not been the initial intent of legislators.[913] Therefore, in their view, the intent of the creators of the Convention was not to create a right to enter the territory of Member States 'illegally' by breaking the rules of European immigration law. In fact, according to the Spanish Government, the applicants had a chance to apply for asylum in the countries of transit. For example, they could have visited the Spanish Consulate in Mauritania or could have lodged an asylum application at the authorised border posts in Beni Ansar (a Moroccan border town adjacent to Melilla). Alternatively, if not applying for asylum, the applicants could have searched for a job in Spain directly from their countries of origin, then secured a working contract, and consequently obtained a work permit to enter Spain legally and reside lawfully under the protection of law.[914]

Therefore, based on the arguments of the Government of Spain, there is no such a thing as a right to enter Europe without undergoing checks at the EU external borders. Interpreting the Convention in this way, according to Spain and other intervening States, is counter-intuitive, as not only it would be against the security interests and safety of EU citizens, but it risks the safety and human rights of immigrants by feeding huge monetary profit to international organised criminals such as human smuggling and trafficking cartels. The representatives of the Government of Spain, in the case of *N.D. and N.T. v. Spain*, used interesting terminology, namely the 'suction effect' or the 'reverse effect.' These expressions means that by allowing people to arrive in Europe through unlawful channels and by breaking the border protection system, we are indirectly causing the violation of human rights by creating a migratory crisis. This situation is a humanitarian challenge with devastating consequences for protecting the human rights of both illegal immigrants and European residents.[915]

The Government even made a use of the primary sources of EU law in resting its point. In this regard, Article 72 of the TFEU stipulates that, asylum and immigration policies, as well as the border control policies of EU Member States must not have a negative impact on the maintenance of 'order' and 'the rule of law,' or should not compromise the 'internal security of Europe.' Therefore, the Government believes that, if the ECtHR rules in favour of the applicants, it is legitimising the illegal act of breaching the rules of EU on border protection and EU immigration law. This will endanger the rule of law and the protection of security in Europe by showing a green light to non-Europeans or third-country

[913] *Ibid*, paras 69 and 73.
[914] *Ibid*, paras 68-79.
[915] *Ibid*, paras 68-79.

nationals to invade the rule of law in Europe and to feel free to violate its immigration and border-control law.

With regard to the third reasoning, the Spanish Government accepted that the whole idea behind Article 4 of Protocol No. 4 was to prevent States from being able to remove a group of aliens from their territories, without examining their personal circumstances and therefore, without enabling them to submit their arguments against the measures taken by the relevant authority.[916] However, the Court has found no violation of Article 4 of Protocol No. 4, where the lack of an individual expulsion decision could be attributed to the faulty and reprehensible conduct, i.e. the 'culpable conduct,' of the person concerned.[917] The 'culpable conduct' argument has been supported by the jurisprudence of the ECtHR in the earlier cases of *Dzavit Berisha and Baljie Haljiti v. the former Yugoslav Republic of Macedonia*[918] and *Dritsas and Others v. Italy*.[919]

In the case of *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*, the applicants themselves had submitted a joint asylum procedure together; therefore, they received a single common decision on their joint application. The ECtHR, in this case, ruled that the fact that the national authorities had issued a single decision for both of the applicants as spouses was a consequence of the applicants' own conduct. The applicants had arrived together in the former Yugoslav Republic of Macedonia, thereafter, submitted one single asylum application together for both of them (and on the exact same grounds), produced the same evidence to support their allegations, and finally, lodged joint appeals before the Government Appeal Commission and the Supreme Court of Macedonia. Hence, the authorities had no other choice other than to evaluate the risks associated with expulsion for both of the applicants jointly. In the light of these facts, the Court concluded that, the deportation of the applicants did not fulfil an instance of collective expulsion within the ambit of Article 4 of Protocol No. 4 of the ECHR.[920]

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[916] *Ibid*, para. 99. Also see: *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, Grand Chamber, Decision (23 February 2012), para. 177. In this regard, also see: *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, European Court of Human Rights, Judgement (21 October 2014), para. 210.

[917] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber, Decision (13 February 2020), para. 134.

[918] *Dzavit Berisha and Baljie Haljiti v. the Former Yugoslav Republic of Macedonia*, Application No. 18670/03, European Court of Human Rights, Partial Decision as to the Admissibility (16 June 2005).

[919] *Dritsas and Others v. Italy*, Application No. 2344/02, European Court of Human Rights, Chamber Decision on the Admissibility (1 February 2011).

[920] *Dzavit Berisha and Baljie Haljiti v. the Former Yugoslav Republic of Macedonia*, Application No. 18670/03, European Court of Human Rights, Partial Decision as to the Admissibility (16 June 2005), para. 2.

Similarly, in the case of *Dritsas and Others v. Italy*, the applicants failed to provide any identification papers, which the police and the Court had requested on several occasions. Due to the lack of identity papers, the authorities were unable to find the expulsion orders issued under the applicants' names, and hence, the ECtHR declared the application manifestly ill-founded and therefore, inadmissible.[921]

At the Grand Chamber level addressing the case of *N.D. and N.T. v. Spain*, the ECtHR judges agreed with the second and the third reasoning of the Spanish Government, and accordingly found no violation of Article 4 of Protocol No. 4 of the Convention. The restatement of the Court's reasoning could be summarised as the following:

1. **First,** Spanish law has afforded the applicants with several possible means of seeking legal admission to the national territory, either by applying for a visa or by applying for international protection, in particular at the Beni Enzar border crossing point, but also at Spain's diplomatic and consular representations in their countries of origin or countries of transit. However, the applicants have not resorted to those available legal means.[922]
2. **Second,** the applicants had, in fact, placed themselves in jeopardy by participating in the storming of the Melilla border fences in an *en mass* manner arrival on 13 August 2014, taking advantage of the group's large number and by using force. Therefore, the collective expulsion is the inevitable result of the applicants' own 'culpable act,' and the Government of Spain could not be held responsible for that.[923]

In addition to the final decision of the Court, two separate opinions were attached to the judgement of the Grand Chamber in the case of *N.D. and N.T. v. Spain* (2020). The first one was a concurring opinion, belonging to Judge Pejchal of the Czech Republic, in which, while agreeing with the final decision of the Court, he vigorously opposed the fact that the case was declared admissible in the first place, and that it even had the chance to be addressed by the ECtHR at the Grand Chamber level. In his words:

> [C]onsiderable doubts remain for me as to whether the Grand Chamber should have dealt with this case at all. In particular, I have doubts as to whether in this case

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[921] *Dritsas and Others v. Italy*, Application No. 2344/02, European Court of Human Rights, Chamber Decision on the Admissibility (1 February 2011). Factsheet on Collective Expulsion of Aliens issued by the Press Unit of the European Court of Human Rights, March 2020, p. 7.
[922] *N.D. and N.T. v. Spain*, Applications Nos 8675/15 and 8697/15, European Court of Human Rights, Grand Chamber Judgement (13 February 2020), paras 212-220.
[923] *Ibid*, paras 206-208.

> it was fair to the community of free citizens living in the Council of Europe member States for an international court to order a hearing on which it expended considerable financial resources, entrusted to it by the High Contracting Parties for the pursuit of justice.[924]

The second separate opinion belonged to Judge Koskelo of Finland. In her partly dissenting opinion annexed to the ECtHR judgment in the case of *N.D. and N.T. v. Spain* (the Grand Chamber Decision of 2020), Judge Koskelo asserted:

> Although the mass influx of migrants and asylum-seekers [...] has in recent years become [...], a dominant point of focus around Europe, these developments should not detract from the fact that other issues and other interests are also relevant in the context of the powers, which the States Parties must be able to exercise at their borders. Important issues of ***national security***, the protection of ***territorial integrity*** and ***public order*** are at stake as well. I see no justification for disregarding those matters in the legal analysis solely on the grounds that [...] many of the aliens turning up at the border may be persons wishing to claim international protection. In my view, it amounts to a distortion of perspective to view the latter scenario as the only one deserving attention and consideration, and to overlook the legitimate need for States Parties to prevent and refuse [...] the entry into their jurisdiction of aliens aiming to cross their external borders with ***known hostile intentions*** or ***posing known threats to national security***.[925] [Emphasis added]

As it can be read clearly in the opinion of Judge Koskelo, the national security concerns of European States must prevail over their human rights obligations towards asylum seekers and the respect for the right to seek asylum. It seems that Judge Koskelo does not agree with the ECtHR in not including explicitly the national security concerns of the States in the Court's assessment of the case with regard to the alleged violation of Article 4 of Protocol No. 4 of the Convention. This opinion is very much in line with the approach of the Government of Spain and other intervening States in their submissions to the Court on the securitisation of immigration through conceptualising national security as a 'meta-right.' As mentioned above, the Government of Spain submitted that if the ECtHR ruled in favour of the applicants, this ruling would legitimise the illegal act of breaching EU law on border control, which would result in endangering the rule of law and the protection of national security in Europe. Based on this line of argument, the right to security for the European community is considered a 'meta-right,' to which the ECtHR supposedly had to commit itself in its ruling. On theorising a 'meta-right to security,' Liora Lazarus

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[924] *Ibid*, para. 1. The concurring opinion of Judge Pejchal annexed to the ECtHR's judgement in the case of *N.D. and N.T. v. Spain* (2020).
[925] *Ibid*, para. 25. The partly dissenting opinion of Judge Koskelo annexed to the judgment in the case of *N.D. and N.T. v. Spain* (2020).

has based her analysis of the 'right to security as a human right' on the idea of the Hobbesian theory of 'security as a meta-right.'[926] In this regard, she argues that the importance of security, in fact, led to the formation of the theory of 'social contract' and the need of human societies for an 'absolute power of sovereign' and the formation of an indivisible government.[927]

In Hobbes' opinion, in order to safeguard security for all the members of society, we need a robust 'sovereign power.' This is how Hobbes has legitimised the control of sovereign power over the destiny of human subjects in a society, a sovereign power that he has called the 'Common Power' or the 'Leviathan.'[928] In Hobbes' words:

> For the Laws of Nature (as Justice, Equity, Modesty, Mercy, …) […], without the terrour of some Power, to cause them to be observed, are contrary to our naturalle Passions, that carry us to Partiality, Pride, Revenge, and the like. And Covenants, without the Sword, are but Words, and of not strength to secure a man at all. Therefore, notwithstanding the Lawes of Nature, […] if there be no Power erected, or not great enough for our security, every man will and may lawfully rely on his own strength and art, for caution against all other men.[929]

What we should keep in mind here with regard to Hobbes' opinion on security is that the English Civil War of the seventeenth century and the cruelties that Hobbes witnessed himself first-hand had made him form such a staunch opinion over the necessity of having a powerful, iron fist government – even if this government tends to grow towards tyranny. Hobbes even further exxagerrated the importance of security. To him, security and maintaining peace and order in society is far more important than protecting individual freedoms and liberties.[930] He continued that liberties bring 'civil disputes,' which at the end threatens 'security' and 'stability' in human societies.[931] Therefore, to Hobbes, there is an *inherent conflict* between protecting individual rights and freedoms as opposed to safeguarding the security of sovereign power and public order. In this regard, he strongly believed that the preference should definitely go to the latter.

As opposed to Hobbes, John Locke – the English philosopher of a similar era as Hobbes – believed that security should not prevail over liberties. In Locke's assertion, Hobbes' conception of security was counter-intuitive, because to

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[926] Liora Lazarus, 'The Right to Security', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), pp. 423-441.
[927] *Ibid*, p. 425.
[928] Thomas Hobbes, *Leviathan* (Minneapolis: First Avenue Editions, 2018), pp. 160-162.
[929] *Ibid*, pp. 156 and 157.
[930] *Ibid*, pp. 167-170, 172, and 173.
[931] *Ibid*, pp. 173 and 174.

Locke, the idea of prevailing the security of sovereign power over individual freedoms and liberties would threaten the security of people itself. Locke was of the opinion that all human beings are equal in the enjoyment of their natural rights to life, liberty, security, and property, all of which he referred to as the 'Properties of Men.'[932] Hence, opposite to Hobbes, Locke regarded the absolute power of sovereign to be the greatest danger and an obstacle to human security.

In the intellectual history of thoughts in the aftermath of Hobbes and Locke, Sir William Blackstone at the end of the nineteenth century agreed with the idea that the need for security is 'intrinsic to human nature.'[933] Like his predecessors, Blackstone believed that security was the prize we earned by entering a social and political community – agreeing with the Hobbesian theory of 'social contract' – and hence, giving up on parts of our individual liberties and freedoms.[934] However, in addressing the concept of security, Blackstone uses the language of 'rights' and employs the phrase of 'the right to security.' Blackstone's conception of the right to security is closer to Locke's opinion on the parallel position of security with enjoying one's freedoms and liberties. In fact, to Blackstone, the right to security is a 'right to personal security,' which regards the State, as the responsibility holder, not the benefactor.[935] To quote Blackstone on this matter:

> The principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by immutable laws of nature, but which could not be preserved in peace, without the mutual assistance and intercourse of social communities. The primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative, result from the formation of states and societies, so that to maintain them is clearly a subsequent consideration. Therefore, the principal object of human laws should be to explain, protect and enforce such rights as are absolute, which in themselves are few and simple.[936]

Following Blackstone, the contemporary legal philosopher Henry Shue has developed the discussion on the right to security as a 'basic right.' Basic rights, in Shue's definition, are 'those rights, enjoying of which is a requirement for enjoying every other rights.'[937] According to Shue, the right to security is a 'line

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[932] John Locke, 'Two Treatises of Government', in Peter Laslett (ed.), *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 2003), pp. 330-334.
[933] William Blackstone, *Commentaries on the Laws of England* (Saint Paul: West Publishing Company, 1897), p. 40.
[934] *Ibid*, p. 38.
[935] *Ibid*, pp. 38 and 39.
[936] *Ibid*, p. 38.
[937] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1996), pp. 19 and 20.

beneath which no one is allowed to sink,' for the reason that this right provides some 'minimal protection against utter helplessness to those too weak to protect themselves.'[938]

Notwithstanding the evolution of the concept of security as a right or a meta-right, or as a basic right, what we should keep in mind here is that safeguarding the national security of the EU Member States and the internal security of the EU has become too heavily intertwined with external Schengen border control and restricting immigration to the EU. In this regard, in order to control and manage immigration, the Council of Europe Member States and the EU countries have concentrated particularly on guarding frontiers. It seems that the political philosophy of the EU with regard to the right to seek asylum is frozen deeply in the seventeenth century ideas of Hobbes on the security of sovereign power and its prevalence over individuals' rights and freedoms. In this context, the refusal of entry and expulsion without any individual assessment of asylum claims have become a norm at the EU external borders as well as in the territory of many EU Member States. As these practices are widespread, and in some countries even systematic, it would be feasible to claim that these practices, also known as 'pushbacks', are an integral part of EU and national-level policies, rather than just merely some random, exceptional, or incidental actions. The highest risk associated with these practices is violating the principle of *non-refoulement*, as not only a customary norm of international law, but also as a primary rule of EU law and the law of the Council of Europe.

The collective expulsion of immigrants together with other forms of pushbacks at the EU external borders again rings the alarm that continuing with these practices or similar might eventually lead to the point that we consider the very basic and fundamental human rights of 'others,' such as the right to seek asylum, irrelevant or absolutely unnecessary. Besides, the exclusion of asylum seekers from the 'Empire of Law' is in breach of the principle of non-discrimination. Here is where the fallacy of the ECtHR Grand Chamber decision in the case of *N.D. and N.T. v. Spain* (2020) is exposed. The Court ruled that the Government of Spain could not be held responsible for the *en masse* inflow of immigrants to the border fences. The judges should be pose with this question that why they chose to ignore the fact that the construction of life-threatening and hazardous border infrastructures between Morocco and Melilla is a direct result of discriminatory *non-entrée* policies of Spain and the EU. Are not these extremely dangerous and inhuman border policies of the EU and its Member States in direct violation of their *non-refoulement* and non-discrimination duties with regard to the right to seek asylum?

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[938] *Ibid*, pp. 18 and 19.

This premise brings me to the final discussion in my dissertation in the following part (Subsection 6.3.2), in which I will show how the securitisation of immigration in EU law and practice has made human beings 'illegal.' An inevitable consequence of this process is again making the right to seek asylum void and meaningless. Therefore, we need to take this right more seriously by respecting the inviolable core of this right. That is why I consider the right to seek asylum to be the same as the Arendtian idea of 'the right to have rights.'

6.3.2. THE RIGHT TO SEEK ASYLUM AS THE RIGHT TO HAVE RIGHTS

As discussed in Chapter 3, the term 'security' is inherently a vague and ambiguous concept denoting different meanings depending on the context within which it is applied. Similarly, when it comes to the notion of 'national security,' no definition has been offered in any statutes or constitutions; hence, when this term is used in the context of immigration, one possibility is to agree on its meaning as the safety and security of all citizens as a collective right. Notwithstanding the importance of national security in the context of immigration, this term has sometimes been used as a '*façade*' or as an 'excuse' for violating the individual rights and not applying the responsibility of states towards immigrants with regard to due diligence and due process of law as established under the rule of law.

In the context of counterterrorism and its effects on immigrants' basic and fundamental human rights, we need to remember that tackling terrorism is no longer a matter of one country; terrorism is, indeed, a universal threat. These days, terrorism knows no boundaries – physical borders or sovereign territories. Terrorists nowadays are active in the cyber World; they spread their ideologies through online communications and interactions where physical State borders provide no barrier to impede their activities. Therefore, the international community should come together and collaborate on countering terrorism without putting unnecessary pressure on physical borders or by violating the very foundations upon which the human rights protection system is based – such as the principle of *non-refoulement*.

It is entirely understandable from a social psychology point of view that whenever a catastrophic incident such as the 9/11 attacks or the 2015-2016 chains of terrorist attacks occur and people get hurt, we naturally become outraged and seek a scapegoat to blame.[939] This kind of mentality and state of mind affect our ability to think logically, which eventually may lead us to make

[939] Marie-Bénédicte Dembour and Tobias Kelly, 'Introduction', in Marie-Benedicte Dembour, Tobias Kelly (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Oxford; New York: Routledge, 2011), pp. 1-22, pp. 21 and 22.

decisions based on hatred, bias, and prejudice. One example of this process of thinking is the securitisation of immigration. In addition to the negative and destructive implications that this phenomena has on the right to seek asylum, a more fundamental effect of this speech-act process is that humans are thrown outside the protection of the 'Law's Empire;'[940] and therefore, their very legal and social existence as human beings becomes nullified in the eyes of the law.

This claim is based on Hannah Arendt's ground-breaking theory of 'the right to have rights.'[941] In other words, according to Arendt, just being born as a human, *per se*, is not enough to enjoy human rights. This is entirely the opposite of what the preamble and Article 1 of the 1948 UDHR have respectively promised, as follows:

> Whereas recognition of the **inherent dignity** and of the **equal and inalienable rights** of all members of the human family is the foundation of freedom, justice and peace in the world'.[942] [Emphasis added] and,
>
> All human beings are born **free** and **equal** in **dignity** and **rights**.'[943] [Emphasis added]

As an anthropologist specialised in immigration trying to understand Arendtian idea of 'the right to have rights,' Shahram Khosravi has formulated that the gap between the rights written on papers and the rights implemented in reality, is attributable to the 'abstractedness' of the law. According to him, we can only be sure that rights are available at an abstract level by including them in international conventions and declarations, but they are 'inaccessible' in reality for many of those who are truly in need of them such as asylum seekers and other undocumented immigrants.[944] Khosravi, in this regard, strongly agrees with Hannah Arendt that the reason for the abstractedness of the law is that the very existence, the manifestation, the realisation, and the materialisation of law all depend on the modern system of 'nation-states.'[945]

In this regard similarly, the contemporary cultural anthropologist Nasir Uddin argues that the persecution of the Rohingya people in Myanmar and elsewhere is not just, because they are non-citizens, but it is precisely because the

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[940] I have borrowed this phrase from the title of Dworkin's book 'Law's Empire' first published in 1986.
[941] Hannah Arendt formulated this theory for the first time in an article published in the German language in 1949, entitled 'The Rights of Man: What are They?'. Later on, this essay became Chapter 9 in the book published in 1951 in the English language: Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), pp. 267-302.
[942] Preamble of the 1948 Universal Declaration of Human Rights.
[943] *Ibid*, Article 1.
[944] Shahram Khosravi, *'Illegal' Traveller: An Auto-Ethnography of Borders* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2010), p. 121.
[945] *Ibid*, p. 122. In this regard, also see: Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), pp. 267-302.

exclusionary policy of the main framework of nation-states reduces this group of people to a status lesser than that of human beings.[946] Thereafter, Professor Uddin by following the literature available within the field of comparative genocide studies proposes using the notion of 'sub-human' (or 'non-human' or 'de-human') for theorising the failure of legal systems created by nation-states to provide human rights to all human beings.[947] The inevitable consequence of this dependency is that in order for us to enjoy human rights – in reality – being born as a human, *per se*, no longer suffices. Whereas in fact, the individual must be attached or belong to a certain 'political community' known as the 'nation-state.' The umbilical cord attaching a human being to a State is called 'citizenship' as if there is nothing more natural for human beings than belonging to a nation-state. Perhaps that is why the technical term for the acquisition of citizenship through application is *naturalisation* and reversely, the loss of citizenship or losing of one's nationality is *denaturalisation*.[948] In this regard, Professor Khosravi asserts:

> Citizenship has become the nature [essence] of being human. Being outside the realm of citizenship means being outside nature. In the condition of statelessness, in the absence of citizenship, one becomes dehumanized (unnatural) and can be exposed to necropolitics – violence and death. Throughout the twentieth century, many nations and groups have been subjected to this dehumanization politics.[949]

On this basis, the problem with the lack of enjoyment of human rights by asylum seekers, refugees, stateless people, and undocumented immigrants (all of whom are categorised as 'forced migrants') is that either *de jure*, or *de jure* and *de facto*, these people have lost their umbilical cord with a nation-state. Although the phrase 'the right to have rights' was first introduced by Arendt in 1949, she did not provide much of elaboration on the meaning or on the exact instances of this phrase.[950] However, she offered a sparse definition in the ninth chapter of her most prominent scholarly work, meaning '*The Origins of Totalitarianism*,'

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[946] Nasir Uddin, *The Rohingya: An Ethnography of 'Subhuman' Life* (New Delhi: Oxford University Press, 2020).
[947] *Ibid*, pp. 1-26 and 135-194. Also, see: Nasir Uddin, 'State of Stateless People: The Plight of Rohingya Refugees in Bangladesh', in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2015), pp. 62-77.
[948] Shahram Khosravi, *'Illegal' Traveller: An Auto-Ethnography of Borders* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2010), p. 122. Also, see: Rhoda E. Howard-Hassmann, 'Introduction: The Human Right to Citizenship', in Rhoda E. Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2015), pp. 1-18.
[949] Shahram Khosravi, *'Illegal' Traveller: An Auto-Ethnography of Borders* (Basingstoke, Hampshire; New York: Palgrave Macmillan, 2010), p. 122.
[950] Stephanie DeGooyer, Alastair Hunt, Lida Maxwell, and Samuel Moyn, *The Right to Have Rights* (London; New York: Verso, 2018), p. 5.

which was published first in 1951.[951] By referring to this source, the mere fact of being a human is not enough to enjoy human rights; whereas, the membership of a 'political community' is necessary.[952] According to Arendt, we become aware of the existence and the importance of 'the right to have rights' only after a group of people have lost their membership of an organised political community because of the 'new global political situation.'[953] The real problem with this loss of membership is not any lack of civilisation or the ruling of tyranny, but instead, the problem lies deeply within the 'new global political changes.' These changes include the fact that no places are left in the World 'uncivilised' – whether we like it or not, we have really started to live in 'One World.'[954]

In Arendt's opinion, humans are not born equals; though, we become equals as members of a community on the strength of our decision to guarantee mutually equal rights to every member of that community. In this regard, Arendt continues that our political lives rest on the assumption that we could create and guarantee each other equality through organisation because we are able to act together and to build a common World only if we are equals.[955]

The right to have rights, while certainly being Arendt's critique of the implementation of human rights, not only amplifies the insufficiency of institutional and legal mechanisms in protecting human rights for all in reality, but it also sheds light on the theoretical foundations of liberal democracies such as 'equality' and 'inherent dignity' of all human beings.[956] In Arendt's words:

> The incredible plight of an ever-growing group of innocent people was like a practical demonstration of the totalitarian movements' cynical claims that no such thing as inalienable human rights existed and that the affirmations of the democracies to the contrary were mere prejudice, hypocrisy, and cowardice in the face of the cruel majesty of a new world.[957]

That is why, to me, the right to seek asylum could be possibly viewed as Arendt's notion of 'the right to have rights.'[958] While by using this phrase, Arendt meant the right to have or to hold a citizenship, it is my firm conviction that without the realisation of the right to seek asylum in the case of forced immigrants, no enjoyment of other basic and fundamental human rights or even becoming a

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[951] The title of the ninth chapter of this book is 'The Decline of the Nation-State and the End of the Rights of Man'. In this regard, see: Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), pp. 267-302.
[952] *Ibid*, pp. 293-297.
[953] *Ibid*, pp. 296 and 297.
[954] *Ibid*, p. 297.
[955] *Ibid*, p. 301.
[956] Stephanie DeGooyer, Alastair Hunt, Lida Maxwell, and Samuel Moyn, *The Right to Have Rights* (London; New York: Verso, 2018), p. 4.
[957] Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), p. 269.
[958] *Ibid*, pp. 267-302.

citizen is imaginable. *The right to seek asylum is, indeed, a pertinent and the first step in establishing the citizenship link between an individual and a nation-state, without which other legal rights attached to citizenship are neither feasible in a legal or factual sense.*

Continuing Arendt's endeavour on understanding the foundations of human rights especially the equality of human dignity, the contemporary philosopher Seyla Benhabib borrowed Kant's conception of natural law, asserting that, 'since we are born to [the] human species as free and rational agents, human dignity and its equality could feasibly be claimed to be the "moral foundation" of human rights.'[959] However, in order to enjoy these rights, Benhabib agrees with Arendt that we definitely need to belong to a political community.[960] While this political community as formulated by Arendt to be the membership of a nation-state in the form of upholding full citizenship (the right to have rights),[961] to Benhabib, in contemporary World politics, we need to move beyond the notion of national citizenship.[962] According to the latter, in order to safeguard human rights for all individuals, in addition to national institutions such as national citizenship, international organisations are of utmost importance through the membership in the World political community – known as the 'cosmopolitan federalism.'[963] What Benhabib means by 'cosmopolitan federalism' follows here:

> Since the adoption of the Universal Declaration on Human Rights in 1948, the world has entered a phase in the evolution of global civil society, which is characterized by a transition from international to cosmopolitan norms of justice. Norms of international justice most commonly arise through treaty obligations and bilateral or multilateral agreements among states and their representatives. They regulate relations among states and other principals that are authorized to act as the agents of states in multiple domains, ranging from trade and commerce to war and security, the environment, and the media.[964]

Under the pretext of Benhabib's version of cosmopolitanism, the power of the democratic sovereigns or the modern democratic nation-states is legitimised not only from their own national constitutions, but also from how much they are

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[959] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), pp. 36-40.
[960] *Ibid*, p. 58.
[961] Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt Brace & Company, 1979), pp. 296 and 297. Also, see: Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), pp. 50 and 51.
[962] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), pp. 67 and 68.
[963] *Ibid*, pp. 176-179.
[964] Seyla Benhabib, 'The Philosophical Foundations of Cosmopolitan Norms', in Robert Charles Post (ed.), *Seyla Benhabib: Another Cosmopolitanism* (New York: Oxford University Press, 2006), pp. 13-44, pp. 15 and 16.

acting in accordance with universal human rights norms and standards.[965] In Benhabib's words:

> [The phrase] "[w]e, the people" [in modern democratic constitutions], refers to a particular human community, circumscribed in space and time, sharing a particular culture, history, and legacy; yet this people establishes itself as a democratic body by acting in the name of the "universal". The tension between universal human rights claims, and particularistic cultural and national identities, is constitutive of democratic legitimacy. Modern democracies act in the name of universal principles, which are then circumscribed within a particular civic community. This is the "Janus face of the modern nation", in the words of Jürgen Habermas (Habermas 1998, 115).[966]

While Benhabib's version of cosmopolitanism may solve the question on the moral foundations of human rights, this theory, however, does not fully dismiss the problem with the normative foundations of human rights, especially for non-nationals such as asylum seekers. In fact, Benhabib herself and some commentators have testified to this problem. In their opinions, the principle of 'territorial membership' in the form of 'residency' or 'getting access to the territory' of a State for claiming the right to seek asylum is still the underpinning condition for representation in the World of 'cosmopolitan federalism.'[967] This precondition makes those who do not have this territorial membership or territorial accessibility fall outside the reach of human rights protection. This is exactly the case for asylum seekers denied access to the EU, in spite of the fact that international and EU law have bound States with regard to the right to seek asylum.

To elaborate further on this point, I shall refer to Catherine Dauvergne's scholarly work addressing the effects of globalisation on various aspects of immigration law.[968] In her work, Dauvergne consciously and deliberately uses the term 'illegal,' when describing undocumented immigrants including asylum seekers.[969] In this regard, she acknowledges that, 'the term "illegal," used as a

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[965] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), p. 178.
[966] *Ibid*, p. 44.
[967] *Ibid*, pp. 213-221. In this regard, also see: Jeremy Waldron, 'Cosmopolitan Norms', in Robert Charles Post (ed.), *Seyla Benhabib: Another Cosmopolitanism* (New York: Oxford University Press, 2006), pp. 83-101, pp. 86, 86, 89, and 90. Also, see: Bonnie Honig, 'Another Cosmopolitanism? Law and Politics in the New Europe', in Robert Charles Post (ed.), *Seyla Benhabib: Another Cosmopolitanism* (New York: Oxford University Press, 2006), pp. 102-127, pp. 108-116. Also, see: Garrett Wallace Brown, *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution* (Edinburgh: Edinburgh University Press, 2009), pp. 203-208.
[968] In this regard, especially see chapter 4 of 'Making Asylum Illegal.' Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge; New York: Cambridge University Press, 2008), pp. 50-68.
[969] *Ibid*, pp. 4 and 50-68.

definer adjective or as an identifier for a certain category of immigrants, while being the most derogatory term in immigration law, is the most expressive one; since the term, in itself, directly implicates the "law" and the "exclusionary power" of the law.' In continuation, she asserts that, 'law creates, constructs, and maintains "illegality," and it has constantly helped Western states find a simple and quick answer to the "xenophobic paranoia thrives" since the late twentieth and the early twenty-first centuries.'[970]

In Dauvergne's assertion, illegality and sovereignty have a reciprocal and parallel relationship, in which one reinforces the other in the way that creating the category of 'others' by law, as 'illegals,' is a significant indicator of the existence of sovereign power and its iron-fisted control over the State territorial borders.[971] In return, when asylum seekers use the language of individual rights or human rights to claim a legal space against the sovereign power, the process of securitisation and the language of collective rights of the nation to security and safety defeat the individual rights' discourse, compromising the right to seek asylum in particular.[972]

Based on these reasons, relying merely on the law and the language of law to resolve the issue of 'illegality' would not resolve the problem, simply because law is necessarily the arena and forum for creating and sustaining – or for producing and reproducing – this 'illegality.' Without the law, which make people illegal, illegal people would never exist. The law creates the category of 'illegal' people, and then, it strives so hard to find solutions to deal with these people. Since 'illegal' people are exceptions to the ruling law, one possible solution offered by the legal scholar and advocate of the Nazi regime Carl Schmitt was to make use of the etymological sense of the term 'exception' to normalise keeping 'illegals' outside the realm of the law's kingdom.[973] In fact, in his conceptualisation of the modern theory of constitutional State, Schmitt defined the 'sovereign' in an

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[970] *Ibid*, p. 4.
[971] *Ibid*, p. 27.
[972] *Ibid*. With regard to the discussion within the Canadian and Australian contexts on the flaws of securitised immigration law in creating illegals which very much resembles the EU's discourse on the matter, see: Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: University of British Columbia Press, 2005), pp. 81-128.
[973] Carl Schmitt introduced the theory of 'state of exception' within constitutional legal theory in his 1921 essay entitled, 'On Dictatorship'. Later on, these thoughts built the foundation for the Schmittian theory of sovereignty in his work published in 1922, i.e. 'Political Theology'. With regard to Schmitt's ideas on the state of exception, see: Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*, translated by Michael Hoelzl and Graham Ward (Cambridge; Malden, Massachusetts: Polity Press, 2014), pp. 79-111. For further examples on how some current politicians, not only in Europe, but all around the World, are using the same Schmittian logic of state of exception in response to catastrophic and challenging events, see: Timothy David Snyder, *On Tyranny: Twenty Lessons from the Twentieth Century* (New York: Tim Duggan Books, 2017), p. 100. In this regard, also see: Masha Gessen, *Surviving Autocracy* (New York: Riverhead Books, 2020), pp. 9-16.

indispensable relation to the 'state of exception,' and characterised the power to declare a 'state of exception' or as we call it today, a 'state of emergency' as the constituting element of a sovereign's ruling power.[974]

Under this scenario, protecting the public from the harms of 'illegal' people creates a state of exception, under the premise that, these 'illegals' are creating a 'danger to national security,' and there is therefore, a necessity for safeguarding the public against them. At this point, the sovereign utilises all its constitutional power to take control of the exceptional circumstances and to transform the state of exception into a long lasting or even into a permanent state of emergency. When a permanent state of emergency lasts for a longer period, gradually and systematically, the state of exception moulds itself into the norm and the exceptional rules become the normal ruling law,[975] which would then legitimise any violation of the basic and fundamental rights of those deemed 'illegal.'[976]

In the light of these arguments, the contemporary philosopher Giorgio Agamben has unfolded Schmittian advocacy for the necessity of existence of tyranny, i.e. a dictator, a totalitarian regime, or an authoritarian ruler, in declaring a state of exception for maintaining national security, public order, and the safety of nation during emergencies.[977] Thereafter, Agamben has reflected on how Nazi Germany benefited from the rationale behind the state of emergency and the absolute power of the sovereign to decide on that, in order to legitimise the creation of camps as a necessary space, created by and within law to deal with the 'problem of undesired illegals.'[978]

Similarly, in the context of critical studies, Mbembe has utilised the Schmittian theory of 'state of exception' in his analysis of the European colonial powers in

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[974] Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*, translated by Michael Hoelzl and Graham Ward (Cambridge; Malden, Massachusetts: Polity Press, 2014), pp. 148-179. In this regard, also see: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: The University of Chicago Press, 2005), pp. 19-79.

[975] Ming-Sung Kuo, 'From Institutional Sovereignty to Constitutional Mindset: Rethinking the Domestication of the State of Exception in the Age of Normalization', in Richard Albert and Yaniv Roznai (eds), *Constitutionalism Under Extreme Conditions: Law, Emergency, Exception* (Cham, Switzerland: Springer, 2020), pp. 21-39

[976] Liora Lazarus and Benjamin J Goold, 'Security and Human Rights: Finding a Language of Resilience and Inclusion', in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Oxford: Hart Publishing, 2019), pp. 1-24.

[977] Agamben has elaborated on Schmitt's theory of 'state of exception' in the following scholarly work: Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005).

[978] *Ibid*, pp. 3 and 4. For more detailed account in this regard, see: Giorgio Agamben, 'Homo Sacer: Sovereign Power and Bare Life', translated by Daniel Heller-Roazen, in *The Omnibus Homo Sacer* (Stanford, California: Stanford University Press, 2017), pp. 99-147.

applying different rules and norms with regard to their subjects – whom they called infamously 'savages' – in the colonial territories under their sovereignty.[979] In this regard, Mbembe concludes that colonies are the sites or spaces 'par excellence where controls and guarantees of judicial order can be suspended – the zone where the violence of the state of exception is deemed to operate in the service of "civilization".'[980] This discussion brings us back to the colonial reading of the history of asylum and refugee law in Europe. As elaborated in Chapter 2, the practice of asylum has always existed even long before the creation of nation-states. However, the formation of nation-states and the control of modern sovereign powers over almost every aspects of human life resulted in the exclusion of those perceived as 'undesirable others' from the rights deemed natural to humans. Some de-colonial research within the critical migration studies has shown that the exclusion of a certain category of immigrants is both longstanding and intentional.[981] Hence, we need to take into account these colonial histories in the analysis and criticism of EU law and policies on immigration and asylum.

This chain of dependency between enjoying human rights and belonging to a nation-state makes us question whether human rights – the right to seek asylum included – truly emerge from our inherent and equal human dignity, or whether perhaps they are just matter of our political choices. For all the reasons formulated above, depending on law alone and the language of rights, as such, is insufficient to realise the right to seek asylum. In addition to the inherent incapability and inability of law to resolve the issue of illegality – as said above, the law creates illegality – this approach limits us to the rigidity of a 'legalistic dogma.'[982] This rigidity in legal thinking results in ignoring the political, social, cultural, and civil contexts, within which human rights in general, and the right to seek asylum in particular have been formulated through time and have found meaning.[983] Instead of understanding the formation of the right to seek asylum from a strictly legalistic approach, we should consider the political processes

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[979] Achille Mbembe, *Necropolitics*, translated by Steve Corcoran (Durham, North Carolina: Duke University Press, 2019), pp. 76-78.
[980] *Ibid*, p. 77.
[981] Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology*, pp. 423-441. Also, see: Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development*, pp. 599-626.
[982] Richard Ashby Wilson, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law', in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge; New York: Cambridge University Press, 2007), pp. 342-369, pp. 360-363.
[983] *Ibid*. In this regard, also see: Jean Grugel and Nicola Piper, *Critical Perspectives on Global Governance: Rights and Regulation in Governing Regimes* (New York: Routledge, 2007), pp. 18-21.

behind the creation of human rights. By understanding human rights as a 'socio-political process,' which brings into existence, provides suitable conditions for realisation and even dismisses rights through different social struggles, we might be able to revive the right to seek asylum as a fundamental human right and to give it a second life in the EU.

To unfold this socio-political process accordingly, the role of civil societies, rights advocates, and NGOs is of pertinent importance.[984] In this regard, we could name some grassroots' movements under the banners of 'No one is illegal,' 'No Human is Illegal,' 'Sanctuary City,' '*Sans-Papiers*,' etc., which started in Germany, France, Canada, and the US, and then transferred to other parts of the World as a global movement – similar to the 'Me Too' movement or '#MeToo' against sexual abuse and harassment.[985] These movements have played a determining role in raising public awareness and intensifying political debates on the negative impacts of current securitised immigration policies on the lives of asylum seekers and their enjoyment of basic and fundamental human rights. These movements have also mobilised grassroots initiatives to provide sanctuary for undocumented immigrants.[986] Perhaps, these movements are the very first step in preventing asylum seekers from becoming the 'illegals.' These movements, in addition, have the power to provoke public debates and to transform public opinion on what is, in fact, illegal: whether an asylum seeker

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[984] Jean Grugel and Nicola Piper, Critical Perspectives on Global Governance: Rights and Regulation in Governing Regimes (New York: Routledge, 2007), pp. 18-21. In this regard, also see: Seyla Benhabib, The Rights of Others: Aliens, Residents, and Citizens (Cambridge: Cambridge University Press, 2004), pp. 220 and 221.

[985] For the Canadian version of this movement, see: No One is Illegal, <www.nooneisillegal.org/>. For the German version of this movement, see: Kein Mensch ist illegal, <www.kein-mensch-ist-illegal.org/>. For the French version of this movement, see: No Border Network, 'A Climax in the History of French Immigration', <www.noborder.org/without/france.html>. In this regard, also see: Jane Freedman, 'The French "Sans-Papiers" Movement: An Unfinished Struggle', in Wendy A. Pojmann (ed.), *Migration and Activism in Europe since 1945* (New York: Palgrave Macmillan, 2008), pp. 81-96. Also, see: Ruben Andersson, *Illegality, Inc.: Clandestine Migration and the Business of Bordering Europe* (Berkeley, California: University of California Press, 2014), pp. 203, 258, and 268. Also, see: Simon Behrman, *'Freedom from Seizure': Law and Asylum in Conflict* (Doctoral Thesis, Birkbeck, University of London, 2016), pp. 226-248. Also, see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge, 2018), pp. 131-191. Also, see: J.J. Mulligan Sepúlveda, *No Human Is Illegal: An Attorney on the Front Lines of the Immigration War* (New York; London: Melville House Publishing, 2019), pp. 47-53 and 55-62. For more information with regard to the anti-sexual abuse and anti-harassment movement, the 'Me Too,' see the following recent brief published by the UN Women: The UN Women, '#MeToo: Headlines from a Global Movement', <www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-metoo-headlines-from-a-global-movement-en.pdf?la=en&vs=3013>.

[986] Elias Steinhilper, *Migrant Protest: Interactive Dynamics in Precarious Mobilizations* (Amsterdam: Amsterdam University Press, 2021), pp. 11-14, 145-167. Also, see: Jane Freedman, 'The French "Sans-Papiers" Movement: An Unfinished Struggle', in Wendy A. Pojmann (ed.), *Migration and Activism in Europe since 1945* (New York: Palgrave Macmillan, 2008), pp. 81-96. Also, see: Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Oxford; New York: Routledge, 2018), pp. 186-191.

as a human being in need of security is illegal, or if the actions of States in violating the principle of *non-refoulement* are illegal.

For sure, here, I do not seek to belittle the role of States and official actors including the judiciary on giving a real meaning to the right to seek asylum. However, what I would like to convey is that in the current environment of highly securitised immigration in the EU, and by considering the deference of Europe's human rights Courts (both the ECtHR and the CJEU) to this approach, we cannot not expect much from the official actors to defend the right to seek asylum. When asylum seekers are denied the right to seek asylum through violating the principle of *non-refoulement*, by subjecting them to practices such as collective expulsion or other forms of preventing access to the EU territory, we could claim that this right is no longer being taken seriously. Formulating the right to seek asylum as a right to have rights is perhaps the closest solution available to think and act politically in the Europe of today.[987] The modern-day Europe that seems to have completely forgotten its own long and turbulent history of war and displacement, closing its door on people coming from the Global South – mainly the Middle Eastern and African asylum seekers.[988] Acting politically, similar to the '*Sans-Papiers*' movement is the closest practical path and tool to get undocumented immigrants in general, and asylum seekers particularly, to gain recognition and a legal agency in realising their human rights.[989]

As Dauvergne has rightfully observed, the morality of immigration discourses, which we choose to base our politics on, greatly influences the way we create 'others' *versus* 'us' in our law.[990] Some citizens of prosperous States might consider their right to move around the World, and the right to remain in a certain territory, as a given. That is why those seeking to enter, 'could be labelled "rorters" seeking to unjustly exploit the system or circumvent the (just) rules that confine them to poorer states with fewer life chances.'[991] However, the privileged citizens of the developed World have completely ignored the fact that

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[987] Ayten Gündoğdu, Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants (New York: Oxford University Press, 2015), pp. 187-202.
[988] Liora Lazarus and Benjamin J Goold, 'Security and Human Rights: Finding a Language of Resilience and Inclusion', in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Oxford: Hart Publishing, 2019), pp. 1-24.
[989] Ayten Gündoğdu, Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants (New York: Oxford University Press, 2015), pp. 187-202.
[990] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge; New York: Cambridge University Press, 2008), pp. 16 and 17.
[991] *Ibid*, p. 17

this right is merely an 'accident of birth' (what I would like to call the 'lottery of birth'),[992] rather than a virtue earned.[993]

In the same vein, the indifference of the EU to the ever-growing neoliberal populist movements sweeping across the European community has created a comfortable place for racist, xenophobic, Islamophobia, and nativist rhetoric to grow in Europe. Covering this ugly discriminatory rhetoric with the *façade* of 'security' is the most dangerous weapon against protecting the basic and fundamental human rights of not only those seeking to enter, but also those already living in the EU.[994] The security narratives of the EU under the labels of 'state of emergency,' the 'war against terror,' or the 'refugee crisis' reminds us of Schmitt enthusiastically advocating for the Nazi dictatorship to assume power and strip certain 'undesirable' groups of people of their human rights – and even their personhood and legal existence – all in the name of 'security' and 'stability.'[995] The essentially inseparable element of sovereign power in Schmitt's philosophy, which all dictatorships share, is the idea of having an 'enemy' who threatens the very existence of the sovereign's entity.[996] This is exactly what the

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[992] In a blogpost for the Stories of Europe Series, I used the phrase 'lottery of life' in criticising Europe basing its human rights policies on citizenship. For more information in this regard, see: Iida Karjalainen and Bea Bergholm, 'Castle in the Sky – Open Europe and the Realities of European Exclusiveness', <www.helsinki.fi/en/news/language-culture/castle-in-the-sky-open-europe-and-the-realities-of-european-exclusiveness>.

[993] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge; New York: Cambridge University Press, 2008), p. 17. For further ethical discussions on the link between birth and citizenship, see: Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, Massachusetts: Harvard University Press, 2009).

[994] For more information in this regard and on the narratives of the right wing and national populist parties on securitising immigration in contemporary Europe, see: Andreas M. Klein, 'The End of Solidarity? On the Development of Right-wing Populist Parties in Denmark and Sweden', in Karsten Grabow and Florian Hartleb (eds), *Exposing the Demagogues: Right-wing and National Populist Parties in Europe* (Brussels: Centre for European Studies, 2013), pp. 105-131. Also, see: Magali Balent, 'The French National Front from Jean-Marie to Marine Le Pen: Between Change and Continuity', in Karsten Grabow and Florian Hartleb (eds), *Exposing the Demagogues: Right-wing and National Populist Parties in Europe* (Brussels: Centre for European Studies, 2013), pp. 161-186. Also, see: Paul Lucardie and Gerrit Voerman, 'Geert Wilders and the Party for Freedom in the Netherlands: A Political Entrepreneur in the Polder', in Karsten Grabow and Florian Hartleb (eds), *Exposing the Demagogues: Right-wing and National Populist Parties in Europe* (Brussels: Centre for European Studies, 2013), pp. 187-203. On how the mass means of communication in the EU have been portraying immigrants as threats to the security of EU since 2015-2016, see: Monika Kopytowska and Łukasz Grabowski, 'European Security under Threat: Mediating the Crisis and Constructing the Other', in Christian Karner and Monika Kopytowska (eds), *National Identity and Europe in Times of Crisis: Doing and Undoing Europe* (Bingley: Emerald Publishing Limited, 2017), pp. 83-112.

[995] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: The University of Chicago Press, 2005), pp. 5-15. In this regard, also see the chapter entitled 'Dictatorship in Contemporary Law and Order: The State of Siege' in the following book: Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*, translated by Michael Hoelzl and Graham Ward (Cambridge; Malden, Massachusetts: Polity Press, 2014), pp. 148-179.

[996] Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*, translated by Michael Hoelzl and Graham Ward (Cambridge; Malden, Massachusetts:

securitisation of immigration is all about; it is about portraying the 'outsider' or 'others' as 'dangerous enemies' who is constantly threatening the very existence of the EU. It seems that maintaining the power of the EU is dependent on framing immigrants as threats against the life and identity of EU and its citizens, and that is how the EU is feeding the racist appetite of the segments of the European community.

Ultimately, considering the right to seek asylum as the right to have rights – the mother of all other human rights – the importance of taking this right seriously becomes even more acute. The right to seek asylum is a guarantor of other basic human rights such as the right to life and the right to personal security. Labelling asylum seekers as 'illegal immigrants,' pushes them towards the 'death of legal personhood,' as if these people do not 'exist' before the law.[997]

6.4. CONCLUSION

In this chapter, I gave clear answers to the main research question of this dissertation. The implications of the securitisation of immigration in the EU on the right to seek asylum is that the two very essential and inviolable cores of this right fall under attack. In other words, the securitisation of immigration in the EU has led to laws, practices, and policies, which prevent asylum seekers from even entering the EU, in the first place, to submit their claims for asylum. Secondly, the securitisation of immigration in the EU has resulted in practices, which endanger the position of the principle of *non-refoulement* as a customary norm of international law. Of greater concern, however, is the development of practices such as diplomatic assurances in torture-expulsion cases, which are in direct conflict with the absolute and non-derogable nature of *non-refoulement* to torture and other forms of ill-treatment.

Thereafter, I elaborated clearly on what the contribution of this research is to the existing academic knowledge on studying the nexus between migration law and security. In this regard, by applying a critical discourse analysis, while combining the two fields of critical security studies and critical legal studies, I exposed the negative effects of the official security narratives of the EU on immigration upon the right to seek asylum as a fundamental human right.

Polity Press, 2014), pp. 148-179. For further analysis on the position of 'enemy' in the Schmittian theory of State, see: Giorgio Agamben, 'Homo Sacer: Sovereign Power and Bare Life', translated by Daniel Heller-Roazen, in *The Omnibus Homo Sacer* (Stanford, California: Stanford University Press, 2017), pp. 93-121.

997 Kathryn Allinson, 'The Right to be Recognised as a Person before the Law', in Elspeth Guild, Stefanie Grant, and C. A. Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (Oxford; New York: Routledge, 2018), pp. 16-20, p. 18. In this regard, also see: Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (New York: Oxford University Press, 2012), pp. 101-104.

The findings of this research made me think what the next step should be in realising the right to seek asylum in the EU. In this regard, the ongoing changes that are being made to the EU immigration and asylum policies, and thereafter, to EU law on the matter are of direct importance. Only time will tell; however, deep reservations remain, because by looking closely at the language of the EU New Pact of Migration and Asylum, the security concerns of the EU still dominates the Pact in the form of external border control prevailing over the language of protecting fundamental human rights. Only time will tell whether the future EU legal system of asylum would prevent the loss of lives – something extremely disturbing that we are witnessing at the external borders of the EU these days.

As final words, I touched upon the practice of the collective expulsion of immigrants by focusing on its prohibition, which is, in my opinion, a critical precondition for the full realisation of the right to seek asylum. In addition to protecting the right to seek asylum, other fundamental rights of asylum seekers, such as the right to life, right to due process and a fair procedure of their asylum claims, and the right to an effective remedy, are highly dependent on respecting the prohibition of the collective expulsion of immigrants. Thereby, I illustrated that safeguarding EU security, in practice, has detrimentally affected the prohibition of the collective expulsion, and therefore the enjoyment of the right to seek asylum and its derivative rights. One of the recent cases addressing this practice under Article 4 of Protocol No. 4 of the ECHR is the landmark case of *N.D. and N.T. v. Spain* (2020), with a final decision that went in favour of the respondent, the Government of Spain. At the Grand Chamber level, the ECtHR judges agreed with the Government of Spain and other intervening States that, considering the fact that Spanish law had offered several legal channels for accessing the territory of Spain, the effort of applicants to enter Spain 'illegally' could not be justified neither tolerated. In addition, the Court agreed with the respondent State and supporting intervening parties that, the Government of Spain could not be held liable for the 'culpable conduct' of applicants in *invading* and *storming* the border fence infrastructures built between Melilla and Morocco. In the Grand Chamber's opinion, a lack of individual decision in the cases of applicants is attributable to the 'culpable conduct' of applicants in causing a *surprise effect* by their large number.

The dissenting opinion of Judge Koskelo of Finland is of utmost relevance and importance to this research. In her assertion, Judge Koskelo criticises the ECtHR in not legitimising the refusal of entry and expulsion of aliens against 'national security, the protection of territorial integrity, and public order' of Member States. In her opinion, States Parties all have the right and the rightful power to prevent and refuse 'the entry into their jurisdiction of aliens aiming to

cross their external borders with known hostile intentions or posing known threats to national security.' What could be derived from the opinion of Judge Koskelo and the arguments submitted by the respondent State is the recognition of a right to collective security as a 'meta-right,' which would justify and legitimise the violation of individual freedoms and human rights. This reading of security is very much in line with the Hobbesian and Schmittian theories of sovereign power and supremacy of this power in deciding on the fate of the members of society even if that means declaring a state of emergency.

Hence, by referring to the critical analysis offered by several social and political scientists (such as Khosravi, Arendt, Agamben, Benhabib, and Dauvergne) to get closer to the real underlying 'problem with human rights,' these rights are not only matters of legal dogmatic discourse. Instead, carefully and critically, we should study and analyse all the political, social, cultural, and even economic contexts, within which human rights are formed and dismantled – even if these studies make us uncomfortable exposing the post-colonial mindset upon which EU law has been constructed. Perhaps, this may help find new ways to give a second life to the right to seek asylum in the EU. Indeed, by closing the doors of the EU, we cannot guarantee that terrorists stay outside. What happens for sure, instead, is that the right to seek asylum in the EU becomes meaningless and if there is no effective right to seek asylum, there will be no effective right to enjoy asylum, either. This leads to the violation of the human rights of those people, who find themselves in the greatest need of protection, *albeit* there will always be someone who may wish to abuse any system

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