KU Leuven
Faculty of Law
European Master's Programme in Human Rights and Democratisation
A.Y. 2019/2020

Refugee Protection at Risk

Right-Wing Populism and its Threat to the Principle of Non-Refoulement in the EU

Student: Nora Achterbosch
Supervisor: Drs. Louise Reyntjens
EMA Director: Prof. Dr. Koen Lemmens

ABSTRACT

This thesis is an attempt to substantiate the intuition that right-wing populism poses a threat to refugee law, and involves a thorough study upon the dynamic between right-wing populism and refugee law, in specific in relation to the principle of non-refoulement. The principle of non-refoulement refers to the prohibition of forced direct or indirect removal of a refugee to a place where his or her freedom is in danger. As main thesis it will be argued that right-wing populism threatens the customary status of the principle of non-refoulement. The principle of non-refoulement is chosen as representative of refugee law, as it enjoys central attention in a variety of legal instruments and enables us to deal with the notion of refugee law in a focused manner. Through an interdisciplinary approach it will be illustrated that right-wing populism should be acknowledged as precarious for democracy and refugee law. Therefore, it should not simply be disregarded as a political momentum which will eventually dwindle down, but instead should be viewed in light of the threat it poses to fundamental values within the EU, of which the principle of non-refoulement is one.

ACKNOWLEDGMENTS
There are several people who have contributed greatly to my thesis, and I would like to take the opportunity to thank them.

First and foremost, I would like to thank Alexander Westerhof, trainer at the Dutch Council for Refugees. Through my experience as a volunteer at the Dutch Council for Refugees and especially through the training provided by Alexander a few years ago, I was inspired to pursue a master in the field of human rights and refugee law. Alexander was the first to introduce me to refugee law and the importance of the principle of non-refoulement, and has therefore provided me with the groundwork of this thesis.

Secondly, my supervisor Louise Reyntjens has been of great support during the writing process of my thesis. Through her extensive feedback in combination with her kindness and enthusiasm, I gained new knowledge, insights and motivation into the subject(s) of this thesis. Undoubtedly, without her great guidance this thesis would not have resulted into what it is now.

Lastly, I would like to thank my parents. Not only did they provide me – during a global pandemic - with a physical safe space in which I could focus all my academic ambitions of which this thesis is a result, by always showing interest in my newest findings and thoughts during our daily lunch hour, I was able to reformulate and organise my arguments more clearly and consistently. Their unrestricted belief in my potential have contributed greatly to believing in my own (academic) abilities.

TABLE OF CONTENTS

INTRODUCTION……..…...1

1. THE LEGAL FRAMEWORK AND THE PRINCIPLE OF NON-REFOULEMENT……...4

1.1. Introduction....……...…….……...4

1.2. The Development of Refugee Law and the Principle of Non-Refoulement…...…….4

1.3. International Refugee Law – The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol……...……6

1.3.1. The Distinction between Article 33(2) and 1F……..…….8

1.3.2. Article 33(2) and Terrorism……....9

1.4. Non-Refoulement in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)...……...……10

1.4.1. Jurisdiction……..…..11

1.4.2. Extradition, Non-Derogability and National Security……..…....12

1.5. The relation between the EU and the ECHR……...…....13

1.6. Non-Refoulement and the European Union…….....15

1.6.1. The Charter of Fundamental Rights……...15

1.6.2. The Treaty on the Functioning of the European Union Article 78(1)……..…..16

1.6.3. The Common European Asylum System……..…….16

1.6.4. The Dublin III Regulation……..……18

1.6.5. Borders and Jurisdiction in the EU……..…...21

1.7. The Legal Status of the Principle of Non-Refoulement……..……..23

1.8. Conclusion……...…….……...26

2. DEFINING POPULISM IN THE EU…….…….27

2.1. Introduction…….27

2.2. Defining Populism; Three Core Concepts……27

2.2.1. The People…….28

2.2.2. The Elite…….29

2.2.3. The General Will……29

2.3. Populism as Thin-Centred Ideology…….30

2.4. Populism and Democracy…….30

2.5. Right-Wing Populism vs Left-Wing Populism…….32

2.6. Characteristics of Right-Wing Populism in the EU……..33
2.6.1. Nativism, Nationalism and 'The Dangerous Other'……...34
2.6.2. Crisis Performance and the Populist Narrative……...39
2.6.3. Euroscepticism……..40
2.7. Conclusion
3. POPULISM THREATHENING THE PRINCIPLE OF NON-REFOULEMENT IN THE EU……..44
3.1. Introduction....……..44
3.2. Populists in Power in the EU.……44
3.3. Recent Developments on Immigration Policy in the EU……..47
3.3.1. Failure of a Burden Sharing Initiative; the Temporary Relocation Scheme and the Revised Dublin Regulation……..47
3.3.1.1. The Temporary Relocation Scheme……48
3.3.1.2. CEAS Reform; Dublin IV……50
3.3.2 External Border Management and Outsourcing……...52
3.3.2.1. Hungarian, Polish, Czech and Slovenian Borders……52
3.3.2.2. Italy at Sea……53
3.3.3. Illiberalism in Poland and Hungary……58
3.4. Conclusion……60
4. EU POLICY IN LIGHT OF POPULISM AND EU-SCEPTICISM……62
4.1. Introduction……62
4.2. Altering the Crisis Narrative……62
4.3. Internal and External Policy Consistency……63
4.4. Responsibility Sharing……..65
4.5. A Common European Identity and Endorsing the Public Sphere……67
4.6. Adherence to the Rule of Law……..69
4.7. Long-Term Education……...71
4.8. Conclusion……72
CONCLUDING REMARKS……..73
BIBLIOGRAPHY.……..75
A. JOURNAL ARTICLES/BOOKS……75
B. CASES……..83

C. LEGISLATION……84
D. TREATIES……...……...85
E. NEWSPAPER ARTICLES……...……...…....86
F. OTHER……....……89

INTRODUCTION

In 2015, the influx of refugees in Europe took an unprecedented turn when over 1.2 million first-time asylum applications were reported as a consequence of various conflicts in the Middle East. In contrast to the previous year, this amount had doubled.[1] This development was quickly referred to in Europe as the 'Refugee Crisis', even though the number of refugees hosted by Europe is only a fraction of the number of refugees hosted in the Middle East, South Asia and Africa.[2] The moral imperative to provide those who are fleeing from danger with an opportunity to safety is embedded in established refugee law. Unfortunately, refugees face increasing hostilities upon arrival in Europe, as right-wing populistic sentiments progressively gain ground.[3]

This thesis is an attempt to substantiate the intuition that right-wing populism poses a threat to refugee law, and involves a thorough study upon the dynamic between right-wing populism and refugee law, in specific in relation to the principle of non-refoulement. As main thesis it will be argued that right-wing populism threatens the customary status of the principle of non-refoulement. The principle of non-refoulement is chosen as representative of refugee law, as it enjoys central attention in a variety of legal instruments and enables us to deal with the notion of refugee law in a focused manner. Through an interdisciplinary approach it will be illustrated that right-wing populism should be acknowledged as precarious for democracy and refugee law. Therefore, it should not simply be disregarded as a political momentum which will eventually dwindle down, but instead should be viewed in light of the threat it poses to fundamental values within the EU, of which the principle of non-refoulement is one.

In the first chapter the legal framework of the principle of non-refoulement will be discussed. The principle of non-refoulement will be defined as 'the prohibition of forced direct or indirect removal of a refugee to a place where his or her freedom is in danger' in reference to a variety of legal instruments which are of relevance to the EU. It will be established that jurisdiction regarding the principle of non-refoulement can be extraterritorial and that case-law illustrates that substantial weight is given to the principle of non-refoulement in reference to article 3

[1] Eurostat, 'Record number of over 1.2 million first time asylum seekers registered in 2015 (2016). <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> Accessed 12 June 2020.

[2] Karman Abbasi, Kiran Patel and Friona Godlee. 'Europe's refugee crisis: an urgent call for moral leadership' *BMJ* (2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4564068/> Accessed 12 June 2020.

[3] Hsiao-Hung Pai 'The refugee 'crisis' showed Europe's worst side to the world' *The Guardian* (2020) <https://www.theguardian.com/commentisfree/2020/jan/01/refugee-crisis-europe-mediterranean-racism-incarceration> Accessed 12 June 202

ECHR, as in some cases the principle of non-refoulement was considered non-derogable. Furthermore, the EU asylum acquis and its relation to aforementioned instruments will be considered. Besides general reference to the Common European Asylum System, the Dublin III regulation deserves special attention as it will be argued that in the current situation, the Dublin III regulation enables direct and indirect refoulement within the EU in light of overburdened coastal states. Lastly, it will be argued that the principle of non-refoulement holds a status as international customary law in the EU, which is based on an objective (practice of law) and a subjective (acceptance of law) limb. The latter, also known as the opinio juris, will be of relevance to this thesis.

In the second chapter, the notion of populism will be discussed, especially in relation to the principle of non-refoulement. Through a plurality of different scholars, populism will be defined as a thin-centred ideology based on a dichotomy of 'the people' against the 'elite' and encompasses the view that politics should be an expression of the 'general will'. It will be argued that populism, both left- and right-wing, through its notion of an unrestrained and homogenous general will, poses a danger to constitutional democracy, which includes safeguards regarding equality and anti-majoritarian measures. As this thesis focuses on right-wing populism, characteristics of right-wing populism such as nativism, nationalism, crisis performance and Euroscepticism are delineated and elaborated upon. Through these different characteristics, it will be shown that the refugee is continuously framed as a danger to the nation, and that it is argued that the EU does not adequately take national characteristics and the sovereignty of its member states into account. Through these arguments, the right-wing populist narrative detracts the opinio juris of the customary status of the principle of non-refoulement.

In the third chapter, the theoretical antagonism between right-wing populism and the principle of non-refoulement as discussed in the previous chapter, will be illustrated through current developments within the EU in regard to EU immigration policy. In doing so, the behaviour of countries which are characterized by right-wing populists' parties in power will be discussed. The following countries are identified; the Czech Republic, Slovakia, Poland, Hungary and Italy. Through these examples, it will be illustrated that the right-wing populist narrative results in non-acceptance of the principle of non-refoulement.

In the fourth chapter, a variety of suggestions regarding a response to the populist threat will be formulated. Central to the suggestions is the avoidance of strict moral condemnation of populist sentiments. Among the suggestions are the altering of the crisis narrative, internal and external policy consistency, responsibility sharing, a common European identity and public sphere,

adherence to the rule of law and long-term education. These suggestions are interrelated and non-exhaustive.

1. THE LEGAL FRAMEWORK AND THE PRINCIPLE OF NON-REFOULEMENT

1.1. Introduction

Refoulement can be broadly defined as the forced direct or indirect removal of a refugee to a country or territory where he or she runs a risk of being exposed to persecution. Consequently, the principle of non-refoulement prohibits this removal.[4] In studying the influence of populism on the principle of non-refoulement in the EU, it is imperative to look into the legal framework, scope, interpretation and value of the principle of non-refoulement. This chapter will elaborate on the definition of the principle of non-refoulement and how this principle is embedded and valued in the various legal instruments relevant to the EU; the legal instruments are both related to International Human Rights Law and International Refugee Law, as to specific EU asylum law. In doing so, I will diagnose a variety of considerations and debates surrounding the interpretation of the principle of non-refoulement by using sources of case law. As will be explained in section 2.5., the relationship between the ECtHR and the CJEU allows for the use of ECtHR case law. This case law will help to delineate how this principle is applied and valued in the EU in practice and how its limitations are defined. Furthermore, I will expand in how the legal instruments and the case law in some cases implicitly translates into certain state obligations and will outline what would constitute a violation of the principle of non-refoulement. Lastly, I will define the concept of international customary law and argue that the principle of non-refoulement currently hold the status of customary law.

1.2. The development of refugee law and the principle of non-refoulement

Refugees are almost single-handedly a product of (inter) national conflict, and for this reason it is not surprising that the establishment of refugee law followed as a consequence of conflict. After the First World War, the Russian revolution and civil war the Red Cross urged for cooperation with the League of Nations in order to accommodate the needs of 800.000 Russian refugees[5]. In 1921, in order to establish a refugee framework, the Norwegian humanitarian Nansen was appointed as High Commissioner for Russian Refugees and received inter alia the

[4] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2008); Ellen F D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat' l L 279; Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of no-refoulement: opinion' in Erika Feller, Volker Turk and Frances Nicholson (eds), Refugee Protection in International Law (Cambridge University Press, 2003) 87, 112.

[5] Peter Fitzmaurice, 'Anniversary of the forgotten Convention: The 1933 Refugee Convention and the search for protection between the world wars' (Legal Aid Board) <https://www.legalaidboard.ie/en/about-the-board/press-publications/newsletters/anniversary-of-the-forgotten-convention-the-1933-refugee-convention-and-the-search-for-protection-between-the-world-wars.html> Accessed April 6 2020.

task to formulate the legal status of refugees. His work did not only result in an - although not legal- duty for states to issue identification documents for refugees, so called Nansen Passports, but he also helped to formulate and strengthen the principle that refugees should not be returned to situations of risk in their country of origin[6]. Here, the preliminary concept of the principle of non-refoulement was brought into being. Nevertheless, international law was still highly state-centric, which meant that there were no strong state obligations in relation to refugees yet, and sentiments of non-interference and sovereignty prevailed.

Leaping forward a few years, in the context of international law paradigm of non-interference and sovereignty, the League of Nations proposed a Convention relating to the International Status of Refugees, which was agreed by 15 states at an intergovernmental conference in October 1933.[7] In article 3 of the Convention it is stated that "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". This was the first explicit obligation imposed on asylum states in which refoulement was defined. Unfortunately, with only eight ratifications, increasing fascism and the failure of the League of Nations to prevent another World War, the Convention lacked weight and proved to be unsuccessful. Nevertheless, the Refugee Convention 1933 had provided fertile ground for the further development of the rights of refugees.

After the Second World War, the human rights regime was rapidly emerging and as intwined with human rights, refugee protection did so as well. During the first session of the United Nations General Assembly in 1946, various doctrines in relation to migration and refugees were laid down. Not only did the General Assembly stress the international nature and obligations in relation to refugee problems and was repatriation confirmed to be an essential objective, it was also confirmed that no refugee with valid objections should be required to return to his or her country.[8] Later on, the right to asylum was included in the Universal Declaration of Human Rights[9] and in 1951, the Convention Related to the Status of Refugees was ratified. The

[6] Guy S Goodwin-Gill, 'International Refugee Law: Where It Comes From, and Where It's Going…' (2017) 45 International Journal of Legal Information 24.
[7] Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663 (1933 Refugee Convention).
[8] *Goodwin-Gill and McAdam* (n 4).
[9] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR).Art 14.1) Everyone has the right to seek and to enjoy in other countries asylum from persecution, 2) This right may not be

relationship between International Human Rights Law and International Refugee Law is sometimes described as the former to provide a safety net for the latter; in contrast to Refugee Law, where persons can be deserving of their refugee status and therefore refugee protection provided by the state is to some extent optional, Human Rights Law authorizes each and every human being to be subject to its regime, simply for the fact of being human. This line of reasoning will be elaborated upon in the upcoming sections.

1.3. International Refugee Law – The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

The most extensive and currently relevant legal framework on Refugee Law is encapsulated by the 1951 Convention Relating to the Status of Refugees[10] - hereafter the Refugee Convention. The Refugee Convention itself is not accompanied by a monitoring body. Nevertheless, in the context of the EU, the Refugee Convention is legally binding upon all EU member states[11]. With regard to the main focus of this thesis – the principle of non-refoulement –, its definition can be found in Article 33 of the Refugee Convention:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[12]

Seemingly, this provision only applies to those who are a refugee. Following from the Refugee Convention and its accompanying protocol of 1967[13], a refugee is defined as follows:

---

invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[10] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[11] UNHCR 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (April 2015).

[12] Refugee Convention (n 10) art 33.

[13] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. The Protocol of 1967 was added to the Refugee Convention 1951 in order to lift the temporary and geographical scope of the Refugee Convention. Initially, the Refugee Convention of 1951, refugee status was

> "Any 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, is unable or, owing to such fear, is unwilling to return to it."[14]

Nevertheless, as Lauterpacht and Bethlehem argue, the 1951 Convention does not stipulate that the principle of non-refoulement only applies to someone who has been formally assigned a refugee status, considering abovementioned terminology refers to any person who 'owing to well-founded fear of being persecuted…'.[15] Resolution 55/74 by the General Assembly reinforces this interpretation by stating that the principle of non-refoulement applies to those seeking asylum as well:

> "6. Reaffirms that, as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardise the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards."

> "10. Condemns all acts that pose a threat to the personal security and well-being of refugees and asylum-seekers, such as refoulement….."[16]

Hence, both someone who is claiming asylum as someone who is formally recognized as a refugee are protected against refoulement. Nevertheless, there are still exceptions to who is protected against refoulement. This can be illustrated by both article 33(2) mentioned above and article 1F below:

---

only applicable as a result of events occurring before the first of January 1951 an gave states the option to interpret the Convention only in light of events that occurred in Europe.

[14] *Refugee Convention* (n 10) art 1; *Protocol relating to the status of Refugees* (n 13) art 1.2.

[15] L*auterpacht and Bethlehem* (n 4).

[16] UNGA Res 55/74 (2001) para 6 and para 10.

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

In relation to these exclusionary articles, it must be stressed that in conjunction with the European Convention of Human Rights and Fundamental Freedoms (ECHR), deportation of an asylum seeker or refugee following from article 33(2) or 1F is prohibited when refoulement amounts to torture or inhuman to degrading treatment or punishment. Because of this, one can argue that Human Rights Law provides a safety net for refugees, considering fundamental rights are applicable regardless of an (acknowledged) refugee status. This will be further elaborated upon in section 2.4.2.

1.3.1. The Distinction Between Article 33(2) and 1F

Although both articles entail provisions for the exclusion of refugees in relation to the principle of non-refoulement, it can be argued that article 33(2) requires a higher threshold for exclusion than article 1F. Whereas article 1F requires "serious reasons for considering that", article 33(2) states that there has to be "reasonable ground for regarding as a danger to the security of the country". Furthermore, in looking at the distinction between the two articles, Article 1F(b) requires a "serious" political crime whereas Article 33(2) requires a "particular serious crime". Hence, invoking article 1F(b) for grounds of exclusion requires a lower standard of proof. In looking further at the distinction between the two articles, Hathaway and Harvey argue that currently article 1F(b) substantiates confusion in relations to the exclusion of refugees.[17] Importantly, 1F(b) is applicable when the relevant crimes were committed outside of the asylum state, not allowing for a refugee to evade lawful prosecution in accordance with extradition law.

[17] James C Hathaway and Colin J Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34 Cornell Int'l LJ 257. As article 1F(a) only relates to a relatively low amount of asylum applications and article 1F(b) is often not invoked for reasons of vagueness surrounding the concept of 'purposes and principles of the United Nations', the main focus of their study is article 1F(b).

Hence "exclusion under article 1F(b) ensures that governments can honour their extradition treaties without fear that fugitives from justice might demand shelter under refugee law".[18] Following from this, one can state that the reason d'être for article 1F(b) is based on interstate commitment to the rule of law and the rejection of impunity, whereas for article 33(2), this is the protection of the national interest of the asylum state[19]. Hence, although both articles are provisions relating to expulsion and therefore permitting refoulement once lawfully enforced, they differ in rationale and therefore in applicability. Nevertheless, state practice illustrates that often, article 1F(b) is wrongfully applied, combining elements of the two articles which results in allowing for a lower standard of proof in the context of the protection of the national interest of the asylum state[20]. This fallacy, which is substantiated by the UNCHR[21], is not only harmful in general because it abuses the reasons for the existence of the articles, as I will argue in the upcoming chapters, it also allows opportunities for the populist narrative to refoul an asylum seeker more easily in the national interest of the asylum state.

1.3.2. Article 33(2) and Terrorism

If an asylum seeker or refugee is involved in or related to a terrorist organisation, he or she can therefore pose a danger to the security of the asylum country and refoulement on the ground of article 33(2) can be authorized as it constitutes a 'particular serious crime'. Even if an asylum seeker is merely a member of such an organisation, this would provide reasons to authorize refoulement on the basis of article 33(2). Nevertheless, there are some legal gaps with regard to exclusion on the basis of (alleged) terrorism. Not only does the international community lack a uniform definition of what constitutes acts of terrorism, there is also no international consensus on which organizations can be defined as terrorist organisations. As argued by Bruin and Wouters,[22] especially the latter is therefore based on the political motivation of the state. In light of this, the EU has drafted a list of terrorist organisations alongside the existing list of the United Nations which stipulates a somewhat uniform approach. Nevertheless, this list itself

[18] Ibid, 319.
[19] Ibid.
[20] Ibid; UN High Commissioner for Refugees (UNHCR), 'The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis (1990) <https://www.refworld.org/docid/53e1dd114.html> accessed 24 March 2020.
[21] UNHCR Standing Committee 'Note on the Exclusion Clause' (30 May 1997) UN Doc EC/47/SC/CR/29, Para 16: "It is important to recall that the intention of [Article 1(F)(b)] is to reconcile the aims of rendering due justice to a refugee **...** and to protect the community in the country of asylum from the danger posed by criminal elements fleeing justice. This Article should be seen in parallel with Article 33…".
[22] Rene Bruin and Kees Wouters, 'Terrorism and the Non-derogability of Non-Refoulement' (2003) 15 Int'l J Refugee L 5.

does not impose any legal duties on states and whether an organization can be defined as terroristic is still under the scrutiny of the state. Hence, the state eventually decides whether an asylum seeker is a terrorist due to his or her involvement with a terrorist organisation and hence if he or she deserving of protection under the Refugee Convention. As I will argue in the upcoming chapters – in specific section 2.6.1. and 3.3. –, the populist narrative which regularly relates asylum seekers to terrorists exploits abovementioned gaps and in doing so, increases a risk for the asylum seeker to be subject to unlawful refoulement.

1.4. Non-Refoulement in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms – hereafter the ECHR – drafted by the Council of Europe in 1950, was brought into being as a regional protection mechanism of human rights inspired by the non-legally binding Universal Declaration of Human Rights. The ECHR was ratified in 1953 and has now 47 Contracting Parties, of which all EU member states form a substantial part. The ECHR itself does not refer to the principle of non-refoulement explicitly, but provides a safeguard against refoulement that amounts to torture or inhuman or degrading treatment or punishment.[23] The scope of the ECHR is wider than that of the Refugee Convention; where the provisions of the Refugee Convention apply merely to asylum seekers and/or refugees, the rights in the ECHR apply to all human beings under the jurisdiction of the states that are member to the ECHR.[24] The duty imposed upon contracting states by the ECHR in relation to refoulement can be summarized as follows:

> "It is . . . well-established in [the Court's] case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3."[25]

[23] Convention for the Protection of Human Rights and Fundamental Freedoms (Signed 4 November 1950) (ECHR). Art 3. "Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[24] Ibid. Art 1. "Obligation to respect Human Rights. The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."
[25] T.I. v United Kingdom App No 43844/98 (ECtHR 7 March 2000).

Hence, states have to safeguard the prohibition of torture, inhuman or degrading treatment or punishment for people under their jurisdiction. Even without an explicit reference, as will be demonstrates below, the case law of the European Court of Human Rights (ECtHR) has widely contributed to the protection of non-refoulement. How this case-law is relevant for the European Union will be demonstrated in section 2.5.

1.4.1. Jurisdiction

The matter of jurisdiction remains an issue of contestation in relation to asylum seekers and refugees, as it touches upon the sensitive subject of sovereignty. When does a refugee or asylum seeker falls under the jurisdiction of a state and hence, when is a state responsible for the asylum seeker or refugee? Interestingly, the concept of jurisdiction in the context of refugee law has broadened over time. As Kim concludes:

"Jurisdiction is a core element of state sovereignty that previously has been understood as essentially a territorial concept. Furthermore, it has generally been thought that the concept of state sovereignty as it relates to border control is founded on the 'unconditional' power of a state. However, this has begun to change in Europe. State sovereignty has begun to reflect human rights concerns such as the principle of non-refoulement, even beyond states' territories. In this regard, the concept of state sovereignty in relation to external migration controls has undergone a paradigm shift from 'unconditional' sovereignty to 'accountable' sovereignty, at least within the European context. The 'forgotten' principle of non-refoulement in an era of restrictive external migration controls has revived in Europe"[26].

The Hirsi and others v Italy case illustrates this development[27]. In this case, 200 migrants from Somali and Eritrea where intercepted at sea by Italian authorities, the Italian Revenue Policy and the Coastguards, when they were travelling from Libya. The applicants were transferred to an Italian military ship and transported back to Libya, were two of the immigrants died in unknown circumstances. 14 of the migrants were eventually granted with a refugee status by the UNHCR in Tripoli. The Strasbourg Court ruled that Italy had been in breach with article 3 ECHR, considering that the applicants had been under the jurisdiction of Italy – as the vessel

[26] Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30 Leiden Journal of International Law 49.69-70.
[27] Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR, 29 February 2012).

was sailing under the Italian flag - and that Italy had or should have known that the applicants would be subject to treatment in breach with article 3. Hence, the judgement established that government authorities are subject to international human rights law, also in cases where they are exercising jurisdiction outside of their 'conventional' geographical borders. As will be illustrated in the upcoming chapters, the populist narrative results in policies often add odds with this broader interpretation of jurisdiction.

1.4.2. Extradition, Non-Derogability and National Security

In relation to Article 3 ECHR and non-refoulement, the notion of extradition is important. The case Soering v the United Kingdom[28] was the first time where article 3 ECHR was brought in line with extradition. Soering, a German national who had committed murder in the US, fled to the UK after which he was indicted with capital murder by the US. Upon extradition by the UK, Soering filed a claim in relation to article 3, arguing he would face the death row once deported. The Commission ruled that extradition would not constitute a breach with article 3 given the small likelihood of receiving the death penalty, but did conclude that: "where it is certain or where there is a serious risk that the person will be subjected to torture or inhuman treatment the deportation or extradition would, in itself, under such circumstances constitute inhuman treatment." Eventually, the Court ruled that extradition could result in violation of article 3. The Soering case did not only confirm the extraterritorial applicability of human rights but also the absolute nature of article 3 ECHR.

In light of the exclusionary article 33(2) and 1(F) of the Refugee Convention, the obligation of states not to subject anyone to torture or inhuman or degrading treatment or punishment can be said to be absolute. This line of reasoning was established through the landmark case Chahal v. United Kingdom[29]. Living in the UK, Chahal was facing deportation to India because he was leader of the Sikh separatist movement and was seen as a national security threat to the UK. The Home Secretary ruled that in this case Chahal was refused asylum in line with article 33(2) of the Refugee Convention. Chahal claimed that upon deportation he would be subjected to torture and persecution. When Chahal's application for judicial review and appeal to the Court of appeal was dismissed, he took the case to the European Commission of Human Rights which ruled an alleged breach of article 3, in light of reports on abuse and extrajudicial activity by the

[28] Soering v The United Kingdom App no 14038/88 (ECHR, 7 July 1989).
[29] Chahal v The United Kingdom App no 22414/93 (ECtHR, 15 November 1996).

Punjab police. It was ruled that "Although Contracting States have the right to control the entry, residence, and expulsion of aliens, and the right to political asylum is not contained in the Convention or its Protocols, it is well-established that an expulsion may give rise to an Art. 3 issue where substantial grounds have been shown to believe that the person would face a real risk of being subjected to treatment contrary to Art. 3".[30] With this ruling, a balancing act between the national security interest and the personal threat imposed on an individual was rejected, once again reaffirming the absolute nature of article 3 ECHR. This point of view was upheld by the Court in other cases.[31]

Some have argued that there exists a contradiction between non-refoulement in the Refugee Convention and article 3 ECHR. Where the former seems to allow derogation from the principle through article 33(2) and 1F, the latter is absolute. However, in alignment of both principles this contradiction can be resolved. Namely, according to the Refugee Convention refoulement relates to persecution in the broader sense namely "where his life or freedom would be threatened", whereas ECHR article 3 prohibits "torture or to inhuman or degrading treatment or punishment". Hence, one can argue that refoulement – and thus persecution - is allowed in certain circumstances, as long as it does not amount to torture or to inhuman or degrading treatment or punishment. Torture or inhuman or degrading treatment or punishment require a minimum level of severity. Although there is not always clear consensus on what defines the minimum level of severity and the concept is somewhat relative[32], both case law and the European Committee for the Prevention of Torture (CPT) has widely contributed to the establishment of this level.[33] In summary, as long as persecution falls out of the ambit of article 3 ECHR, refoulement is permitted on the basis of the exclusionary articles.[34]

1.5. The Relation Between the EU and the ECHR

From a methodological point of view, it is important to elaborate upon the relation between the provisions of the Charter of Fundamental Rights of the European Union - hereafter, 'the Charter' - and the European Convention for the Protection of Human Rights and Fundamental

[30] Ibid [73 -74].
[31] Paez v Sweden App no 29482/95 (ECtHR, 30 October 1997); Saadi v Italy App no 37201/06 (ECtHR, 28 February 2008); Ramzy v The Netherlands App no 25424/05 (ECtHR, 20 July 2010).
[32] Ireland v. the United Kingdom App no 5310/71 (ECtHR, 18 January 1978).
[33] Aisling Reidy, 'A Guide to the Implementation of Article 3 of the European Convention on Human Rights' (2003) 6 Human Rights handbooks 10-19.
[34] Julia Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment' (2012) 14 Eur J Migration & L 119.

Freedoms - hereafter the ECHR -, considering this relation demonstrates that case-law from the ECtHR is relevant to the EU for the inquiry into the interpretation and legal status of the principle of non-refoulement within the EU. All Member States of the EU are state parties to the ECHR and hence are bound by its provisions whereas the EU itself is not. Due to its complexity as a supranational body, the accession of the EU to the ECHR is a highly complicated matter. For this reason, the EU developed its own Charter of Fundamental Rights, which is of relevance in relation to all EU law. Following from the Treaty of the European Union (TEU) article 6(2) and 6(3), accession to the ECHR is required by law, and the ECHR is a foundational source of fundamental rights in the EU.[35] Nevertheless, opinion 2/13 issued by the CJEU in 2014 stressed *inter alia* the uniqueness of EU law and potential procedural supremacy of the ECtHR as impediments to accession[36], and has momentarily suspended the accession of the EU to the ECHR. Whether the actual accession is desirable is left up to debate, it does beg the question to what extent the two courts currently relate to on another. Article 52(3) of the Charter[37] sheds some light on the matter:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

From this article one can conclude that the CJEU will take ECtHR case law into account when interpreting rights which are both included in the Charter and the ECHR, although its case law is not legally binding upon the CJEU.[38] Hence, even though the EU is not party to the ECHR, abovementioned illustrates that the case law of the ECtHR is of relevance for the fundamental rights protection from out the EU. For this reason, the ECtHR case-law is of relevance in assessing the principle of non-refoulement in relation to EU legislation.

[35] Consolidated Version of the Treaty of the European Union [2008] OJ C115/13, art. 6 (2): "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties" and 6(3): "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[36] European Court of Justice, 'Opinion 2/13 Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (18 December 2014).

[37] Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

[38] Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law & Practice of International Courts and Tribunals 375.

1.6. Non-Refoulement and the European Union

The legal framework related to non-refoulement in the European Union is extensive and plural in its scope. In this section I will elaborate on the different instruments and frameworks in which the principle of non-refoulement is referred or related to: The Charter of Fundamental Rights in the EU, the Treaty on the Functioning of the European Union and the Common European Asylum System (CEAS) which includes the Asylum Procedure Directive, the Qualification Directive and the Reception Conditions Directive and the Dublin Regulation.

1.6.1. The Charter of Fundamental Rights

The Charter of Fundamental Rights was brought into being in 2000 and became legally binding in 2009 upon the ratification of the Lisbon treaty. The Charter is of relevance in relation to the legal actions taken by the EU and to the member states that are implementing EU law[39]. With regard to the principle of non-refoulement both article 4 and article 19 are of importance, considering they relate to the ECHR article 3 and the Refugee Convention article 33(2).

> "Article 4. Prohibition of torture and inhuman or degrading treatment or punishment
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

> "Article 19. Protection in the event of removal, expulsion or extradition
> 1. Collective expulsions are prohibited.
> 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

Considering that article 4 and 19 of the Charter are similarly formulated as article 3 ECHR and no derogations from the meaning and scope of article 3 ECHR are allowed[40], it can be concluded that article 4 and 19 of the Charter are absolute rights from which no derogations are allowed.[41]

[39] Charter of Fundamental Rights of the European Union (n 37). Art 51(1): "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."
[40] Ibid. Art 52(3).
[41] *Soering* (n 28), Cruz Varas and others v Sweden App no. 46/1990/237/307 (ECtHR 20 March 1991), Vilvarajah and others v The United Kingdom App no 13163/87 (20 October 1991) are examples of case law

1.6.2. The Treaty on the Functioning of the European Union Article 78(1)

The Lisbon Treaty of 2007 reinstated two fundamental EU treaties into one unified treaty; The Treaty on the Functioning of the European Union (TFEU). The TFEU originates from both the Treaty of Rome, which brought into being the European Economic Community in 1957 and the Treaty of Maastricht of 1992, which transformed the EU into the supranational institution which we known today. Together, these treaties provide the constitutional basis for the day-to-day functioning of the EU. Within this treaty, the principle of non-refoulement is mentioned as foundational principle within the call for a common asylum system.

> "Article 78(1). The Union 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."[42]

1.6.3. The Common European Asylum System

Since 1999 and following from TFEU Article 78(1), the Common European Asylum System (CEAS) has been developed in order to provide a harmonization instrument and a common minimum standard for asylum in all EU Member States. Following from a Green Paper by the Commission in 2007, CEAS circumscribes three pillars: legislative harmonization, practical cooperation and solidarity amongst the Member States.[43] Currently, the CEAS consist out of the revised Qualification Directive(QD)[44], the revised Asylum Procedures Directive(APD)[45],

---

which provided principles of which the Charter article 19 should be in conformity with in Paul Lemmens, 'The Relations between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights - Substantive Aspects' (2001) 8 Maastricht J Eur & Comp L 49, 56 and 61.

[42] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1 art 78(1). Art 78(2) and 78(3) entail more detailed instruments and standards regarding to 78(1).

[43] Commission (EC), 'On the future Common European Asylum System' (Green Paper) COM (07) 301 final, 6 June 2007.

[44] Council Directive 2011/95/EU 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 (Qualification Directive).

[45] Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedure Directive).

the revised Reception Conditions Directive(RCD)[46], and the Revised Dublin (Dublin III) regulation.

The QD clarifies who exactly qualifies for protection. The QD reinforces the principle of non-refoulement through article 21. Protection from refoulement:

> "Article 1. Member States shall respect the principle of non-refoulement in accordance with their national obligations."

> "Article 2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:
> (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State."

The APD harmonizes the procedural guarantees among member states. Within the ADP, it is repeatedly stated that extradition is only authorized when it does not result in direct or indirect refoulement.[47] The RCD ensures minimum standards regarding housing, information, employment, health care etc. in relation to the reception of asylum seekers, and refers to non-refoulement in its pre-amble. Although in the directives the principle of non-refoulement is often only mentioned in relation to refugees, in accordance with article 78(1) TFEU, the CEAS is required to be in conformity with the Refugee Convention. This is also mentioned in the preamble of the directives. Hence, all those who are waiting for their determination of a refugee status and seek asylum in the EU are also subject to protection against refoulement.[48]

[46] Council Directive 2013/33 EU of June 26 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive).
[47] Asylum Procedure Directive (n 45). Art 9(3): " A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect refoulement in violation of the international and Union obligations of that Member State. Art 28 (2): "…..Member States may provide for a time limit of at least nine months after which the applicant's case can no longer be reopened or the new application may be treated as a subsequent application and subject to the procedure referred to in Articles 40 and 41. Member States may provide that the applicant's case may be reopened only once. Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement."

1.6.4. The Dublin III Regulation

As consequence of the 1997 Schengen Agreement[49] in which the internal borders of the EU were abolished in order to facilitate free trade, the possibility of asylum shopping increased.[50] Asylum shopping both refers to a strategy of asylum seekers in which the asylum seeker applies for asylum in another country after their claim was rejected, in order to increase their possibility of obtaining asylum, and to an asylum seeker selecting a certain member state which has the most lenient refugee policies. In general, asylum shopping has been seen as exploiting the system and is something that must be prevented. Although the Schengen Convention provided some safeguard regarding this matter[51], the Dublin Regulation was brought into being in order to reinstate a system in which the country responsible for an asylum claim is determined, which would decrease asylum shopping.[52] This regulation circumscribes a procedure in which an application will be only examined by one member state, which will be the first state in which the asylum seeker has claimed asylum.[53] Interestingly, if a second state is confronted with an asylum claim that is the responsibility of another state, it is not prohibited to process the claim either way, although formally it is not the second state's responsibility.[54] Hence, there is a possibility in which an asylum claim can be investigated by multiple countries, but this is subject to the decision of national authorities.

Although the principle of non-refoulement is not explicitly mentioned in the Dublin III regulation, in light of current developments, flaws in the Dublin III regulation may contribute to refoulement. Firstly, the current Dublin III regulation inadequately provides a system of equal burden sharing between member states and hence is in contradiction with the third pillar

[49] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common Borders [2000] OJ L 239/13 (Schengen Agreement); Violeta M. Lax 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 European Journal of Migration and Law 1-3.
[50] *Lax* (n 49).
[51] *Schengen Agreement* (n 49). Art [28]-[38].
[52] Council Regulation 604/2013/EU 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 (Dublin III Regulation); Randall Hansen and Desmond King, 'Illiberalism and the New Politics of Asylum: Liberalism's Dark Side' (2000) 71 The Political Quarterly 396., 400.
[53] *Dublin III regulation* (n 52); *Lax* (n 49).
[54] *Dublin III Regulation* (n 52). Art 3(2): "By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

of the CEAS; solidarity between member states. At current, considering the first country of registration as an asylum seeker is the country responsible, member states at the border of the EU – such as Italy and Greece- carry a disproportional responsibility to deal with the mass influx, since many refugees travel through the Mediterranean. Secondly, the concept of safe-third countries within the EU in relation to the Dublin III regulation is problematic, therefore contributing to refoulement. Especially in conjunction, the unequal burden sharing and concept of safe third country proofs to be problematic with regard to the principle of non-refoulement. Assumed in the Dublin Regulation is the premise that all EU countries are 'safe countries' considering all EU members have acceded to both the ECHR and the 1951 Refugee Convention and are subject to the CEAS and its accompanying directives.[55] Following from the legal status of these instruments in the member states, it is concluded that all EU countries provide certain standards for refugees, standards which rules the country 'safe'. Hence, there is mutual trust between the member states that they all adhere to minimum principles regarding the protection of refugees. This presumption implies that transfers from one EU Member State to another cannot violate the principle of non-refoulement. Nevertheless, as argued by Lax[56], this assumption of safe countries is not clearly established. Namely, the question remains whether this automatic assumption of a safe country is absolute or in some cases rebuttable. Lax argues that in some individual cases, this assumption is rebuttable, but that it remains unclear which criteria are used to refute the concept of safe country. In T.I. v. UK[57], T.I, an asylum seeker from Sri Lanka, was tortured by the terrorist organisation Liberation Tigers of Tamil Eelam before fleeing the country. Considering this organization is not a state organisation, Germany – the country responsible for the asylum claim – refused his asylum claim on the basis that the persecution did not qualify as proscribed by the 1951 Convention. T.I. fled to the UK to apply for asylum, where the UK wanted to send him back on the basis of the Dublin Regulation, after which T.I. involved the ECtHR. The Court ruled that the UK did carry responsibility to safeguard protection against refoulement, illustrating that both indirect and direct refoulement were of relevance[58], and hence the court argued that the UK could not automatically rely on the concept of 'safe countries' within the EU. Hence, the concept of safe countries in the EU can

[55] Ibid para [3] "In this respect, and without the responsibility criteria laid down in this Regulation being affected, Member states, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals".
[56] *Lax* (n 49).
[57] TI v the United Kingdom App no 43844/98 (ECtHR 7 March 2000).
[58] Sending an asylum seeker back to a state where he or she is subject to refoulement constitutes direct refoulement, whereas sending an asylum seeker back to a state which will refoul, constitutes indirect refoulement.

be concluded to be rebuttable and decision takers carry the duty to investigate the safety and status of an asylum claimant both in relation to the member state responsible for the asylum claim as to the country of origin, especially in regard to risk of refoulement. Nevertheless, the court proved to be highly unpredictable, where in *K.R.S.* v U.K[59] the automatic assumption of EU Member States as safe countries was maintained again if there is no evidence of individual risk of refoulement in that specific country[60]. However, in 2011, the landmark case *M.S.S v Belgium and Greece*[61] reconfirmed the refutability of the concept of 'safe country. The case involved an asylum seeker from Afghanistan who applied for asylum in Belgium, although his fingerprints were taken in Greece. Although the UNHCR urged for the suspension of a transfer considering the dire circumstances for asylum seekers in Greece, the Belgium court ruled that M.S.S had to return back to Greece. Upon return in Greece M.M.S. suffered from inhuman and degrading treatment when he was put into detention under dire circumstances after which upon release, with no resources for food and without accommodation, he lived in a park and was maltreated again when he attempted to flee from Greece with false papers. The Strasbourg Court condemned Greece for violating ECHR article 3 in combination with ECHR Article 13. Belgium was also found in violation with article 3, both directly and indirectly considering sending M.M.S. back was regarded as refoulement. With the M.M.S case, the automatic assumption of an EU member state as safe was refuted. Hence, where there is substantial proof of an individual risk of refoulement, may it be direct or indirect, case-law is developing against the absolute concept of safe-countries within the EU. The obligation deriving from this case law requires the second states to investigate compliance with law as well as practical compliance with certain standards within the country where the asylum claimant will be returned to. This seems to contradict the assumption of safe-third country made by the Dublin III regulation.

In sum, abovementioned illustrates that the unequal burden sharing following from the Dublin III regulation results in overcrowding of refugees in certain countries in Europe and in combination with the sending return to these countries in accordance with the Dublin III regulation, the principle of refoulement can be violated. Although some countries in line with article 3(2) of the Dublin III regulation have taken the decision to not send refugees back to

[59] K.R.S v the United Kingdom App no 32733/08 (ECtHR 2 December 2008).
[60] *Lax* (n 49).
[61] M.M.S. V Belgium and Greece App no 30696/09 (ECtHR 21 January 2011).

these overburdened countries[62], in accordance with recommendations from the UNHCR[63], adherence to the principle of non-refoulement should not be subject to the sovereignty of a state. In order to safeguard the principle of non-refoulement, reform of the Dublin III Regulation is desirable. Nevertheless, negotiations regarding Dublin IV has come to a hold due to the non-cooperation of certain populistic member states.[64] This will be further elaborated upon in the third chapter.

1.6.5. Borders and Jurisdiction in the EU

As I will elaborate upon in the upcoming chapters, the populist narrative in Europe increasingly results in stricter border regulations. In light of this, it is important to look into the obligation that states have in relation to the asylum seeker at the border. Namely, the principle of non-refoulement prohibits the return of a refugee by a host state, if this return would result in refoulement. Hence, in order to assess whether this would be the case, an asylum seeker's claim has to be investigated by the asylum state that is responsible. Considering that a state can't exclude the possibility refoulement without an investigation into the asylum claim, the principle of non-refoulement subsequently leads to the prohibition of refusal at the border of someone who is recognizable as refugee, e.g. claiming asylum. This view can be supported by a variety of sources. Firstly, the Refugee Convention from 1933, the predecessor of the Refugee Convention 1951, "explicitly codified non-admittance as an aspect of refoulement".[65] Although this former Convention has been replaced by the latter, the travaux préparatoires of the Refugee Convention 1951 likewise illustrate that the principle of non-refoulement was intended to restrain states from summary removal and the refusal of entry of asylum seekers.[66] More recently, Hathaway and Hansen reaffirmed the view that rejection at the border constitutes a violation of the principle: "the duty of non-refoulement ….. thus amounts to a de facto duty to admit the refugee at least until the refuge claim is examined, since admission is normally the

[62] Ibid.
[63] UNHCR, 'Position on the return of asylum seekers to Greece under the "Dublin Regulation' (Geneva 2008).
[64] Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives: EU Refugee Policies in Times of Crisis' (2018) 56 Journal of Common Market Studies 3.
[65] *1933 Refugee Convention* (n 7). Art 3: "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. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country." .
[66] *D'Angelo* (n 4).

only means of avoiding the alternative, impermissible consequence of exposure to risk."[67] In addition, Lauerpacht and Bethlehem argue that states are not free to without constraint to reject asylum seekers at the frontier. Although the principle of non-refoulement does not constitute a right to asylum, "when states are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to refoulement".[68]

This obligation for states remains a contentious issue considering it directly relates to state sovereignty and self-determination. What are states without borders, what remains of states when everyone with an asylum claim is allowed entry? In the context of the EU as a supranational body, questions related to the sovereignty of its member states, remain an area of tension. Especially in the context of irregular migration, this question is paramount. The unique system that is the EU is organised in such a way, that refusal at a national border of a member state can be argued to not necessarily constitutes a violation of the principle of non-refoulement. This can be explained through the following. Firstly, as explained above, the Dublin III[69] regulation allows for refusal of entry of an asylum claimant when another country is already responsible for the asylum claim. Secondly, and also in relation to the Dublin III regulation, a country can refuse an asylum seeker once this asylum seeker is finding him or herself physically under the jurisdiction and/or geographical area of another member state, which is then responsible for the asylum claim. This will be the case for most EU countries who are not geographically located at the external border of the EU. Peukert *et al* clarifies this situation through analysing the lawfulness of the increased border control by the Federal Republic of Germany at the border with Austria in light of the refusal of entry of asylum seekers.[70] They argue that at the external border, at an international transit area of an area of airport a refugee may not be refused entry, unless their extradition is to a safe third state. However, at international borders within the EU, refugees can be refused entry considering according to the Schengen Border Code, they have not entered the territory of the member state if they have been denied access at the border. Therefore, they must be in the territory of another state, which

[67] James C Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2014] SSRN Electronic Journal <https://www.ssrn.com/abstract=2479511> accessed 9 March 2020.238; Alexander Peukert and others, 'To Allow or Refuse Entry: What Does the Law Demand in the Refugee Crisis at Europe's Internal State Borders?' (2017) 18 German Law Journal 617.
[68] *Lauterpacht and Bethlehem* (n 4) 113.
[69] *Dublin III Regulation* (n 52).
[70] *Peukert et al* (n 67).

is then responsible for determining who is responsible for the asylum claim[71]. Nevertheless, a contradiction can be found if we look into the territorial scope of the Asylum Procedure directive. Namely, article 3(1) states: "This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection".[72] Hence, it remains rather unclear if refusal at the border constitute a violation of the principle of non-refoulement in the case of the internal EU borders. What will be demonstrated in the chapter three however, is that these contradictory assumptions regarding state obligations at the border are exploited by the populist states of the EU, therefore contributing to possible violation of the principle of non-refoulement.

1.7. The legal status of the principle of Non-Refoulement

In the previous sections, the definition, interpretations and controversies circumscribing the principle of non-refoulement in the EU have been described. Non-refoulement has often been viewed as constituting the backbone of Refugee Law, but what legal value is exactly attached to this principle? As argued before, the principle of non-refoulement has seemed to develop itself into a just cogens norm, a recognized norm of international law from which no derogation is possible.[73] Namely, as soon as expulsion results in persecution which amounts to torture or inhuman or degrading treatment or punishment, refoulement is prohibited. Nevertheless, in cases where persecution that does not amount to abovementioned, refoulement can be authorized on the basis of the Refugee Convention Article 33(2) and 1F and/or EU Qualification Directive article 21(2). It is supported by International Law Commission that the prohibition of torture can be said to be a jus cogens norm.[74] Nevertheless, the principle of non-refoulement itself does not amount to a just cogens norm. As argued by Battjes, the case law of the Strasbourg court shows that the prohibition on expulsion resulting in ill-treatment under article 3 ECHR is subject to various forms of balancing.[75] Hence, the principle of non-refoulement

[71] Ibid; Dublin III Regulation (n 52). Art 20.4: "Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present.".
[72] *Asylum Procedure Directive* (n 45).
[73] *Vienna Convention on the Law of Treaties*, adopted on 22 May 1969 (entered into force on 27 January 1980). Art 53.
[74] Mirgen Prence, 'Torture as Jus Cogens Norm' (2011) 7(2) Juridica, 87; Law Commission *Chapter V Peremptory norms of general international law (jus cogens)* Law COM No A/74/10, 2019) 141.
[75] Hemme Batjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR reassesed' (2009) 22 Leiden Journal of International Law, 583, 583.

does not currently hold a Jus Cogens status. As jus cogens 'enjoys a higher rank in the international hierarchy that treaty law and even 'ordinary' customary rules[76], that the principle of non-refoulement does not enjoy a just cogens status does not preclude it from being widely recognized as the principle of non-refoulement does enjoy a status of International Customary Law (ICL).[77]

ICL "consists out of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way".[78] ICL can be defined as the primary source of international law and is defined by the International Court of Justice as 'a general practice as acceptance of law'[79]. Following from the International Law Commission statute, ICL consist out of an objective (the general practice) and subjective limb (the acceptance as law, opinio juris).[80] With regard to the former, general practice circumvents the empirical (therefore objective) view of recognition of a practice, although it is recognized that general practice is not completely cleared from some inconsistencies and contradictions.[81] With regard to the latter, as stated by Walden[82], opinio juris is not merely constituted on the fact that a practice is already binding, but also that it ought to be legally binding. Therefore, opinio juris relates to the psychological state of the state actor. Considering this, opinio juris might be hard to substantiate. In light of this task, the International Law Commission developed a non-exhaustive list of possible evidence of acceptance as law. The list refers to public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference, and inaction (under certain circumstances). [83]

[76] Dinah Shelton, *Normative Hierarchy in International Law*, American Journal of International law (2006) 291-323.

[78] Shabtai Rosenne, *Practice and methods of international law (*Oceana Publications 1984) 55.
[79] Statute of the International Court of Justice (entered into force 24 October 1945). Art 38(1)(b).
[80] Report of the International Law Commission, Seventieth Session (30 April – 1 June and 2 July – 10 August 2018), UN Doc A/73/1.
[81] Omri Sender and Michael Wood, 'A Mystery No Longer? *Opinio Juris* and Other Theoretical Controversies Associated with Customary International Law' (2017) 50 Israel Law Review 299.
[82] Walden in *Sender & Wood* (n 81).
[83] International Law Commission, Draft Conclusions and identification of customary international law, with commentaries (2018), UN Doc A/73/10. Conclusion 10 'Forms of evidence of acceptance as law (opinio juris)'.

To date, a variety of scholars and institutions have defended the ICL status of the principle of non-refoulement.[84] Furthermore, The UNHCR states "for a rule to become part of customary international law, two elements are required: consistent State practice and opinio juris, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it. UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law"[85]. Furthermore, Goodwin Gill argues that "Today, the principle of *non-refoulement* is not only the essential foundation for international refugee law, but also an integral part of human rights protection, implicit in the subject matter of many such rights, and a rule of customary international law."[86] Furthermore Lauterpacht and Bethlehem indicate an broad interpretation of the principle of non-refoulement as customary law.[87]

In light of the scope of this thesis, I will focus on the subjective limb - opinio juris - in the study on the influence of populism on the ICL status of the principle of non-refoulement. The conduct of entities other than States and international organizations — for example, non-governmental organizations (NGOs) and private individuals, but also transnational corporations and non-State armed groups — is neither creative nor expressive of customary international law.[88] For this reason, although sometimes relevant when it comes to the interpretation of the principle of non-refoulement, non-governmental actors are not taken into account in the research on the influence of populism on the ICL status of the principle of non-refoulement.

In summary, the principle of non-refoulement currently holds a CIL status, which is based inter alia on acceptance of law, opinio juris. Evidence of this opinio juris can broadly to be said to be actions taken on behalf of states in line with the principle of non-refoulement. As I will demonstrate in the upcoming chapters, the upsurge of populism in Europe threatens the ICL

---

[84] Kees Wouter, *International Legal standards for the protection from refoulement: a legal analysis of the prohibition on refoulement contained in the Refugee Convention, the European Convention of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture.* (Intersentia, 2009); *Lauterpacht and Bethlehem* (n 4); Goodwin-Gill and McAdam (n 4); Phil C.W. Chan, 'The protection of Refugees and Internally Displaced Persons: *Non-Refoulement* under Customary International Law' (2006) 10 *The International Journal of Human Rights* 231, 232.

[85] UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (Geneva 2007).

[86] *Goodwin Gill* (n 4).

[87] *Lauterpacht and Bethlehem* (n 4), 163-164.

[88] *International Law Commission* (n 83). Conclusion 4. 'Requirement of practice'.

status considering the acceptance of law, hence the subjective limb of CIL, is increasingly undermined. Considering non-state actors do not influence the ICL status of the principle, I will look into states in which populist are currently instated in the government and their relation to the principle of non-refoulement.

1.8. Conclusion

Although the principle of non-refoulement is embedded in various legal instruments which are relevant for refugee law in the European Union, the abovementioned sections illustrates that although strong suggestions are made by scholars and case law upon the interpretation and application of the principle, consensus on the exact weight and limitations of this principle is in some cases hard to find. Nevertheless, its customary status is defended widely in the literature. In the next chapters right-wing populism and its threat to the principle of non-refoulement and its customary status will be discussed, and consequently it will be illustrated how populism exploits the gaps in the abovementioned examined discussions, leading to a hollow and more fragile definition of the principle of non-refoulement.

2. DEFINING POPULISM IN THE EU

2.1. Introduction

In this chapter I will start with a broad definition of populism as a 'thin-centred ideology' – an ideology which is not substantial enough to stand on its own - in which the three main concepts of populism[89] are elaborated upon in order to assess the influence of right-wing populism on the principle of non-refoulement. In relation to these three main concepts, it will also be argued that populism – by definition – poses a threat to constitutional democracy. Furthermore, in viewing populism as a 'thin-centred ideology' a distinction between left- and right-wing populism is necessary to be made. Considering populism in the EU is mainly characterized by right-wing populism, I will continue to look into the specific characteristics of right-wing populism.[90] Characteristics relating to nativism, crisis performance and EU scepticism will be identified in relation to right-wing populism. In addition, I will provide insights into why these characteristics of right-wing populism in Europe, once embedded into state practice, poses a threat to international refugee law, especially in regard to the principle of non-refoulement.

2.2. Defining Populism; Three Core Concepts

Populism is one of the phenomena that has been widely discussed within the field of political science and sociology. Some view populism merely as a political style, where others view it as an ideology[91]. Although the literature is divided on its exact definition, Mudde's and Kaltwasser's definition[92] has gained popularity[93] as it crystalizes the core concepts of populism through which it is established as a thin-centred ideology.[94] Populism is "an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the volonté générale (general will) of the people".[95] Hence, populism is

[89] Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism; a very short introduction* (Oxford University Press, 2017).
[90] Michael Ignatieff, 'The Refugee as Invasive Other' (2017) Social Research: An International Quarterly 84.1 (2007) 223. Jordan Kyle and Limor Gultchin, *Populist in power around the world* Tony Blair Institute for Global Change (2018); Cas Mudde. *Populist radical right parties in Europe.* Vol. 22. No. 8. Cambridge University Press (2007); Simon Otjes and Tom Louwerse. 'Populist in parliament: Comparing left-wing and right-wing populism in the Netherlands' (2015) 63.1 Political Studies 60; Ruth Wodak, Majid Khosravinik, and Brigitte Mral (ed.). *Right-Wing populism in Europe: Politics and discourse (*A&C Black 2013).
[91] Ben Stanley 'The Thin Ideology of Populism' *(2008)* 13(1) Journal of political ideologies, 95, 95.
[92] *Mudde and Kaltwasser* (n 89).
[93] Ana Bojinovic Fenko, Marko Lovec, Jure Pozgan and Danijel Crncec 'Euroscepticism as a functional pretext for populism in central and eastern European states: the eurozone, migration and Ukrainian crisis' (2019) Special issue LVI Teorija in Praska 56.
[94] Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach*. (Oxford: Oxford University Press 1996).
[95] Cas Mudde 'The Populist Zeitgeist' (2004) 39 (4) Government and Opposition 542, 543.

constructed as an appeal to "the people" and the denunciation of "the elite" involving a critique of the establishment and an adulation of the common people; the 'pure people' versus the 'corrupt elite". [96] It is acknowledged that the danger of such a broad definition of populism is that is can be applied to almost all political actors. For this reason, populism should be viewed in light of what it is not; elitism, pluralism and clientelism. Elitism refers to the idea that the people are dangerous and the elite is morally, culturally and intellectually superior.[97] Pluralism comprises the view that society is a melting pot of a wide variety of actors which all should be taken into account in the political sphere.[98] As will be elaborated upon, pluralism rejects the concept of a general will. Clientelism should be viewed a (exchange) strategy employed by voters and politicians in which the former receives goods in exchange of political support of the latter.[99] Besides looking into what populism is not, three core concepts of populism are indicated: the people, the elite and the general will.

2.2.1. The People

Within populism, 'the people' are seen as the morally driving force behind political decision making. 'The people' can be referred to as the sovereign, the common people and/or the nation.[100] With regard to sovereignty, the people as collective body, functions as the legitimizing source of power within democratic society. The idea of 'the common people' refers to the idea of a common identity, which is often based on socioeconomic status in combination with cultural traditions and/or values. The people as the nation focuses on the ethnic or civic community. However, viewing the people as analogous with the population is problematic, as often different ethnicities reside on the same territory. Rather, the people refer to an imaginary core of a 'virtuous and unified population'.[101] Inherent to this idea of 'the people' is the belief that this group is homogenous in its identity, and is united in their political interest(s). The exact characteristics of 'the people' is depending on the political, cultural or economic context of the state.[102] As will be elaborated upon in section 2.6.1, right-wing populism defines 'the people' mainly on a basis of culture, which in relation to refugees provides fertile grounds for sentiments of exclusion.

[96] *Mudde and Kaltwasser* (n 89).
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Paul Taggart, *Populism* (Open University Press 2000), *95.*
[102] Takis Spyros Pappas and Hanspeter Kreisi, 'Populism and crisis: a fuzzy relationship' *European Populism in the Shadow of the Great Recession* (2015) 303.

2.2.2 The Elite

The elite can be viewed in a political, economic and cultural light and is characterized on the basis of power. Following the anti-establishment rhetoric of populism, the elite is -in contrast to 'the people'- corrupt and therefore does not only not comply with, but also actively ignores the interest of the people.[103] Interestingly, considering that populist in power would become part of the elite, it can be argued that populists cannot continue to stay in power once they are. As argued by Mouffe: "it is no doubt encouraging to see that the appeal of those parties diminishes once they become part of the government, and that they seem able to strive only when in opposition. This reveals their structural limits". [104] However, as will be argued in the substantiated in chapter three, currently there are populist in power in a variety of countries in the EU. Regardless of the potential duration of their power and their 'structural limits', it will be illustrated that inevitably damage can and is done to the foundations of democracy, the project of European integration and refugee law through a populist narrative.

2.2.3. The General Will

Rousseau distinguished between the general will and the will of all[105], where the former relates to the pursuit of the enforcement of a common interest, the latter is merely constituted out of the sum of interests. The abovementioned rhetoric of 'the good people' versus 'corrupt elite' result in the belief that popular sovereignty of the people will be established after the downfall of the elite. Popular sovereignty - which refers to the idea that the power of the state is founded upon the consent of the people – will then be restored. As argued by Stanley[106], in populism the general will is constructed through aggregation of individual negative experiences which eventually functions as a representation of a totality, where certain unsatisfied demands work as a catalyser. In populism, the general will should be as least restrained as possible, ideally not at all. For his reason, populism often shows strong preferences for direct democracy. In light of this, populism is regularly defended considering it is way through which political space is given to a substantial group which feels like they are overlooked in their societal and political interest.[107] Therefore, the appeal to the general will and the preferences for direct democracy in which people can let their voices be heard, can be argued to have democratizing effects.

[103] *Mudde and Kaltwasser* (n 89); *Kyle and Gultchin* (n 90).
[104] Chantal Mouffe, 'The 'End of Politics' and the Challenge of Right-Wing Populism' in *Populism and the Mirror of Democracy* (2005) 50, 155.
[105] *Mudde and Kaltwasser* (n 89).
[106] *Stanley* (n 91).
[107] *Kyle and Gultchin* (n 90).

However, as will be argued in section 2.4, as there is no such thing as a single homogenous identity and one unified interest of a nation, the appeal of an unrestrained general will overlook certain societal safeguards which can have detrimental effects to constitutional democracy.

2.3. Populism as Thin-Centred Ideology

Following from abovementioned, populism can be said to be constituted out of a "us versus them" rhetoric which refers to the 'good people' versus the 'corrupted hegemonic elite', and the belief that politics should be representative of the general will of the people. Hence, populism is founded upon a discourse of difference, which can be related to economic class, social status or ethnicity.[108] Nevertheless, this rhetoric by itself will be problematic in developing a comprehensive political direction. As an ideology, therefore, it can be said to be thin-centred. The term thin-centred ideology was created by Michael Freeden[109], who argued that not all ideologies are comprehensive enough to stand on their own, and therefore they are combined with other (elements of) ideologies. Populism, as argued by Stanley "conveys a distinct set of ideas about the political which interact with the established ideational traditions of full ideologies." [110] Hence, from populism as thin-centred ideology, sub types of populist derive as populist itself is not substantial enough.

2.4. Populism and Democracy

Considerable debate has been given to the relation between populism and democracy. Following from its aim to establish popular sovereignty, populism - both left and right-wing – favours direct democracy as this will lead to the best possible expression of the general will. Populism seems to be gaining popularity as it can be viewed as a way through which democratic processes can be improved and promoted. As argued by Mouffe[111], this success of populism can be ascribed to a lack of alternatives in the democratic debate, the increasing role of the legal system -which has a strong influence on the regulation of social relations- and the prioritization of smooth functioning of the market. In this modernity, populism gives hope to those who want society to be arranged differently. Therefore, populism can be argued to have a transformative potential, through which democracy is strengthened as it brings to light previously unfulfilled needs.

[108] Ernesto Laclau, *On populist reason* (Verso 2005).
[109] *Freeden* (n 94).
[110] *Stanley* (n 91).
[111] *Mouffe* (n 104).

Nevertheless, multiple scholars have argued that populism by definition is illiberal and therefore precarious for the functioning of democracy.[112] One of those scholars are Abts and Rummens, who argue through reconstruction of the traditional two strand model into a model of three logics that populism inherently threatens democracy.[113] The two-strand model argues that constitutional democracy exists out of two competing pillars; a liberal/constitutional pillar and a democratic pillar.[114] The former provides safeguards for individual rights on the basis of equality – the protection of minorities is part of this -, whereas the latter reiterates popular sovereignty and political participation. As argued by Abts and Rummens, populism is often wrongfully believed to fall under the democratic pillar. They argue that in viewing populism as part of the democratic pillar, populism its democratic legitimacy is overestimated. Although they agree with Mouffe that constitutional democracy too some extend fails to accommodate unfulfilled needs, the democratic pillar includes a logic that the general will has to be a mediated and ongoing construction, which is incompatible with populism. Hence, the two-strand model is wrong in viewing the two pillars as merely competitive. To resolve this, a model of three logics is introduced. In democracy, the locus of power is not clearly embodied by a person, which leads to an empty space; 'democratic rulers cannot identify themselves with the locus of power; instead, they only hold public offices on a temporary basis, subject to a regular political and electoral competition'.[115] Populism seems to resolve this by filling up the space of power in presenting one general will which is abstracted from a homogenous group. However, 'The inclusive and democratic nature ultimate depends on the integrity of the democratic ethos of the people and is, therefore, threatened as soon as citizens are lured by the fictitious image of a substantive collective identity'.[116]

Hence, a way in which populism threatens democracy is through its rejection of pluralism, which is derived from a desire to fill up the empty locus of power by a homogenous group with a general will. Consequently, the belief in a homogenous general will can lead to illiberalism and the undermining of the rule of law. Namely, as democratic institutions are inherently

[112] *Pappas and Kreisi* (n 102); Duncan McDonnell and Giuliano Bobba 'Italy: a strong and enduring market for populism' *European Populism in the Shadow of the Great Recession* (2015), 163.; Gianfranco Pasquuino, 'Populism and democracy' *Twenty-First Century Populism: The Spectre of Western European Democracy* (2008) 15.
[113] Abts and SRummens 'Populism versus democracy' (2007) 55.2 Political studies 405.
[114] *Mouffe* (n 104).
[115] *Abts and Rummens* (n 113) 412.
[116] Ibid 422.

pluralistic and based on compromise, they are seen to restrain the general will and are rejected by populist altogether. In line with arguments of political theorist Carl Schmitt, "because populism implies that the general will is not only transparent but also absolute, it can legitimize authoritarianism and illiberal attacks on anyone who (allegedly) threatens the homogeneity of the people".[117] By extension, populist also often attack institutions which counter the idea of a general will and homogeneity of the people. Müller states: "populist only oppose those institutions that, in their view, fails the produce the … correct political outcomes"[118]. An important paradoxical argument employed by populist is that the suppression of the people is (at least partly) caused by undemocratic institutions and for this reason populists actors refused to be constraint by them. This line of reasoning seemingly legitimizes populist actions to discredit the media, organizations that protect minorities etc.[119]

In relation to refugee law, it can be illustrated that right-wing populism threatens both the liberal/constitutional pillar and democratic pillar of constitutional democracy, which is in line with Abt's and Rummens' argumentation. Legal and humanitarian duties, of which the principle of non-refoulement is one, are by populist redefined as burdens which should be let go off[120], although these duties function as counter-majoritarian pressure, and hence are measures which fall within the scope of the constitutional pillar. Furthermore, the alleged homogeneity of the people and anti-pluralist belief results in right-wing populists to refuse political compromise and demand radical and often oversimplified solutions, a practice which is inherently undemocratic.[121] In addition, the attack on certain democratic institutions happens also externally, which will be elaborated upon in section 2.6.3. In the upcoming chapter, this will be illustrated in section 3.3.3, where it is shown that right-wing populist countries show illiberal tendencies and overrule certain democratic institutions.

2.5. Right-Wing Populism vs Left-Wing Populism

Following from populism as a thin-centred ideology, a common categorization of populism, is made between right-wing and left-wing populism. The literature on populism has concentrated mainly on right-wing populism.[122] While left- and right-wing populism focus on 'the people

[117] *Mudde and Kaltwasser* (n 89).
[118] Jan-Werner Müller *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016), 61.
[119] *Kyle and Gultchin* (n 90).
[120] *Ignatief* (n 90).
[121] Thomas Greven 'The Rise of Right-Wing Populism in Europe and the United States; A Comparative Perspective' (2016) Friedricht Ebert Foundation, Washington DC Office.
[122] *Otjes and Louwerse* (n 90).

versus the elite' dichotomy, left-wing populism bases itself on socio-economic relations and claims that the political elite fixates on the interest on the business elite and ignores the interest of the working man. Hence, it focuses itself on egalitarianism, and mainly the lack thereof in the economic area which is upheld by the current elite.[123] Right-wing populism, however, includes a dimension of nativism which comprises the idea that only natives should inhabit a state and that all non-native elements pose a threat to the nation. Hence, the 'us versus them' rhetoric is founded on a cultural homogenous basis.[124] Interestingly, although Otjes and Louwerse are cautious in generalizing their findings, voting behaviour of both left- and right-wing populist parties in the Dutch parliament seem to be more influenced by their accompanied ideology than by populism itself.[125] This is in line with the concept of populism as a thin centred ideology. Nevertheless, regardless of which ideology takes the upper hand in political decision making, as will be argued it is the dangerous mixture of the populist thin-centred ideology with the right-wing ideology, which constitutes a danger for refugee law in contemporary Europe. Populism is chameleonic concept that adapts itself to the circumstance and context.[126] However, regardless of the sub-types of populism or its position on the left- or right-wing spectrum derived from this context, as argued in the previous section, populism is by definition inimical to democracy and the rule of law, which will have detrimental effects on EU refugee law and the principle of non-refoulement.

2.6. Characteristics of Right-Wing Populism in the EU

Over the last view years, it is widely acknowledged by scholars that globally, populism has been on the rise.[127] In Europe, this increase has been mainly characterized by right-wing populism.[128] This upsurge of populism in Europe should not be overlooked, as the current position of populist parties in power can alter fundamental principles of international law; especially the opinio juris of customary status. As indicated in the previous section, right wing populism is a sub category of populism in which the concept of 'the people' is established on a culturally homogenous basis. It is important to stress that from on the global level, populism does not always manifest itself in relation to these cultural arguments. As argued before, as a thin-ideology, populism knows multiple sub types. However, in Europe a substantial majority

[123] Luke March 'From Vanguard of the Proletariat to Vox Populi: Left-populism as a 'shadow' of contemporary socialism' (2007) 27.1 Review of International Affairs, 63.
[124] *Greven* (n 121).
[125] *Otjes and Louwerse* (n 90).
[126] *March* (n 123).
[127] *Kyle and Gultchin* (n 90).
[128] Ibid.

-74 out of 102- populist parties in Europe are both nativist and populist.[129] Considering this paper is focusing on the political landscape in the EU in relation to refugee law, the research focus therefore will be on the relation between right-wing populism and international refugee law, and in specific related to the principle of non-refoulement. The next paragraph will identify the characteristics of right-wing populism which can be argued to pose a threat to the principle of non-refoulement.

2.6.1. Nativism, Nationalism and 'The Dangerous Other'

One of the main characteristics of right-wing populism is nativism. Nativism can be defined as the belief that "states should be inhabited exclusively by members of the native group ('the nation') and that non-native elements (persons and ideas) are fundamentally threatening to the nation state".[130] Hence, the 'us versus them' dichotomy is extended to a literal in and outsider perspective, where the most prevailing national culture is the determining factor. As indicated by Kyle and Gultchin, cultural (nativist) populism, does not only 'punch up' against the political establishment, but also 'punches down' to elements – and especially to people such as immigrants, refugees, ethnic and religious minorities and criminals – which seemingly pose a threat to the nation state.[131] By extension, welfare chauvinism, majoritarianism and appeals to law-and order are a result of this nativism which characterizes right wing populism. Nativism is distinct from nationalism in the sense that nationalism allows for the co-existence of different ethnicities, cultures and religions as long as they are loyal to the nation. Hence, the nation provides an 'umbrella' culture, which unites a plurality of actors under a similar political identity. Nativism and populism in general, however, denies this pluralism altogether and argues that only one group constitutes the 'true' people of the nation. Combined with populism, this means that a single and cultural homogenous group constitutes a general will which has to revolt against the interest and power of the elite. Occasionally, nationalism and nativism are used synonymously, as both are intertwined with racism and xenophobia. As argued by Riedel, nativism is a close ally of nationalism as the concepts are more similar than different.[132] What distinguishes nativism however, is that it does not 'share with nationalism the exclusive orientation on the nation as the only or main political community. It goes beyond that

[129] Martin Eiermann, Yascha Mounk and Limor Gulchin 'Trend, Threats, and Future Prospects (2017) Tony Blair Institute for Global Change. Retrieved from <https://institute.global/policy/european-populism-trends-threats-and-future-prospects> on 15 May 2020.
[130] *Cas Mudde* (n 90) 19.
[131] *Kyle and Gultchin* (n 90).
[132] Rafal Riedel, 'Nativism Versus Nationalism and Populism – Bridging the Gap' (2018), 6(2) Central European Papers 18.

perspective, offering other criteria of the communitarian feeling or the "common sense". It may be in-born genetic make-up, but it can also be localism language or dialect, historical legacy or religion. Nationalism is in this sense much more reductionist but also offer much more developed ideology that spread globally."[133] Hence, nationalism is more widespread and to some extent more straightforward, as it exclusively focuses on the nation as political community, whereas nativism offers more criteria which constitute a community.

Bonikowski argues that characteristics of the right-wing, rather than that of populism, constitutes radical nationalism, nativism and authoritarianism tendencies. In order to understand contemporary politics, populism, ethno-nationalism and authoritarianism must be viewed as separate component of radical-right mobilization.[134] However, it cannot be denied that the thin ideology of populism – based on the 'us versus them' dichotomy and a homogenous 'us'- inevitably provides fertile grounds for these characteristics to be exploited. As argued by Mudde, the combination of populism and nativism, nationalism and authoritarianism make the position of right-wing populism unique.[135] In analysing populism, it is indeed important to separate and analyse these concepts, however, the lethal mixture of populism and the characteristics of the right-wing, allows for a strengthening of these right-wing characteristics of nationalism, nativism and authoritarianism. Maybe one could even go as far as arguing that populism contributes to the radicalization of right-wing politics. Nevertheless, right-wing populism in Europe inserts a cultural dimension into the 'us versus them' dichotomy of populism, which is referred to as nativism.

In relation to the focus of this thesis, this nativism can be said to pose a fundamental threat to refugee law. Namely, nativism allows for the framing of refugees as 'the invasive other' who poses a threat to the nation. As argued by Mouffe, the construction of 'the people' in right-wing populism is xenophobic as all immigrants are perceived as a threat to the identity of the nation, which is problematic.[136] Similarly, Arrocha observes that certain violent incidents targeting immigrants are a result of 'communities embracing nativism and xenophobia as a response to a deep fear of the "other"; an "other" who is no longer perceived as an immigrant or a refugee

[133] Ibid 27.
[134] Bart Bonikowski 'Ethno-nationalist populism and the mobilization of collective resentment (2017) 68 The British Journal of Sociology 181.
[135] *Mudde* (n 90).
[136] *Mouffe* (n 104).

but as an "illegal alien", "illegal criminal" or "invader".[137] No longer is the refugee seen as an individual person with certain rights, but as an invasive other.[138] Yilmaz goes even further, and ascribes the new focus on the debate relating the Islam to issues of terrorism and security to the a hegemonic shift of the mid 1980s, when right-wing populism started to intervene with the immigration debate through the narrative that immigration poses a cultural threat to European nations.[139] Hence, the right-wing populist rhetoric is characterised by xenophobia and often the equation of the refugee as dangerous other. By extension, refugees are regularly framed as terrorists. Although this framing is not exclusively done by right-wing populists, as will be elaborate upon in chapter three, right-wing populist state actors regularly adopt this framing.[140]

But how exactly does the dynamic between this nativist right-wing populist rhetoric and the principles of non-refoulement work? Once in power, populists' parties have influence on the opinio juris of customary law as they influence the 'acceptance as law'. Namely, as elaborated upon in the first chapter, this acceptance of law is indicated through public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference, and/or inaction (under certain circumstances). The influence of the nativist right-wing populism rhetoric for the opinio juris for the customary status of the principle of non-refoulement can be argued to be twofold.

Firstly, the 'conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference' in relation to the principle of non-refoulement can be said to be influenced negatively by right-wing populists in power. Namely the right-wing populist strategy is to keep out 'threats to the nation'. Consequently, nativist populist in power will result in the closing of the internal borders to keep refugees out. In the first chapter, it was illustrated that following from the traveaux prepatoires and a variety of scholars, that in line with the principle of non-refoulement, those who identify as a refugee should not be refused at the

[137] William Arrocha 'Combating Xenophobia and Hate Through Compassionate Migraiton: The Present Struggle of Irregular Migrants Escaping Fear and Extreme Poverty'(2019) 71 Crime, Law and Social Change 245, 249.
[138] Ignatieff (n 90).
[139] Ferruh Yilmaz, 'Right-wing hegemony and immigration: How the populist far-right achieved hegemony through the immigration debate in Europe' (2012) 60(3) Current Sociology 368.
[140] The Huffington Post, 'Beppe Grillo calls for 4 measures to protect Italy from the "comings and goings of terrorists". Immediately off the irregular ones and stop in Schengen' *The Huffington Post* (December 23 2016); Ireneusz Pawle karolewski and Roland Benedikter, 'Europe's Migration Predicament: The European Union's Refugees' Relocation Scheme versus the Defiant Central Eastern European Viségrad Group' (2018) Journal of Inter-Regional Studies: Regional and Global Perspectives 40, 41.

border. However, Peukert et al argued that at the internal borders within the EU refugees can be refused entry at a border, as following the Schengen Borders Code, the refugee has not entered the territory and therefore must be in the territory of another state, which is then responsible for the asylum claim following from the Dublin III Regulation.[141] This finding, however, is in contradiction with article 3(1) of the Asylum Procedure Directive[142]. It is clear that due to this lack of clarity on the matter of entry of refugees at the border, the nativist right-wing populist rhetoric has room to close its borders, which can be argued to result in to a hollower principle of non-refoulement than it was intended. Hence, through its actions, right-wing populist in power negatively influence the principle of non-refoulement.

Secondly, the nativist right-wing rhetoric does not necessary lead to non-compliance with the 'practice of law' limb of the customary status of the principle of non-refoulement but can result into a weaker or refusal of acceptance of law in relation to the exclusionary articles touched upon in chapter 1. For this, we have to look again the exclusionary articles of the Refugee Convention. As argued by article 33(2) of the Refugee Convention:

"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." [143]

However, if the dominant belief of a state – which in populism is said to represent the general will – is that refugees inherently constitute a danger to the community of the country, which is the case following the nativist rhetoric of populist in power, refugees in themselves will be through article 33(2) not deserving protection against non-refoulement in any situation. This illustrates that right-wing populism characterized by nativism shows to be incompatible with the principle of non-refoulement. Here it is not argued that countries in which right-wing populists are in power, act in contradiction with the 'practice as law' of the principle and that courts exploit the exclusionary articles or ignore the principle of non-refoulement altogether. However, it does negatively influence the belief that the principle of non-refoulement is "accepted as law" as the nativist discourse will extend the exclusionary articles to all refugees,

[141] *Peukert et al* (n 67).
[142] *Asylum Procedure Directive* (n 45).
[143] *Refugee Convention* 1951 (n 10).

since the nativist rhetoric equates refugees with a danger to the nation. Furthermore, as explained in section 1.3.2., there is lack of a uniform definition of terrorism and there is little consensus on which organisations can be defined as terrorist organisations. Therefore, whether a refugee might be seen as a terrorist or as affiliated with a terrorist organisation, is subject to the state. Once a state is ruled by right-wing populism which regularly relates refugees with terrorism, one can argue that the likelihood of a refugee being excluded from protection against refoulement on the basis of alleged terrorism increases. In addition, another exclusionary article is article 1F of the Refugee Convention:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations." [144]

As previously argued in the section 1.3.1., article 1F(b) – provision (b) being the most invoked in courts – requires a lower threshold and is included in the Refugee Convention in relation to the rejection of impunity as it relates to crimes committed outside of the asylum state. However, a trend is observed in which article 1F is invoked on the basis of protection of the national interest of the asylum state, with a lower threshold.

In sum, the right-wing populistic rhetoric, which is characterized by nativism, equates refugees with a danger to the nation. Once right-wing populist are in power, and hence this rhetoric becomes part of the state's discourse, the acceptance of law (opinio juris) of the principle of non-refoulement is curtailed. Firstly, because the refusal of refugees at the border becomes a state practice, which can be argued to signal a rejection (non-acceptance) of the principle of non-refoulement. Secondly, because the exclusionary articles 33(2) and 1F of the Refugee Convention are no longer seen exclusionary, as refugees constitute by definition a danger to the

[144] Ibid.

nation. In the upcoming chapter, the rejection of the principle of non-refoulement as acceptance of law will be substantiated by developments in EU migration policy.

2.6.2. Crisis Performance and the Populist Narrative

Besides the elements of the people, the elite and the general will, populism is also often referred as a certain performative method – a way of 'doing politics', especially but not limited to a context of crisis. Although the literature is divided on the exact dynamic between populism and crisis, it is clear that the perception or threat of crisis facilitates populism.[145] Regarding this matter, Moffit provides useful insights. Moffit argues that crisis should not only be seen as a trigger for populism, but also vice versa; Crisis, should be seen as an essential core feature of populism itself. He introduces a six-step model of 'performance' employed by populism in relation to crisis; 1) Identity failure, 2) Elevating the level of crisis by linking it into a wider framework and adding a temporal dimension, 3) Framing the 'people' vs those responsible for the crisis, 4) Using the media to propagate performance, 5) Present simple solutions and strong leadership and 6) Continuation to propagate crisis.[146] Moffit emphasises that most of the abovementioned steps of crisis performance are inherent to crisis politics in general. What is distinct as a performative method in populism however, is the centrality of the people in relation to those responsible for the crisis- step three - and the necessity that the crisis perpetuates - step six -. Following from the three concepts of populism, step three is based on concept of 'the people'. As argued by Taggart "Populists are often more sure of who they are not than of who they are. The demonization of social groups, and particularly the antipathy towards the elite, provides populist with an enemy, but it is also a crucial component of the attempt to construct an identity."[147] Moffit states "the performance of crisis offers populist actors a seemingly objective rationale for targeting their enemies, beyond outright discrimination".[148] In general, populist favour generalizations, as it simplifies that us versus them distinction.[149] Social divisions are in the populist narrative exacerbated through the rhetoric of crisis.[150] In doing so, appeals to emotions of fear and anger, simplifications of both problems and solutions fit well into this rhetoric. Moffit himself doesn't distinguish between right- and left-wing populism regarding this matter and hence we can assume that this performative crisis model is inherent

[145] *Wodak et al* (n 90).
[146] Benjamin Moffitt 'How to Perform a Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' (2015) 50 Government and Opposition 189.
[147] *Taggart* (n 101) 94.
[148] *Moffit* (n 146) 202.
[149] *Greven* (n 121).
[150] *Kyle and Gultchin* (n 90).

to populism as a thin ideology. Nevertheless, the way in which in step three – framing the people versus those responsible for the crisis - is shaped, can be argued to be different following from the characteristics of right- and left-wing populism. As argued before, in left-wing populism the people are identified on the basis of socio-economic relations. In right-wing populism, this identification is based on nativism. Kampmark adds that especially in the light of the refugee crisis, some governments adopt exclusionist tendencies.[151]

In sum, the performative strategy of right-wing populism in the context of crisis continuously utilizes the narrative of demonizing certain groups. The perception and performance of crisis therefore, assist the right-wing populist in identifying a 'dangerous other'. Specifically, in relation to the refugee crisis it is clear that the refugees are blamed for the crisis as the nativist dimension is added in right-wing populism. Hence, the notion of crisis allows populist to continuously frame refugees as the scapegoat, which adds to the narrative that they constitute a danger to the nation. As explained the previous section, systematically framing refugees as danger to the nation, signals non-compliance with the principle of non-refoulement.

2.6.3. Euroscepticism

In its external policy, populism is often linked with Euroscepticism. Not every Eurosceptic party is populist, and surprisingly not every populist party is Eurosceptic.[152] However, a link between populism and Euroscepticism can be said to be observed as non-populist Eurosceptic parties are very uncommon.[153] Especially since right-wing populism views non-native people, ideas or policies as threats to the nation, it comes as no surprise that the EU is viewed as a danger as well. When populism is viewed as having an internal and external dimension, in its external dimension, core elements of 'the people', 'the elite' and the 'general will' can be said to be transposed into 'the nation', 'the European Union', and the 'national general will'. Hence, the thin-centred ideology of populism can easily be extended to an international context, and especially in regard to the EU. A distinction is made between 'hard' Euroscepticism which rejects the entire idea of European integration and 'soft' Euroscepticism which 'involves contingent or qualitied opposition to European integration'.[154] Most populist parties adopt a

[151] Binoy Kampmark 'The Influence of Right Wing Populism: Denmark, the EU and Immigration'(2015) Centre for Research and Globalization, retrieved at https://www.globalresearch.ca/the-influence-of-right-wing-populism-denmark-the-eu-and-immigration/5458700
[152] *Fenko et al* (n 93).
[153] *Otjes and Louwerse* (n 90).
[154] Paul Taggart and Aleks Szcerbiak 'Contemporary Euroscepticism in the party system of the European Union candidate states of Central and Eastern Europe' (2004) 43.1 European Journal of Political Research 1, 3-4.

'soft' approach.[155] Nevertheless, Brexit illustrates that a 'hard' approach is also employed in contemporary Europe.

The link of populism and Euroscepticism is both related to issues of sovereignty and to matters of identity and culture, which are undoubtedly inherently interlinked. With regard to sovereignty, in general populistic parties are reluctant in transferring their political decision-making power to non-majoritarian or supranational institutions.[156] As touched upon before, in populism the general will should be as unrestrained as possible, as it reinforces popular sovereignty through which the state authority and government are legitimised. Through the populist eye, the EU constraints this general will through a democratic deficit.[157] Furthermore, the EU is often accused of being an institution in which the elite rule over those with less power, which of course restrains the (national) general will of the member states. Hence, political decisions taken by the EU interfere with domestic matters of national sovereignty and self-determination and these decisions are based on a democratic deficit and are unequally influenced by the dominant member states of the EU. Hence, in the 'us versus them' dichotomy, the 'us' can be said to be the marginalized member states against the 'them' which comprises the elite dominant member states of the EU. With regard to matters of identity and culture, it is often argued that the EU imposes values upon its member states which are add odds with the (cultural) identity of a member state. Furthermore, Leconte argues that the development of the EU fundamental rights policy has given rise to value-based Euroscepticism "e.g. the perception that the EU via its fundamental rights policy, unduly interferes in matters where values systems and core domestic preferences on ethical issues are at stake".[158] Opposition to the EU then originates from this interference. The European integration project can be said to question traditional notions of a state and its identity considering its fundamental rights policy redefine national identities.[159]

With reference to international refugee law, the principle of non-refoulement can be seen as part of this EU Fundamental Rights policy which interferes with the right-wing populist idea of a cultural homogenous nation, as it obliges countries to take responsibility for third country

[155] Cécile Leconte 'The EU Fundamental Rights Policy as a Source of Euroscepticism' (2014) 15 Human Rights Review 83.
[156] Otjes and Louwerse (n 90).
[157] *Mudde* (n 95).
[158] Leconte (n 155) 83.
[159] Jef Huysman 'Contested Community: Migration and the Question of the Political in the EU' (2000) International Relations Theory and the Politics of European Integration 149.

nationals who are subject to persecution upon return. As argued by Mouffe, the multiculturalism resulting from allowing refugees into the country, is perceived as a project from the elite in order to constrain the popular will. [160] With this, the linkage between the idea of right-wing populist of a homogenous nation and Euroscepticism is clarified. As argued by Piro and Taggart, a variety of crisis - economic, financial, migrant and Brexit – have provide fertile ground for an increase in Euroscepticism and could 'tip the balance of contention in their favour'.[161] This can undoubtedly be linked with the analysis of Moffit, who argues that the performative crisis model employed by populist helps to strengthen the us versus them rhetoric. Hence, crisis provide functional in the gaining popularity of populist. As argued by Murray and Longo, "the EU's ability to produce effective outcomes, and to resolve complex problems of governance, is substantially dependent on the member states' willingness to empower or enable effective performance".[162] As will be illustrated in the upcoming chapter, Eurosceptic attitudes of populist countries are harmful for the effective performance in relation to the protection of refugees and the principle of non-refoulement as it results in non-compliance with EU agreements and political stalemates regarding (Dublin) reform negotiations which ought to *inter alia* reinforce the principle of non-refoulement.

2.7. Conclusion

In conclusion, right-wing populism in the EU is characterized by 1) a threat to constitutional democracy, 2) nativism, 3) a performative method of a crisis and 4) Euroscepticism. All of these characteristics, and especially the reinforcing mechanism between these characteristics can be argued to constitute a threat to refugee law in general, but especially to the right to non-refoulement. The inherent criticism of (right-wing) populism of pluralism and certain democratic institutions lead to the undermining of these institutions which safeguards the liberal pillar of democracy. The unrestrained general will and alleged homogeneity of society rejects pluralism and with that overthrow certain fundamental values such as the rule of law, equality and the protection of minorities. By extension, the rejection of the liberal pillar of democracy, the principle of non-refoulement is threatened. Right wing populism in Europe is characterized by nativism, which is the belief that anything non-native poses a threat to the nation. Nativism

[160] *Mouffe* (n 104).
[161] Andrea LP Pirro and Paul Taggart 'The Populist Politics of Euroscepticism in Times of Crisis: A framework for Analysis (2016) 38(3) Politics. 378; Thomas A. Birkland 'Focusing events, mobilization and agenda setting' (1998) 18.1 Journal of Public Policy 53.
[162] Philomenia Murray and Michael Longo 'Europe's Wicked Legitimacy Crisis: The Case of Refugees (2018) 40.4 Journal of European Integration 411, 412.

can lead to the rejection of the principle of non-refoulement, since the narrative of the refugee as 'the dangerous other' will not only lead to the conduct of closing borders, it can also result into broadening of the exclusionary articles of the principle of non-refoulement. Furthermore, both right- and left- wing populism employ a method of crisis performance which helps to further dramatize the us versus them rhetoric. Therefore, crisis does not only reinforce populism, populism also reinforced the notion of a crisis to meet its own ends. In combination with nativism in right-wing populism - the notion of refugee as invasive others – this crisis rhetoric demands for simple solutions and the adoption of exclusionary tendencies. In addition, a strong link between populism and Euroscepticism can be observed. The us versus them narrative of populism is extended in relation to the EU, where the EU is seen as an elitist project which poses a danger to the sovereignty and (cultural) values of the member state. Following from this Euroscepticism, it will be illustrated in the upcoming chapter that negotiations upon refugee policy and therefore the safeguarding of the principle of non-refoulement comes to a hold. Hence, once right-wing populist are in power in the EU, they pose a fundamental threat to the principle of non-refoulement considering the opinio juris does not signal support the principle of non-refoulement. The combination of nativism, anti-democratic tendencies, Euroscepticism and crisis performance can be argued to be lethal when refugees seek refuge in countries in which populist are in power. The upcoming chapter will substantiate this argument by exemplifying current developments in the EU in relation to the principle of non-refoulement.

3. POPULISM THREATHENEING THE PRINCIPLE OF NON-REFOULEMENT IN THE EU

3.1. Introduction

This following chapter will relate the principle of non-refoulement as customary law and populistic state attitudes in the EU. The subjective limb – the opinio juris - of customary law "acceptance as law" includes *inter alia* public statements on behalf of states, government legal opinions, conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.[163] I will look into these sources of customary law in relation to EU countries where nativist right-wing populism parties currently hold office. Most of the EU countries which are considered in this chapter, are identified in a worldwide study on populist in power by Kyle and Gultchin: Hungary, Poland, and Slovakia.[164] As I will argue however, this list is not exhaustive as I will illustrate that countries such as the Czech Republic and Italy also illustrate non-acceptance of the principle of non-refoulement through a populistic state narrative. In this chapter, I will exemplify through deductive reasoning that over the last years these country's populistic attitudes have negatively affected the subjective limb (opinio juris) of the customary status of the principle of non-refoulement.

3.2. Populists in Power in the EU

In almost all countries within the EU, populist parties are present; Reassemblement National (previously known as Front National) in France, the Partij voor de Vrijheid in the Netherlands, Alternative für Deutschland, Vox in Spain, Lega in Italy, and so on.[165] Nevertheless, in order to be able to influence the opinio juris of customary law of the principle of non-refoulement, it is important to clarify that only right-wing populist parties which constitute a substantial part of a government are of relevance to this thesis, considering the opinio juris is related to acceptance of law by the state. As elaborated upon in chapter one by Walden[166], opinio juris relates to the psychological state of the state actor. Only when right-wing populism is embedded in the state's policy, it can challenge the principle of non-refoulement through what the International Law Commission lists as substantiating the opinio juris: statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, conduct in connection with resolutions adopted

[163] *Sender and Wood* (n 81).; International Law Commission (n 83).
[164] *Kyle and Gultchin* (n 90).
[165] BBC, 'Europe and Right-Wing Nationalism: A Country-By-Country Guide' *BBC* (13 November 2019) <https://www.bbc.com/news/world-europe-36130006> Accessed 7 June 2020.
[166] *Sender and Wood* (n 81).

by an international organisation or at an intergovernmental conference, and inaction (under certain circumstances).[167]

Now the task remains to provide an overview with countries in the EU of which a substantial part of the government shows right-wing populistic tendencies. The analysis by Kyle and Gultchin will be guiding in providing this overview, as they provide an extensive study of populist in power through a three-step method.[168] First, they identified 66 academic journals in sociology and political science which frequently publish articles on populism through which they established a potential list of populist leaders through scanning all articles containing the word 'populist' or 'populism'. Next, they provided an in-depth analysis of the sources in relation to their definition of populism – a definition in line with populism as thin-centred ideology as described in the previous chapter – in order to fine-tune the list of populist leaders. Lastly, the list they derived from beforementioned steps was verified by populism experts. In their analysis, Kyle and Gultchin proceed with three subtypes of populism; cultural populism, socio-economic populism and anti-establishment populism.[169] Cultural populism is related to nativist right-wing populism, where the nation state is based on a cultural homogenous identity (often related to religious traditionalism) and migrants, criminals, minorities and cosmopolitan elites can be referred to as the outsiders.[170] Socio-economic populism is populism more related to left-wing populism, as the true and honest hard-working people of the worker class are overlooked by the interest of the business elite.[171] Anti-establishment populism extents the us versus them dichotomy in such a way that the primary enemy (political elite) are outsiders and therefore intra-society divisions are less relevant.[172]

In light of the thesis, we will focus on cultural populism, as in chapter two it is elaborated upon that especially this subtype of populism constitutes a danger to the principle of non-refoulement and is most prevalent in the EU. Following from Kyle and Gultchin analysis, countries in which cultural populist hold power are described in the table below. Please note that the study goes as far as 2018, which is sufficient for this chapter's analysis.

[167] Ibid.
[168] *Kyle and Gultchin* (n 90).
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.

Country	Party	Leader	Years in Office
Hungary	Fidesz – Magyar Polgári Szövetség (Fidesz Hungarian Civic Alliance)	Viktor Orbán	1998-2002, 2010 -
Poland	Prawo i Sprawiedliwość (PiS) (Law and Justice Party)	Jaroslaw Kaczyński	2005-2010, 2015 -
Slovakia	Smer – sociálna demokracia (SMER CD)	Robert Fico	2006-2010, 2012-2018

[173]

Although the focus of this following chapter will be on the abovementioned countries, this list is not exhaustive. As explained in the previous chapter, populism in general, through its Euroscepticism and crisis narrative can pose a danger to the principle of non-refoulement. Furthermore, although a populist party in power might not be purely based on right wing-nativist populism, in coalitions with other right-wing parties, the government can result in anti- or strict migration policies. For this reason, Italy will also be included in the analysis of this chapter. As will be elaborated upon, the populist Five Star Movement of Italy is defined as anti-establishment populism[174] but is ambiguous on its stance towards immigration as it highly influenced by its coalition with the right-wing Lega party. Resulting from this coalition, Italy's policy towards rescue ships and its agreements with Libya can be related to the non-acceptance of the principle of non-refoulement. In addition, the Czech Republic may be categorized as anti-establishment populist[175], but as argued by Riedel, as part of the VISEGRAD countries the Czech Republic 'is an illustrative example of the evolving problem of nativism due to the trajectory which these states – there populations and elites – took in the recent years'[176]. This will be further discussed in section 3.3.1. where it is illustrated that the VISEGRAD countries utilize nativist populist arguments to obstruct migrant reallocation schemes and the recasting of the Dublin Regulation.

[173] Ibid. As derived from Table 2 28-31.
[174] Ibid.
[175] Ibid
[176] *Riedel* (n 132).

3.3. Recent Developments on Immigration Policy in the EU

In this section, a plurality of developments from approximately the last 5 years which exemplify the threat of right-wing populism to the principle of non-refoulement in the EU will be touched upon. In doing so, the failure of a burden sharing initiative, external border management and outsourcing, and illiberalism will be discussed.

3.3.1. Failure of a Burden Sharing Imitative; the Temporary Relocation Scheme and the Revised Dublin Regulation

In 2015, after the influx of asylum seekers reached new heights, it laid bare that the current EU acquis which dealt with irregular migration was insufficient.[177] As resulting from the Dublin Regulation[178], which as described in chapter one implies that the country of first entry is responsible for the application of the refugee, coastal countries such as Italy and Greece were carrying a disproportionate burden.[179] In light of this, the EU's promise of burden sharing felt short and the principle of non-refoulement was increasingly at threat. As explained in chapter one, in accordance with the Dublin Regulation, asylum seekers were sent back to overburdened countries where the likelihood of them being subject to inhuman treatment was increasing under the pressure of the unprecedented influx of refugees. In 2015, the European Commission acknowledged these problems and proposed both a temporary reallocation scheme and a recasting of the Dublin Regulation.[180] As will be explained in the upcoming sections, both initiatives failed. I will argue that this failure can predominantly be ascribed to the right-wing populistic narratives maintained by various EU Member States.

[177] European Commission 'Asylum Statistics – Number of Asylum Applicants (non-EU-27 citizens), EU-27, 2008-2019' (2020). <https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> Accessed June 7 2020; Michele Nicoletti, 'Report of Parliamentary Assembly of the Council of Europe; Committee on Migration, Refugees and Displaced persons: After Dublin – the urgent need for a real European asylum system' (2015). <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22016&lang=en. Accessed June 7 2020.

[178] Dublin III Regulation (n 52).

[179] Shella Maas, Elena Jurado, Mathieu Capdevilla, Maylis Labayle, Laura Hayward, 'Evaluation of the Dublin III Regulation Final Report', (2015), European Commission DG Migration and Home Affairs.

[180] Regulation 197/2016/COM Proposal for a Regulation of the European Parliament and of the Council 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) (Dublin IV Regulation).

3.3.1.1. The Temporary Relocation Scheme

The temporary relocation scheme proposed by the European Commission in 2015 refers to a relocation of a total of 12000 asylum seekers from Greece, Italy and Hungary.[181] The relocation scheme would be a rule which would temporarily guide the Dublin III Regulation and took into account national variables. A distribution key which was based on quantifiable and verifiable criteria was established based on population size (40%), total GDP (40%), average number of applications over the previous years (10%) and the unemployment rate (10%).[182] Furthermore, the relocation includes a monetary award of 6000 euro to the Member state of relocation for each relocated person and 500 Euro transportation costs for Italy, Greece and Hungary for each relocated person. Although controversial, the relocation scheme was eventually accepted through a majority vote.[183]

Nevertheless, the Visegrad countries Hungary, the Czech Republic and Slovakia had voted against and refused to take their share of asylum seekers. At first, Poland accepted the scheme but received criticism from the other Visegrad countries. In refusing the relocation scheme, a variety of arguments against EU migration policy were given, of which some show strong resemblance with the right-wing populist rhetoric elaborated upon in chapter two. Namely, the Visegrad countries view the EU's migration policy as a 'forced transformation of Central Eastern European societies towards religious societies (fearing that it might increase the chance of Islamist terrorism)'.[184] It is argued that the EU in its migration policy ignores a link between multi-cultural and multi-religious societies and long-term stability and overlooks the variety of historical contexts and specific needs of (part of) the member states.[185] Here, it is clear to see that the nativist populist narrative based on a homogenous (religious) identity helps

[181] Communication 286/2015/EC Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece - General Approach.
[182] Communication 286/2015/EC Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece - General Approach Annex. < https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_annex_en.pdf.> Accessed June 7 2020.
<https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_solidarity_a_refugee_relocation_system_en.pdf> Accessed June 7 2020
[183] Council Decision 2015/1601 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece (22 September 2015).
[184] *Karolewski and Benedikter* (n 140). and Roland Benedikter, 'Europe's Migration Predicament: The European Union's Refugees' Relocation Scheme versus the Defiant Central Eastern European Viségrad Group' (2018) Journal of Inter-Regional Studies: Regional and Global Perspectives 40, 41.
[185] Ibid.

strengthening the us – 'our' homogenous (religious) society – against them – (Islamic) migrants – dichotomy. Hence, the migrants are seen as a threat to national security as the homogenous society is not fit for different religions and cultures. As explained in chapter two, equating refugees with a threat to security signals non-acceptance of the principle of non-refoulement. Besides, the arguments made by the Visegrad countries clearly illustrates that nativist populistic sentiments provide an obstacle for the implementation of equal burden sharing mechanisms, which as explained in chapter one, indirectly leads to violation of the principle non-refoulement.

An infringement procedure was started by the European Commission against the Czech Republic, Hungary and Poland[186], as they continued to refuse their share of asylum seeker as derived from the relocation scheme. In response to the eventual ruling that the countries indeed had violated the agreement[187], the countries provided statements, clearly inspired by the right-wing populist narrative. Poland responded with a statement from the government: "The refusal to comply with the relocation mechanism was dictated by the need to protect Poland's internal security and defend it against uncontrolled migration. The most important goal of government policy is to ensure the safety of our citizens".[188]. Hungarian President Orbán responded through reciting again the reasons for opposing the relocation scheme; protecting the Christian identity of Hungary and Europe from Muslim threats[189]. Furthermore, the statement by Czech prime minister Andrej Babis painfully laid bare the influence of the Visegrad countries attitudes by stating that "It is essential that we will not accept any migrants and that, meanwhile, the quota system was cancelled, and that is mainly thanks to us."[190] Eleanor Sharpston, Advocate General of the European Court of Justice stated in her opinion that the three countries' arguments invoking security concerns were insufficient because they still had the right to bar individuals deemed a threat, and a "spirit of mutual trust and cooperation must prevail".[191]

---

[186]European Commission, 'Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice' (December 2017) <http://bit.ly/2j0Mlw8> Accessed June 7 2020.

[187] Joined Cases C 715/17, C718/17 and C719/1 European Commission v Republic of Poland and Others [2 April 2020].

[188] Matina Stevis-Gridneff and Monika Pronczuk, 'E.U. Court Rules 3 Countries Violated Deal on Refugee Quotas' *New York Times* (2 April 2020) < https://www.nytimes.com/2020/04/02/world/europe/european-court-refugees-hungary-poland-czech-republic.html> Accessed June 7 2020

[189] Robert Mackey, 'Hungarian Leader Rebuked for Saying Muslim Migrants Must Be Blocked 'to Keep Europe Christian' *New York Times* (3 September 2015) <https://www.nytimes.com/2015/09/04/world/europe/hungarian-leader-rebuked-for-saying-muslim-migrants-must-be-blocked-to-keep-europe-christian.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> Accessed June 7 2020

[190] Matina Stevis-Gridneff and Monika Pronczuk, 'E.U. Court Rules 3 Countries Violated Deal on Refugee Quotas' *New York Times* (2 April 2020) < https://www.nytimes.com/2020/04/02/world/europe/european-court-refugees-hungary-poland-czech-republic.html> Accessed June 7 2020

[191] Euractiv, 'Czech Republic, Hungary and Poland "breached EU law' by refusing refugees', *Euractiv* (1 November 2019) <https://www.euractiv.com/section/politics/news/czech-republic-hungary-and-poland-breached-eu-law-by-refusing-refugees/> Accessed June 7 2020

The non-compliance with EU policy signals a wider problem within the EU. Murray and Longo argue that such large-scale resistance against EU policies is relatively recent but persistent in its nature.[192] Hence, Euroscepticism – and with that the non-acceptance of EU level decision making – is on the rise and obstructs policies proposed and implemented by the EU. Besides the abovementioned reaction to the Commission's temporary relocation scheme, this Euroscepticism can be further illustrated by Orban's proposal for a national referendum in response to the reallocation, which illustrates that the Government of Hungary had the intention to disregard EU policy making in its entirety. Nevertheless, although 98% of the voters called for a rejection of the EU relocation scheme, the referendum didn't pass the threshold which would make the referendum binding.[193] As can be observed however, this referendum illustrates both the populist narrative of simplicity and preference for direct democracy, as it demands straightforward solutions brought about by the general will. Furthermore, Hungary and Slovakia had even questioned the legality of the relocation scheme in front of the CJEU, which was dismissed in September 2017 by the Court.[194] As argued by Murray and Longo: "populism, which has found strength in anti-migration narratives that define the EU as the enemy of the people, can derail the EU, simultaneously depriving it of support and hollowing it out as a values community. In both cases the EU is stripped of authority and legitimacy."[195]

In sum, the right-wing populistic narratives based on nativism and Euroscepticism were employed in order to obstruct the instalment of an instrument which would enable fairer burden sharing and therefore improve the treatment of asylum seeker in Europe, especially but not exclusively in relation to the principle of non-refoulement. Altogether, this signals a non-acceptance of the principle of non-refoulement clearly inspired by right-wing populistic attitudes.

3.3.1.2. CEAS Reform; Dublin IV

After breakdown of the Dublin III regulation during the unprecedented influx of refugees, it was acknowledged by the European Commission that there was a need for a reform[196]; 'there

[192] *Murray and Longo* (n 162).
[193] The Economist 'Viktor Orban fails to win his referendum against migrants' *The Economist* (3 October 2016). <https://www.economist.com/europe/2016/10/03/viktor-orban-fails-to-win-his-referendum-against-migrants> accessed 7 June 2020.
[194] Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v Council [6 September 2017].
[195] *Murray and Longo* (n 162).416.
[196] Augustin José Menendez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the

was the need to resolve 'the weaknesses in the design and implementation of the Dublin system, which had been exposed by the unprecedented movement of persons seeking international protection to the EU in 2015'.[197] Although revising the Dublin regulation was only one part of the proposed CEAS reform, it was at heart of the reform proposal.[198] As indicated by Tubakovic, the Dublin regulation is mainly problematic as it did not take into account that since its instalment, the context surrounding it has changed.[199] Not only did the EU expand to more than twice its original size in terms of member states since 1990, the relatively recent outbreak of a variety of violent conflicts led to the unprecedented influx of migrants.

Dublin IV would, in contrast to Dublin III, include three main changes.[200] The first change includes a sanctioning mechanism which places an asylum claim under an accelerated procedure when the applicant is situated in a country through secondary movement. "This new element is aimed at ensuring 'an orderly management of flows, to facilitate the determination of the Member State responsible, and to prevent secondary movement."[201] The second change refers to a rule which is added which strengthens the agreement that only one member state will be responsible for an asylum application. The third change includes a mechanism of relocation which is initiated once member states receives over 150% of its fair share of asylum applications. This mechanism would function in a similar way as the abovementioned temporary relocation scheme.

Tubakovic argues that the relocation might be a step in the right direction but is critical of the recasted Dublin regulation as it fails to address some substantial challenges that coast state face.[202] Furthermore, the Dublin IV regulation includes exceptions from receiving relocated asylum seekers as member states can refuse relocation on the basis of national and public security concerns or can pay 250,000 euros to the member state from which the asylum seeker is relocated from. Two important questions remain here. Firstly, states already refuse asylum seekers on the basis of national and security concerns, especially right-wing populist states

Structural Crisis of European Integration' (2016) 22;4 European Law Journal, 388.

[197] European Commission Communication 2016/197 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' (6 April 2016).

[198] Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives: EU Refugee Policies in Times of Crisis' (2018) 56 JCMS: Journal of Common Market Studies 3.

[199] Tamara Tubakovic, *A Dublin IV Recast: A New and Improved System?'* EGMONT Royal Institute for International Relations (2017).

[200] Ibid.;European Commission Communication 2016/197 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' (6 April 2016);

[201] *Tubakovic* (n 199) 4.

[202] Ibid.

which see asylum seekers as a threat to the homogenous (religious) state identity, so based on which criteria is a 'threat to national and public security concerns' a valid reason for the refusal of asylum seekers? Secondly, doesn't the 'pay not to play' opt-out option disables a genuine burden sharing mechanism, as it incentivises richer states to pay which leads to poorer states to host more asylum seekers?[203]

Regardless of the implications of a relocation mechanism, the likelihood of support by the EU Member States is small. Within the new Dublin IV proposal, a mechanism similar to the temporary relocation scheme is included, it this is undoubtedly again a highly controversial issue. As elaborated upon above, the temporary scheme was partly rejected and not complied with, inter alia on the basis of right-wing populist arguments. For this reason, a similar but more permanent relocation scheme is not likely to be a popular item. The Dublin reform is part of a wider CEAS reform and is therefore likely to take a lot of time before being put into practice. As derived from interviews, officials of EU Member States have already indicated that on such issues extensive and prolonged negotiations are expected.[204] Up until now, the last actions regarding the CEAS reform has been taken place in June 2018, when the Council took stock of progress.[205]

3.3.2. External Border Management and Outsourcing

3.3.2.1. Hungarian, Polish, Czech and Slovenian Borders

The closing of national borders is of course one of the most straightforward ways to keep migrants out. It comes therefore not as a surprise that various countries, countries which are known for their right-wing populistic tendencies, employ this strategy. As argued in chapter one, the refusal of asylum claimants at the border as derived from the Asylum Procedure Directive indicates that the refusal at the border, constitutes a violation of the principle of non-refoulement.[206] Namely, without inquiry into the reasons of the asylum seeker and taking into account his or her asylum claim, a country can not send back an asylum claimant as he or she could be subject to refoulement.

[203] Eiko Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56 JCMS: Journal of Common Market Studies 63.
[204] *Niemann and Zaun* (n 198).
[205] Council of the European Union 'Timeline: Reform of EU asylum rules' <https://www.consilium.europa.eu/en/policies/ceas-reform/ceas-reform-timeline/> Accessed June 7 2020
[206] *Asylum Procedure Directive* (n 45).

The Report 'Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States' by the Hungarian Helsinki Committee confirms that the principle of non-refoulement is violated at the border in a variety of instances.[207] In the Czech Republic, guards refused to register asylum claims at the Prague Airport, at the Eastern border of Poland and in Slovenia in 2016, there were attempts to adopt stricter border and asylum procedure measures which were add odds with the principle of non-refoulement. Furthermore, at the height of the mass influx of refugees, Hungary built a high-tech razor wire fence at the border with Serbia, redirecting the refugee flow elsewhere.[208] It has also been reported that Hungary only let in two asylum seekers a day.[209] Poland even went as far as to adopt strict immigration policies which 'almost completely limited the influx to Christians', as they allegedly would be more culturally similar to Poland and therefore would not threaten the countries stability.[210]

It is clear that through the closing of borders or through strict entry policies, and with that the refusal of most asylum seekers into the country, the acceptance of the principle of non-refoulement is curtailed through a narrative of right-wing populism.

3.3.2.2. Italy at Sea

With regard to Italy, it is important to specify that it is through the coalition of the two biggest parties, the right-wing Lega party - before 2018 known as the Lega Nord - and the populistic Five-Star Movement that the principle of non-refoulement is threatened. Here again, it will be substantiated that the consolidation of populism with right-wing tendencies, proofs to be a lethal combination for the protection of refugees and the principle of non-refoulement. In the latest general elections in 2018, both the Five Star Movement and the Lega Party came out as the major parties through which populist and far-right forces were 'propelled'[211] and it was viewed

[207] Hungarian Helsinki Committee, *Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States* (2017) < https://www.helsinki.hu/wp-content/uploads/pushed_back.pdf> Accessed 7 June 2020.

[208] *Murray and Longo* (n 162) 417; Marton Dunai and Anita Komuves, 'Hungary will defend EU against migrant wave, Orban says' *Reuters* (4 March 2020) <https://www.reuters.com/article/us-europe-migrants-centraleurope/hungary-will-defend-eu-against-migrant-wave-orban-says-idUSKBN20R1H0> Accessed 7 June 2020.

[209] Soraya Sarhaddi Nelson, 'Hungary Reduces Number of Asylum Seekers It Will Admit to 2 Per Day' *NPR* (3 February 2018) < https://www.npr.org/sections/parallels/2018/02/03/582800740/hungary-reduces-number-of-asylum-seekers-it-will-admit-to-2-per-day?t=1591185957324 > Accessed 7 June 2020.

[210] Marc Santora, 'Poland Bashes Immigrants, but Quietly Takes Christian Ones', *New York Times* (26 March 2019). < https://www.nytimes.com/2019/03/26/world/europe/immigration-poland-ukraine-christian.html> Accessed 7 June 2020.

[211] Donatienne Ruy, 'Italian Election Results' (Center For Strategic & International Studies (CSIS), March 7 2018) <https://www.csis.org/blogs/european-election-watch/italian-elections-results> Accessed 7 June 2020.

that 'the gains for populist represent a political earthquake that will send shockwaves to the EU in Brussels'[212]. The parties gained 32% of the votes and 133 seats and 17.5% of the votes and 73 seats respectively. It has been argued that the Five Star Movement itself is ambiguous with regard to migration policy as it informed by sovereigntist arguments rather than nationalists[213] and its Euroscepticism is not as much ideologically motivated, but rather strategically.[214] However, founder and leader of the Five Star Movement until 2017, Beppe Grillo has in the past expressed a link between migration and terrorism[215], something common to right-wing populism as explained in chapter two. However, regardless of The Five Star Movement's stance on migration, through its coalition with the Lega party the consequences of policy making on immigration issues are far reaching as the Lega party is identified as xenophobic, nationalistic and sometimes even populist[216]. Hence, the combination of an anti-establishment populist party and right-wing party resulted in Italy's strict migration policy and a threat to the principle of non-refoulement. Nevertheless, the strategic use of strict attitudes towards migration after the mass influx of refugees in 2015, can be argued to have influenced the political gains of right-wing populism and coalitions which in themselves reinforces these negatively influence migration policies. The negative influence of Italy's right-wing populistic fuelled policy towards the principle of non-refoulement can be exemplified by two developments. Firstly, the refusal of ships carrying rescued migrants into the Italian harbours, and secondly the 2017 Memorandum of Understanding between Italy and Libya.

In a variety of instances, Italy has been criticised for refusing migrant rescue ships entry into Italian harbours. In 2008, two smaller fishing vessels from Tunisia had rescued migrants at sea after which the crew members were tried for human trafficking when they disembarked the migrants to Lampedusa after the Italian authorities refused to give them permission to

[212] BBC, 'Italy election: Populist Five Star and League vie for power *BBC* (March 5 2018) <https://www.bbc.com/news/world-europe-43272700> Accessed 7 June 2020
[213] Davide Vittori, 'Podemos and the Five-Star Movement: Populist, Nationalist or What?' (2017) 9 Contemporary Italian Politics 142.
[214] Paolo Franzosi, Francesco Marone and Eugenio Salvati, 'Populism and Euroscepticism in the Italian Five Star Movement' (2015) 50 The International Spectator 109.
[215] The Huffington Post, 'Beppe Grillo calls for 4 measures to protect Italy from the "comings and goings of terrorists". Immediately off the irregular ones and stop in Schengen' *The Huffington Post* (December 23 2016). <https://www.huffingtonpost.it/2016/12/23/grillo-terrorismo-migrant_n_13813082.html> Accessed 7 June 2020.
[216] Gabriele Abbondanza and Francesco Bailo, 'The Electoral Payoff of Immigration Flows for Anti-Immigration Parties: The Case of Italy's Lega Nord' (2018) 17 European Political Science 378.; Council of Europe, 'European Commission against Racism and Intolerance Second Report on Italy' (2001) para 73 <https://rm.coe.int/second-report-on-italy/16808b582e> Accessed 7 June 2020

disembark.[217] Similarly, in 2009, a Turkish cargo ship carrying 154 rescued persons was refused entry to Lampedusa and the port of Malta and were only disembarked in Italy once the European Commission had intervened.[218] In 2019, another humanitarian aid ship with 64 rescued migrants on board was refused entry into Italy after which Interior Minister Salvini stated 'that Italy would not accept the migrants and that since it was a German ship it should "go to Hamburg".[219] This was not the only rescue boat that was refused entry by Salvini.[220] Hence the refusal of rescue ships into Italian harbours has happened regularly in the past and still occurs. As illustrated by the extraterritorial applicability of the principle of non-refoulement explained in chapter one, states should 'abide at all times with the principle of non-refoulement, including on the high seas and at borders'. Hence, the refusal of Italy to let rescue ships into their harbour can be argued to signal non-acceptance of the principle of non-refoulement. In 2017, Luigi di Maio, a prominent partisan of the Five Star Movement, urged for "an immediate stop to the sea-taxi service". Furthermore, although denying that it would not question the law of the sea and international treaties, then interior Minister Marco Minniti stated that "there must be find a balance between their (migrants) rights and those of the country that host them"[221], signalling a trade-off between the widely recognised rights of migrants– such as the principle of non-refoulement – and the sovereignty of Italy. Illustrated by this statement, is again the us versus them dichotomy employed by right-wing populist in relation to migrants. In June 2018, the government based on the coalition between the Five Star Movement and the Northern League decided again to close Italian ports for rescue ships. Together with measures employed by the Italian government to prevent NGOs to operate at sea, a spike in deaths occurring in the Mediterranean was observed as a consequence[222].

---

[217] Kristof Gombeer, 'Human Right adrift? Enabling the disembarkation of Migrants to a place of safety in the Mediterranean' (2017). Pre-Proof Draft of forthcoming article in Volume X of the Irish Yearbook of International Law.

[218] Ibid.

[219]The Guardian, 'Migrant ship with 64 people denied safe port by Italy and Malta' *The Guardian* (4 April 2019) <https://www.theguardian.com/world/2019/apr/04/migrant-ship-storm-64-people-denied-safe-port-harbour-italy-malta> Accessed 7 June 2020

[220] The Local 'Italy refuses entry to another migrant rescue ship', *The Local* (28 August 2019) <https://www.thelocal.it/20190828/italy-refuses-to-allow-another-ship-carrying-migrants-to-enter> Accessed 7 June 2020; Billy Perrigo, 'The Far Right Lost Power in Italy Two Month Ago. So Why are Migrant Rescue Boats Still Being Refused Entry?' *Time Magazine* (29 October 2019)

[221]Valentina Za and Andrew Bolton, 'Italian prosecutors widen investigation to include MSF over migrant rescues: source' *Reuters* (5 August 2017) < https://www.reuters.com/article/us-italy-migrants-medecins-sans-frontier-idUSKBN1AL0HZ?il=0> Accessed 7 June 2020.

[222] Mattea Villa, Rob Gruijters and Elias Steinhilper, 'Outsourcing European border control: Recent trends in departures, deaths and search and rescue activities in the central Mediterranean' *Faculty of Law of the University of Oxford* (11 September 2018)

The Memorandum of Understanding of 2017 between Italy and Libya also signals a non-acceptance of the principle of non-refoulement by the Italian authorities. This Memorandum – formally referred to as "Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic" – was an attempt to counter the arrival of migrants at the Italian shore as the Italian authorities would assist the Libyan Coast Guard in their duties in order for the Libyan Coast Guard to return migrants back to Libya.[223] The Memorandum is a renewed version of the Treaty of Friendship, Partnership and Cooperation between Italy and Libya which was signed in 2008[224] and which has been criticised by various NGO's such as Human Rights Watch and Amnesty International. According to Human Rights Watch "Italy violates the international legal principle of non-refoulement when it interdicts boats on the high seas and pushes them back to Libya with no screening whatsoever".[225] Through various interviews with migrants who were send back to Libya by the Italian Authorities, Human Rights Watch reports that Lybia's record on asylum law and procedures falling short; Asylum seekers are put in jail upon arrival and/or suffer from mistreatment and detention centres are overcrowded. Moreover, UNHCR interviews over 82 people which were not only 'just' send back to Libya by the Italian authorities in 2009, but also suffered from inhuman treatment by the Italian authorities themselves as they were not offered food, their documents were confiscated and not returned and a source even stated that the Italian naval personal even used electric shock devices to get the migrants off the boat.[226] Shockingly, it can not only be concluded that the agreement between Italy and Libya violated the principle of non-refoulement – the return of asylum

<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/09/outsourcing> Accessed 7 June 2020.

[223] Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic 2017. <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> Accessed 8 June 2020.

[224] Natalino Ronzitti, 'The Treaty on Frienship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1 Bulletin of Italian Politics, 125.

[225] Human Rights Watch, 'Pushed Back, Pushed Around; Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers', (Report) (2009) <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> Accessed 8 June 2020; S.S., Italy and Amnesty International and Human Rights Watch, 'Written Submissions on Behalf of the Interveners, App no 21660/18'. <https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf > Accessed 8 June 2020.

[226] UNHCR, 'UNHCR interviews asylum seekers pushed back to Libya' *UNHCR* (14 July 2009) < https://www.unhcr.org/news/briefing/2009/7/4a5c638b6/unhcr-interviews-asylum-seekers-pushed-libya.html> Accessed 8 June 2020.

seekers to a place in which they are in danger – but the Italian authorities themselves also seem involved with inhuman and degrading treatment of asylum seekers. Furthermore, Amnesty International argues that by renewing the Memorandum in 2020, Italy is complicit in the torture of migrants and refugees.[227]

It should be acknowledged that Italy as coastal state, deals with a disproportionate percentage of incoming migrants. Although Italy's reaction both in relation to access to their harbours and their agreement with Libya violates the principle of non-refoulement and is should in no way be approved off, it does lays bare the need for a different kind of responsibility sharing within the EU, as the pressure of EU states to deal with an unprecedented influx of migrants is exemplary for what the EU as organisation should provide answers to. As argued by Louise Guillaumat, the deputy director of an NGO operating a rescue ship "When a relocation agreement is settled, Italy is willing to open its ports".[228] As argued by Gombeer, a port sharing scheme can provide an outcome as long as the disembarkation does not indicate the full responsibility for processing the asylum applications.[229] Hence, the attitude of Italy might not only be exclusively ascribed to right-wing populistic sentiments, as Italy might change its attitude upon a fairer system of responsibility sharing. Furthermore, it must be noted that the coalition between the Five Star Movement and the Lega failed in august 2019, when the Lega stated to no longer support the government.[230] Hence, it is rather unclear to what extend the Five Star Movement as a left-wing populist party will be influenced or reconciliated with right-wing tendencies, and what this will hold for the future of immigration policy and the principle of non-refoulement. It is clear however, that Italy illustrates how right-wing populist tendencies negatively influence migration policies and acceptance of the principle of non-refoulement.

---

[227] Amnesty International, 'Libya: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees' (Report) (20 January 2020) <https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/> Accessed 8 June 2020.

[228] Billy Perrigo, 'The Far Right Lost Power in Italy Two Months Ago. So Why are Migrant Rescue Boats Still Being Refused Entry? *Time Magazine* (29 October 2019) <https://time.com/5713279/italy-migrant-rescue-boats/> Accessed 7 June 2020.

[229] *Gombeer* (n 217).

[230] Angela Giuffrida, 'Italian PM resigns with attack on 'opportunist' Salvini, *the Guardian* (20 August 2019) <https://www.theguardian.com/world/2019/aug/20/italian-pm-expected-resign-giuseppe-conte> Accessed 8 June 2020; The Economist, 'Italy's Five Star Movement has a deal to form a new government: a new collation leaves the far-right Northern League in the cold', *The Economist (*29 August 2019) . <https://www.economist.com/europe/2019/08/29/italys-five-star-movement-has-a-deal-to-form-a-new-government> Accessed 8 June 2020.

3.3.3. Illiberalism in Poland and Hungary

As discussed in section 2.4., through its belief in an unrestrained and homogenous general will, populism tends to reject the constitutional pillar of democracy which provides safeguards stooled upon equality and against arbitrary rule. In doing so, populism tends to dismiss institutions which consolidate these constitutional safeguards, as in their view they constraint the general will. The constitutional pillar however, enables the everchanging democratic environment to be based on fundamental values which guide the political process.

One specific element of the constitutional pillar of democracy can be said to be the rule of law. The rule of law is a widely contested concept and comprises the idea that actions should be taken in accordance with formal rules. Hence, the rule of law protects people against arbitrary rule. In further formulating the concept of the rule of law, Konstadinides distinguishes between a thin and a thick approach of the rule of law.[231] A thin approach to the rule of law refers to the compliance of law with formal rules, and focuses on the procedures in which the rules are formulates. The independence of the judiciary branch of government is central to this notion. The thick approach, adopted mainly in the second half of the twentieth century, extends the rule of law by adding content to it. Hence the rule of law relates to principles of equality, rationality fairness etc. The EU has increasingly adhered to the thick approach, which contributes to the promotion of fundamental values within the EU.[232]

In reference to the Copenhagen Criteria[233] and in article 2 of the Treaty of the European Union, the EU mentions the rule of law as a founding value:

"The Union 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." [234]

The rule of law is paramount for the functioning of the EU for multiple reason; 1) mutual trust and therefore the smooth cooperation between member states depends on the rule of law, 2) the

[231] Theodore Konstadinides '*The Rule of Law in the European Union: The Internal Dimension*' (2017) Bloomsbury Publishing 45.
[232] Ibid.
[233] Copenhagen European Council, 'Presidency Conclusions' (1993) <https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> Accessed 8 June 2020.
[234] Consolidated Version of the Treaty of the European Union [2008] OJ C115/13.

EU has a duty to protect all EU citizens against arbitrary rule and 3) the rule of law reinforces credibility of the EU to the outside world.[235] Especially the second line of reasoning is central to this thesis. Although asylum seekers are not EU citizens upon arrival (and might not become one depending on their application), the EU holds a duty to protect them in accordance with a variety of legal instruments mentioned in chapter one. Hence, the EU as supranational body has a duty to act upon the breach of the rule of law by its member states in order to protect asylum seekers residing within the EU.

A link is observed between a decline in democracy and increasing populism in Eastern Central Europe.[236] Exemplary for this are Hungary and Poland, which have been widely criticised for their illiberal tendencies and their breach with the rule of law over the last few years. According to the media, the developments of Hungary and Poland are seen as parallel to one another.[237] As argued by Moffit, parties such as PiS and Fidesz have not only employed populism as a political style, but have actually altered the foundations of constitutional democracy. [238] These parties do so by provoking xenophobia and internal polarization as they argue that they give voice to the true representation of the people based on a shared cultural identity.[239] A multitude of actions that were taken by Hungary and Poland were viewed as being add odds with the rule of law[240]; Both Poland and Hungary implemented sudden retirement reforms which threatened the independence of the judicial branch. Furthermore, members of the European parliament have again recently expressed concerns about *inter alia*, judicial independence, freedom of expression and the situation for asylum seekers in Hungary.[241]

With regard to the reaction of the EU, the Venice Commission implied that the rule of law was no longer upheld in Poland in 2016, although it continued a more polite discussion with

[235] Carlos Closa and Dimitry Kochenov 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options. *Strengthening the Rule of Law in Europe: From Common Concept to Mechanisms of Implementation'* (2016) Oxford Hart Publishing 173.
[236] Attila Ágh, 'Increasing EU populism as a megatrend in East Central Europe: From façade democracies to velvet dictatorships' (2017) 5 Baltic Journal of Political Science 21.
[237] Henry Foy and Neil Buckley, 'Orban and Kaczynski vow "cultural counter-revolution" to reform EU'. *Financial Times* (7 September 2016) <http://www.ft.com/cms/s/0/e825f7f4-74a3-11e6-bf48-b372cdb1043a.html#axzz4Jed295EY> (Accessed 8 June 2020).
[238] Benjamin Moffit, *The global rise of populism: performance, political style and representation* (2016 Stanford University Press).
[239] Müller (n 118); Walter Rech, 'Some Remarks on the EU's Action on the Erosion of the Rule of Law in Poland and Hungary' (2018) 26 Journal of Contemporary European Studies 334.
[240] *Rech* (n 239).
[241] European Parliament 'Rule of law in Poland and Hungary has worsened' News *European Parliament* (16 January 2020) <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened> Accessed 8 June 2020.

Hungary.[242] Later on, infringement procedures were initiated by the European Commission against Poland in 2017[243] and later by the European Parliament against Hungary in 2018.[244] In July 2019, the European Commission has also referred Hungary to the Court of Justice on the basis a new Hungary legislation on the criminalisation of support to asylum applicants and the introduction of new non-admissibility grounds for asylum applications.[245] Hence, it is clear to see how populism poses a serious challenge to the rule of law in the EU[246] and therefore to its migration policies. Nevertheless, there is also criticism on whether the EUs reaction is both effective and fair.[247] Options for EU reactions to illiberalism will be further explored in chapter four.

Abovementioned proofs that countries ruled by populism, such as Hungary and Poland, increasingly turn illiberal through the adoption of measures that allegedly give power back to the people but undermine the rule of law and its accompanying values. Of course, the problem of illiberalism is widespread to all policy domains within the Member States and the EU and is not just focused on migration policies. However, what is important to note is that once the rule of law is endangered, safeguards such as minority protection, equality etc – safeguards which are inherent to a fair process for asylum seekers and the principle of non-refoulement – are at stake. In sum, illiberalism is a problem that is not merely related to refugee law, but it does contribute to the non-acceptance of the principle of non-refoulement as the rule of law is no longer upheld and hence arbitrary rule is commonplace as nothing stands in the way of unfair treatment of asylum seekers. Therefore, developments such as those in Poland and Hungary should be countered, as otherwise refugee law – and with that the principle of non-refoulement – will no longer hold a customary status.

3.4. Conclusion

In conclusion, a variety of developments within the EU have signalled the non-acceptance of the principle of non-refoulement by countries in which populist are in power. The main countries identified as currently lead by populist are Hungary, Poland, the Czech Republic,

[242] *Rech* (n 239).
[243] Case C-192/18 *Commission v Poland [2018] ECJ*.
[244] European Parliament Resolution 2017/2131 (15 November 2017)
<(https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf> Accessed 8 June 2020.
[245] European Commission, 'European Commission takes Hungary to Court for Criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones' *European Commission* (25 July 2019)
< https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260 > Accessed June 2020.
[246] *Agh* (n 236).
[247] *Rech* (n 239).

Slovakia, and Italy. Through a variety of instances, these countries have signalled non-acceptance of the principle of non-refoulement. Firstly, burden initiatives which would prevent refoulement within the EU were rejected by the Visegrad countries. Secondly, border management by Hungary, Poland and the Czech Republic were clearly at odds with the principle of non-refoulement. Furthermore, Italy's attitude towards rescue ships and its agreement with Libya also clearly demonstrated non-acceptance of the principle of non-refoulement. Lastly, Hungarian and Polish tendencies towards illiberalism threaten the principle of non-refoulement, as the rule of law in general is continuously violated.

4. EU POLICY IN LIGHT OF POPULISM AND EU-SCEPTICISM

4.1. Introduction

Through a description of the principle of non-refoulement as customary law, characteristics of right-wing populism and current developments within the EU as described in the previous chapters, it can be concluded that right-wing populism poses a genuine threat to the principle of non-refoulement. In this last chapter I will briefly provide some suggestion for approaches regarding the reaction of the EU to right-wing populism in relation to its influence on refugee law and its crippling effect on EU migration policy-making. Suggestions as such that are provided in this chapter are 1) the renunciation of the discourse of 'crisis', 2) internal and external policy consistency, 3) continuous debate on measures of responsibility sharing, 4) promoting a shared identity and the public sphere in the EU 5) adherence to the rule of law and 6) long term education. It should be stressed that these suggestions are non-exhaustive and encompass – due to the scope of this thesis – only a concise overview of viable options. Furthermore, is it especially in conjunction that the suggestions are expected to adequately deal with the threat that populism poses.

4.2. Altering the Crisis Narrative

Although the term 'refugee crisis' has been employed in the previous chapters, this has been done through the idea of a common understanding rather than acceptance of the term 'crisis'. As argued by socialist Encarnación Gutiérrez Rodriguez in the Guardian; "The concept of a "crisis" caused by the movement of people into the European continent has always been embedded in the Eurocentric way of seeing things. This rupture brought about by the arrival of the "other" creates anxiety and fear in the European mind, thus the need to create never ending irrational, ideological justifications for that anxiety and fear."[248] Here however, I would like to challenge this conceptual framing and propose a more neutral discourse in relation to issues of migration for the reason mentioned in chapter two, section 2.6.2; populism utilizes the prolonged perception of a crisis. As argued by Moffit, crisis is a core feature of populism and assist in strengthening the us versus them dichotomy of populism and the demonizing of certain groups, which are both the asylum seekers as the EU in case of mass influx of immigrants.[249] Hence, the continuous notion of a crisis reinforces the idea that asylum seekers impose an

[248] Hsiao-Hung Pai 'The refugee 'crisis' showed Europe's worst side to the world' *The Guardian* (2020) https://www.theguardian.com/commentisfree/2020/jan/01/refugee-crisis-europe-mediterranean-racism-incarceration Accessed 12 June 2020.
[249] *Moffit* (n 146).

inevitable danger to society, as the us versus them dichotomy is strengthened and prolonged. In order to strip populism from the strength it derives from the notion of a crisis, I here suggest that the term 'refugee crisis' should be reformulates as 'refugee challenge' in all EU law, policy, reports and other official publications. Exemplary for framing situations as a challenge rather than a crisis Merkel's 'Wir schaffen das'. Although it was criticized for neglecting certain sentiments in Germany's society, it allowed for a hopeful and rational voice in contrast to spreading the idea of an imminent threat or danger. Similarly, the rephrasing of 'crisis' to 'challenge' acknowledges that mass influx of migrants and/or refugees poses certain serious challenges for the EU and its member states, but without excessively exaggerating certain developments. Furthermore, this idea of a neutral discourse can be extended to the concept of 'burden sharing'. As it is fair to acknowledge that receiving asylum seekers into one's nation brings along certain (financial) burdens, especially in large quantities, it reinstates that influx of refugees as something predominantly negative rather than something that has to be dealt with in accordance with international agreements. Hence, in my view, modification of 'burden sharing' into 'responsibility sharing' in all EU publications would further contribute to diminish the crisis narrative employed by right-wing populist in the EU.

4.3. Internal and External Policy Consistency

As already argued in chapter one, the EU's migration policy, specifically in relation to the principle of non-refoulement, is not always as clear and consistent as one would hope. Hence, in order to prevent the right-wing populist narrative to exploit the space that is left by inconsistent interpretations of the principle of non-refoulement and surrounding definitions and interpretations, the EU should both emphasize the centrality and of the principle of non-refoulement in its migration policies and should adhere to the principle of non-refoulement more rigorously in both its external and internal policies.

One suggestion in relation to the EU's internal policy and non-refoulement is the abolishment of the concept of a safe third country. As argued by Lax and in reference to the M.M.S. case: "the principle of mutual trust can no longer be considered to provide per se a sufficient basis for intra-EU transfers of asylum seekers, the practical implementation of protection standards by the Member State concerned must be verified first."[250] Both in light of overburdened coastal states and in light of increasing right-wing populism, which as previously argues often results

[250] *Lax* (n 49) 29.

in the adoption of measures add odds with the principle of non-refoulement, the protection standards for asylum seekers in the receiving country should be verified before intra-transfers in the EU can occur. Only in this way can the EU can safeguard the principle of non-refoulement within its borders. A critical note regarding Lax's argumentation, is that the abolishment of the safe third country concept can possibly result in a race to the bottom regarding the treatment of asylum seekers and refugees; without the safe third country concept, states which are characterized by right-wing populism are likely to 'worsen' the circumstances for refugees in order circumvent their responsibility towards them. Hence, abolishment of the safe-third country concept might be preferred by right-wing populists, because it strips them from their responsibility towards refugees. Nevertheless, if protecting a refugee from refoulement will be recognized as paramount within EU migration policy – as it should be –, it should be acknowledged that some countries within the EU cannot be viewed as safe. It would be unethical and irresponsible for the EU to argue that all EU countries are safe-third countries, while knowing that some are not. Therefore, the automatic presumption that all EU countries are safe-third countries, should be abolished while EU countries in which the standards for refugee protection are lacking should be supported and motivated to improve these.

Another suggestion relating to the EU's internal policy is providing guiding definitions of terrorism and terrorist organisations. As a widely recognised definition of terrorism is yet to be found, it is left to the states to determine which organisation is a terrorist organisation or not.[251] In leaving this scrutiny up to the states, the possibility of expulsion of asylum seekers on the basis of the exclusionary articles of the principle of non-refoulement can be exploited, especially in countries where right-wing populists are in power and where the equation of the refugee with terrorism is common. The EU has already issued a list of organisations which it recognizes as terroristic.[252] Nevertheless, making this list binding in relation to migration policy in accordance with the existing listing procedure[253] is desirable. Namely, in doing so, it will be prevented that right-wing populistic states will relatively easily relate an asylum seeker to a terrorist organisation, which can be the basis for expulsion. In this way, terrorism is combatted without politicizing the matter. Hence, in order to limit the strategy of right-wing populists

[251] *Bruin and Wouters* (n 22).
[252] Council Decision (CFSP) 2020/20 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2019/1341.
[253] Martin Wählisch, 'EU Terrorist Listing. An Overview about Listing and Delisting Procedures' (2010) Berghof Peace Report 1.

which associates refugees with terrorism too easily - something that provide grounds of exclusion of the refugee - the EU should continue to provide an updated list of terrorist organisations and should make this list binding.

A suggestion for the EU's policy is related to the centrality of the principle of non-refoulement in the EU's external policy. It is widely argued by scholars that the EU-Turkey deal violates the principle of non-refoulement, as Turkey cannot be seen as a safe third country.[254] Hence, the EU allows for the return of asylum seekers to a place where their freedom and lives are at threat. The EU should steer clear from inconsistencies and hypocrisy in both its official and non-official agreements and should acknowledge that the outsourcing of refugee flows does not result in the EU not carrying responsibility for the wellbeing of asylum seekers.

In sum, it is up to the EU to emphasize the importance of the principle of non-refoulement and to promote adherence to it, both in its internal as external policy. If not, the EU continues to lose credibility, which provides fertile grounds for exploitation of unclear interpretations of the principle of non-refoulement and international refugee law by right-wing populists. Furthermore, inconsistencies in the applying fundamental rights act as a restrain for the EU in becoming a true promoter of human rights.

4.4. Responsibility Sharing

There is no doubt that 'responsibility sharing', both geographically and financially is important in all EU policy levels. The EU, intended as a project of economic integration in order to prevent a third world war, is stooled upon cooperation and its modern objective can be said to provide an establishment which deals with problems that transcends national borders. This is true in the case of financial crises, the current Corona epidemic and climate change. It comes as no surprise then, that in case of unprecedented migration flows, only through cooperation there can be expected to be found a solution. But how is this to be achieved in times of political stalemates, when right-wing populistic countries deliberately refuse to cooperate with agreements which have the potential to enable this responsibility sharing?

First and foremost, the challenges of the current EU acquis in relation to immigration and asylum should be identified. As argued by Hathaway upon acknowledging the failure of the

[254] Jenny Poon, 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' 1(3) International Law 1195.

asylum system, "the failure to explore change would be unethical"[255]. Although Hathaway referred to the asylum system prior to 1997, it is clear that in light of the unprecedented influx of refugees in 2015, which laid bare the shortcomings of the EU immigration acquis, this moral imperative to reform the current asylum acquis, and in specific the Dublin III regulation, is still very much applicable. Regardless of resistance by right-wing populist countries, the EU has to continue to look for a fair system of responsibility sharing. In doing so however, the arguments employed by right-wing populism should not just be condemned and ignored as they contribute to blocking necessary reforms.

What could help in resuming the negotiations on EU migration reform is the acknowledgement that refugee protection, first and foremost is of a temporary nature. As stated by Hathaway: "Temporary protection, leading in most cases to repatriation, makes clear that refugee law is a form of human rights protection, and not a "back door" to permanent immigration. It is concerned to safeguard human dignity only until and unless the home state is able to effectively resume its primary duty of protection. If temporary protection is conceived in a rights-regarding and solution-oriented manner, most refugees will be able to return home."[256] Nevertheless, refugees flows are often not of a temporary nature, as they derive from long-term instability in a variety of countries, of which Syria and Palestine are examples. For this reason, although in essence refugee protection is temporary, it often leads to long-term obligations of the refugee receiving state. However, it can be argued that refugee protection is sometimes automatically presumed to bring along these long-term obligations, as there is fear of long-term cultural alteration of the receiving state. Long term protection however, does not always have to be the case; as reported by the UNHCR, in 2019 5.6 million refugees returned to their home countries.[257] In recognizing that refugee protection in essence is temporary, the EU acknowledges and potentially takes away the worries of the right-wing populist, which is based on a fear of indefinite alteration to the (cultural) characteristics of the nation state.

Furthermore, the EU migration policy will always remain a contentious and highly politicized issues, as it directly relates to the sovereignty of the member states. Nevertheless, improvement of the acquis and continuous debate should not be avoided out of fear of a political stalemate.

[255] James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harv. Hum. Rts. J. 115, 151.
[256] Ibid 210.
[257] UNHCR 'Figures at Glance' *UNHCR* (2020) https://www.unhcr.org/figures-at-a-glance.html Accessed 7 July 2020.

Instead, the arguments addressed by right-wing populists should be acknowledged and a debate upon the relocation measure in Dublin III and its distribution key should be discussed. Are there ways in which the historical context of countries can be taken into account? Is it true that the stability of some countries is more affected than another upon certain influxes of migrants? And if certain rights within refugee law, such as the principle of non-refoulement, are non-negotiable, how do right-wing populism expect to circumvent this in the EU debate?

In sum, it should be acknowledged by both the EU as supranational institution and its member states that a sudden influx of immigrants is something that only can be dealt with at the EU level and that there is a moral imperative to reform the current EU migration acquis. Even though the member states are sometimes reluctant and try to circumvent their responsibilities towards refugees, the EU should continue to promote fundamental values and facilitate debate upon matters of immigration. In doing so, negotiations could not come to a halt simply because there is (fear of) a political stalemate and there should be space to address concerns in order to come to a fair and effective way of responsibility sharing. In relation to the creation of this space, the following section will provide more insights.

4.5. A Common European Identity and Endorsing the Public Sphere

Although populism should be seen as the threat it poses, Drago is optimistic and argues that the rise of populism will eventually save the EU, as it exposes a fundamental shortcoming of the EU; the non-existence of a European public sphere.[258] He argues that a public sphere will add to creating a European identity, which will transcend national identities which feed nativism and nationalism. Hence, the EU should not just project criticism on populist countries, but should also turn inwards in order to tackle the underlying causes of populism. This view is supported by Rech, who states that "the liberal and democratic project runs the risk of turning into its opposite if it promotes a dichotomic vision of the political world in which some actors pose as forces of the good without reflecting on their own biases and contradictions"[259].

Drago argues that populism originates from two theses. The first is the thesis of 'Globalization Losers', the idea that the EU is divided by countries who benefit from economic modernization and globalization, and those who don't. Hence, those countries who can't keep up with

[258] Alessandro Giuseppe Drago, 'Towards a New EU: Why Populism Can Save the European Union (2018) 12 (1) Review of European and Russian Studies 1.
[259] *Rech* (n 239) 335.

economic competition can't provide national solutions as they have lost their economic sovereignty due to globalization, which leads to growing dissatisfaction. This dissatisfaction is strongly channelled through right-wing populism, as the main supporters are those who have suffered the most from globalization.[260] In relation to the us versus them dichotomy employed by right-wing populism, immigration is often perceived as a cause of declining economic prosperity, and with that extending cultural arguments based on heterogeneity into the economic sphere.[261] The second thesis relates to the perceived democratic deficit of the EU. As explained in 2.2.3 and 2.4., the populist rhetoric promotes democracy through the idea of an unrestrained general will. It will come as no surprise that a perceived democratic deficit in an institute, results in non-acceptance of this institute. This democratic deficit is often perceived due to the infringement and power of the EU in national economic matters, as citizens have lost trust in whether their governments can deal with problems and engage in decision making.[262] Furthermore, due to the absence of any "real" opposition – such transnational social movements - within the EU, the inability of the European parliament to enable citizens to hold the EU accountable, and the increasing power of unelected experts of the European Commission and Central Bank, the democratic deficit might not just be perceived, but an actual reality.[263] A clear example of the increasing popularity of populism stemming from a democratic deficit is Italy's Five Star Movement, which is discussed in 3.3.2.2 and derived from protesting anti-austerity measures which were accepted by Mario Monti's unelected government which was supported by the EU.[264] As argued by Mouffe: "When democratic politics has lost its capacity to shape discussion about how we should organise our common life, and when it is limited to securing the necessary conditions for the smooth working of the market, the conditions are ripe for talented demagogues to articulate popular frustration".[265]

Both theses clearly relate to the Eurosceptic arguments provided by populist, as mentioned in section 2.6.3 and should inspire reactions to the upsurge of populism within the EU. First and foremost, the EU should not simply ignore or exclude arguments of populists in relation to the EU and should instead work on strengthening the public sphere and its common identity, which

[260] Anton Pelinka, 'Right wing Populism: Concept and Typology in Right-Wing Populism in Europe' *Politics and Discourse* (2013) Bloomsbury 3,11.
[261] Pappas Kreisi (n 102).
[262] European Commission 'Eurobarometer 83 "Public Opinion in the European Union."' (2015) http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_first_en.pdf Accessed 8 June 2020; *Drago* (n 258).
[263] *Drago* (n 258).
[264] Duncan McDonnell and Giuliana Bobba, 'Italy: a strong and enduring market for populism' *European populism in the shadow of the great recession* (2015), 163, 170.
[265] *Mouffe* (n 104) 155.

should be more based on fundamental values such as equality and liberalism rather than economic competition.[266] Although the EU over time has increasingly strengthened its fundamental rights regime, there is still much to be desired.[267] In order to (re)inforce and promote fundamental rights, the EU should implement more open channels for debate and dissent[268] regarding these rights and should end unpopular economic/political measures. In doing so, the foundations of right-wing populism – nationalism, nativism and xenophobia – are channelled and lose their strength and a common European identity is more likely to be formulated and adhered to. In relation to international refugee law and the principle of non-refoulement, this might result in the asylum seeker not be predominantly framed as a danger to (the economy of) the nation.

4.6. Adherence to the Rule of Law

One the one hand the underlying structures that enable populism to gain popularity - democratic deficit and continuous prioritization of the free market - should not be overlooked and worries of the right-wing populist should be acknowledged. On the other hand, the illiberal tendencies of populism should be taken seriously and should be condemned, as it erodes the foundations of constitutional democracy. The concept of the rule of law might contribute to an answer. As discussed in section 3.3.3., the rule of law comprises the idea that actions should be taken into account with formal rules, and is threatened by the populist idea of an unrestrained general will. Adherence to the rule of law is part of the EU's Copenhagen Criteria and functions as the glue between the EU member states, as little would remain from international cooperation if there is no common ground of principles one should adhere too. Furthermore, the rule of law is important as the EU has a duty to protect those against within the EU against arbitrary law.[269]

Upon breach with the rule of law by populist actors, the literature is divided on what course should be taken. Mouffe argues that strict moral condemnation will strengthen the us versus them dichotomy employed by populist and will therefore contribute to its popularity: 'as far right-wing populist parties are concerned, this strategy (moral condemnation) is generally

[266] Jürgen Habermas and Jacques Derrida, 'February 15, or what binds Europeans together: A plea for a common foreign policy, beginning in the core of Europe' (2003) 10(3) Constellations, 291, 295; Fontaine (2014 in Alessandro Giuseppe Drago (n 258).
[267] Allan Rosas 'The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?' (2017) 7 Przeglad Prawniczy Uniwersytety im. Adama Mickiewicza 7; Gráinne de Búrca, 'The Evolution of EU Human Rights Law' in P. Craig ad G de Búrca, *The Evolution of EU Law* (Oxford University Press 2011).
[268] *Drago* (m 258); Chantal Mouffe 'In defence of left-wing populism' *The Conversation* (29 April 2016) < https://theconversation.com/in-defence-of-left-wing-populism-55869> Accessed 8 June 2020.
[269] *Closa and Kochenov* (n 235).

counterproductive since, as we have seen, their appeal is often linked to their anti-establishment rhetoric, so their exclusion by the governing elites serves to reinforce their oppositional image.[270] Abts and Rummens however, argue the following:

> "Populist adhering to the populist logic no longer share the symbolic framework that defines the political stage for democratic political struggle…. Therefore, populist are no longer ordinary adversaries, but political enemies who hold an incompatible view of the symbolic structure of the locus of power itself. In these cases, the legitimation of populists by accepting them as equal democratic adversaries or by allowing them access to power constitutes a disavowal of the democratic logic and might, as a result, contribute to a corrosion of the democratic ethos of the people. Consequently, we believe that it is important that populist parties, to the extent that they are inimical to democracy, should be revealed as such, treated accordingly and, if necessary, isolated from power."[271]

In response to these contrasting views, I would here like to propose a compromise with regard to the EU's response in case of violation of the rule of law. It has been argued that the success of populist in power has only been temporarily so far.[272] Furthermore, some belief that by the actual instalment of populist in power, they lose their appeal.[273] Therefore, I would suggest not to isolate populism from power altogether. As argued in the previous sections, populism both reveals shortcomings of democratic societies while simultaneously threatening the democratic foundations. Excluding populist from the debate altogether will strengthen the populist appeal. Instead, showing the populist narrative shortcomings through nuanced debate and the continuous adherence to the rule of law within the institutes of the EU, will expose its flaws and hopefully will contribute to decreasing popularity.

So, what does both the inclusion and condemnation of populism mean on a practical level? Response by the EU to a breach with the rule of law can both comprise financial sanctions, following from article 260(1) and 260(2) TFEU[274] or the suspension of EU membership rights, following from article 7(3) TEU.[275] With regard to the former, the suspension of voting rights

[270] *Mouffe* (n 104) 59.
[271] *Abts and Rummens* (n 113) 422.
[272] *Greven (121).*
[273] *Mouffe* (n 104) 59.
[274] Consolidated versions of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[275] Consolidated Version of the Treaty of the European Union (TEU) [2008] OJ C115/13.

in the Council is a measure which can be applied. However, when applied, this would lead to an exclusion of the country in violation – in this context the populist country violating the rule of law – from the democratic debate. Hence, populist countries who argue in favour of more democracy, are excluded from it. Consequently, it is clear to see that the likelihood of such a country turning more against the EU is increasing. However, the populist countries which according to the European Court of Justice violate the rule of law should not 'get away with it' and should be restrained in their negative influence on constitutional democracy. Hence, the condemnation of populist countries in breach with the rule of law should not be penalized through a suspension of voting rights, but should instead encompass the immediate demand to adjust its non-democratic measures and financial penalties. This way, the countries are faced with continuous international scrutiny while simultaneously confronted with certain financial consequences which pose an incentive to alter undemocratic measures, without being excluded from the democratic debate on the EU level altogether.

4.7. Long-Term Education

As the right-wing populist reaction to migrants is one based on fear, as the asylum seeker is systematically seen as 'dangerous other' which poses a threat to the nation's culture rather than a person who is in dire need of protection, it is inevitably important that those initial fears should be curtailed. Hence, the EU should focus on funding projects on long-term education regarding themes such as cultural sensitivities, refugees and democracy. In practice, this could mean increased funding on Erasmus+ trainings, support regarding educational material or EU promotion activities for youngsters with a focus on these topics. In doing so, the EU will not only show that it acknowledges the existence of the worries and arguments of right-wing populism, it also promotes it fundamental values in accordance with Article 3 TEU[276] and actively tries to enable dialogue and take away fears. Interestingly, Hjerm[277] has found that "levels of nationalist sentiments as well as of xenophobia decrease with increasing levels of education, despite substantial differences between the educational systems in the countries." Hence, education from out the EU could be beneficial. How in specific and to what extent the EU can influence national education on these matters, is a discussion beyond the scope and academic field of this paper. However, it is important that the potential effects of long-term education on matters like nationalism, nativism and xenophobia should not be overlooked.

[276] Consolidated Version of the Treaty of the European Union (TEU) [2008] OJ C115/13.
[277] Mikael Hjerm, 'Education, xenophobia and nationalism: A comparative analysis' (2014) 27(1) Journal of Ethnic and Migration Studies 37, 37.

4.8. Conclusion

In conclusion, a variety of responses can be adopted by the EU in relation to the populist threat on refugee law, and in particular regarding the principle of non-refoulement. Firstly, the adoption of a more neutral discourse by the EU will strip the populist narrative from the strength it derives from the crisis rhetoric. Secondly, the internal and external policy consistency in relation to the principle of non-refoulement will prevent the populist narrative to exploit the space created by inconsistencies and will contribute to the EU as a credible defendant of fundamental rights. Thirdly, the acknowledgement of shortcomings of the EU acquis in relation to immigration and attempts to reform with a focus on increased responsibility sharing should be continued. Fourthly, the EU should strengthen its common identity and public sphere in order to diminish sentiments of nationalism, nativism and xenophobia. Fifthly, the rule of law should be adhered to, although the EU should steer clear from suspending the voting rights in the Council. Lastly, education on matters regarding nationalism, nativism, xenophobia and the EU should be promoted as way to combat right-wing populist tendencies in the long run.

CONCLUDING REMARKS

The principle of non-refoulement is a central principle in refugee law and prohibits the forced direct or indirect removal of a refugee to a country or territory where he or she runs a risk of being exposed to persecution. This principle is embedded in a variety of legal instruments of relevance to the EU and can be said to hold a status of International Customary Law (ICL). The recognition of such a principle as ICL is based on the practice (objective) and acceptance (subjective) of the principle. The latter is also referred to as the opinio juris and is based inter alia upon official publications, government legal opinions, diplomatic correspondence, decisions of national courts, treaty provisions, conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference, and inaction (under certain circumstances).

The populist narrative is based upon a dichotomy of 'the people' versus 'the elite' and in combination with right wing sentiments of nationalism, nativism and crisis performance this has consequences for international refugee law. Currently, the right-wing populist narrative, once embedded in state practice, signals disapproval of the principle of non-refoulement on the basis that refugees pose an inherent threat to the nation and the EU policy functions as a restrained on the general will of the nations. The principle of non-refoulement is therefore add odds with the general will. Hence the 'acceptance of law' of the principle of non-refoulement is depreciated.

This non-acceptance of the principle of non-refoulement can be illustrated through the right-wing populist narrative employed by the governments of the Czech Republic, Slovakia, Poland, Hungary and Italy. Namely, this narrative incorporates both the framing of the refugee as danger to the nation which should be kept out and general reluctance against the EU and its accompanying migration policy. Furthermore, the notion of a crisis is used as a performative method to continuously frame refugees as a threat, as the 'us' versus 'them' dichotomy is prolonged and strengthened. This results in policies of closing borders, non-cooperation with the EU, bilateral agreements which involve indirect refoulement, and noncompliance with the rule of law which illustrate the deterioration of the opinio juris of the principle of non-refoulement.

It should be noted that this thesis is limited to the subjective limb of customary law, as the objective limb (practice of law) was beyond the scope of this paper to discuss. Hence, the

customary status is not completely overruled by populist sentiments just yet, as there are still legal safeguards in courts all over Europe which prohibit refoulement on a daily basis. Nevertheless, as acceptance of law is highly important in order for a legal principle to be widely implemented, the threat that populism poses should be taken very seriously. As discussed in the last chapter, this should be done through a neutral discourse, internal and external policy consistency, the avoidance of strong moral condemnation, internal reflection upon the EU as project of integration, adherence to the rule of law and long-term education. The EU should continue to hold on to fundamental principles, while simultaneously enabling the public sphere. Only through this, responsibility sharing during times with increasing refugee flows and the overall European integration project in relation to asylum is likely to contribute to making Europe a safe place for those who are in danger.

BIBLIOGRAPHY

A. JOURNAL ARTICLES/BOOKS

Abbondanza G. and Bailo F., 'The Electoral Payoff of Immigration Flows for Anti-Immigration Parties: The Case of Italy's Lega Nord' (2018) 17 European Political Science 378.

Abts and Rummens 'Populism versus democracy' (2007) 55.2 Political studies 405.

Ágh A., 'Increasing EU populism as a megatrend in East Central Europe: From façade democracies to velvet dictatorships' (2017) 5 Baltic Journal of Political Science 21.

Arrocha W., 'Combating Xenophobia and Hate Through Compassionate Migration: The Present Struggle of Irregular Migrants Escaping Fear and Extreme Poverty' (2019) 71 Crime, Law and Social Change 245, 249.

Batjes H., 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR reassesed' (2009) 22 Leiden Journal of International Law 583.

Bonikowski B., 'Ethno-nationalist populism and the mobilization of collective resentment (2017) 68 The British Journal of Sociology 181.

Bruin R. and Wouters K, 'Terrorism and the Non-derogability of Non-Refoulement' (2003) 15 Int'l J Refugee L 5.

Chan P. C. W., 'The protection of Refugees and Internally Displaced Persons: *Non-Refoulement* under Customary International Law' (2006) 10 *The International Journal of Human Rights* 231, 232.

Closa C. and Kochenov D., 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options. *Strengthening the Rule of Law in Europe: From Common Concept to Mechanisms of Implementation'* (2016) Oxford Hart Publishing 173.

D'Angelo E.F., 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 Vand J Transnat' l L 279.

De Búrca G., 'The Evolution of EU Human Rights Law' in P. Craig ad G de Búrca, *The Evolution of EU Law* (Oxford University Press 2011).

Drago A.G., 'Towards a New EU: Why Populism Can Save the European Union (2018) 12 (1) Review of European and Russian Studies 1.

Eiermann M., Mounk Y. and Gultchin L., 'Trend, Threats, and Future Prospects (2017) Tony Blair Institute for Global Change. Retrieved from <https://institute.global/policy/european-populism-trends-threats-and-future-prospects> on 15 May 2020.

Fenko A., Lovec M., Pozgan J. and Crncec D., 'Euroscepticism as a functional pretext for populism in central and eastern European states: the eurozone, migration and Ukrainian crisis' (2019) Special issue LVI Teorija in Praska 56.

Fitzmaurice P., 'Anniversary of the forgotten Convention: The 1933 Refugee Convention and the search for protection between the world wars' (Legal Aid Board) <https://www.legalaidboard.ie/en/about-the-board/press-publications/newsletters/anniversary-of-the-forgotten-convention-the-1933-refugee-convention-and-the-search-for-protection-between-the-world-wars.html> Accessed April 6 2020.

Franzosi P., Marone F. and Salvati E., 'Populism and Euroscepticism in the Italian Five Star Movement' (2015) 50 The International Spectator 109.

Freeden M., *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Oxford University Press 1996).

Gombeer K., 'Human Right adrift? Enabling the disembarkation of Migrants to a place of safety in the Mediterranean' (2017) Pre-Proof Draft of forthcoming article in Volume X of the Irish Yearbook of International Law.

Goodwin-Gill G.S. and McAdam J., *The Refugee in International Law* (Oxford University Press, 3rd ed, 2008).

Goodwin-Gill G.S., 'International Refugee Law: Where It Comes From, and Where It's Going…' (2017) 45 International Journal of Legal Information 24.

Greven T., 'The Rise of Right-Wing Populism in Europe and the United States; A Comparative Perspective' (2016) Friedricht Ebert Foundation, Washington DC Office.

Habermas J. and Derrida J., 'February 15, or what binds Europeans together: A plea for a common foreign policy, beginning in the core of Europe' (2003) 10(3) Constellations, 291.

Hansen R. and King D., 'Illiberalism and the New Politics of Asylum: Liberalism's Dark Side' (2000) 71 The Political Quarterly 396.

Hathaway J. C. and Neve A. R., 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harv. Hum. Rts. J. 115.

Hathaway J.C. and Gammeltoft-Hansen T., 'Non-Refoulement in a World of Cooperative Deterrence' [2014] SSRN Electronic Journal <https://www.ssrn.com/abstract=2479511> accessed 9 March 2020.

Hathaway, J.C. and Harvey C.J., 'Framing Refugee Protection in the New World Disorder' (2001) 34 Cornell Int'l LJ 257.

Hjerm M., 'Education, xenophobia and nationalism: A comparative analysis' (2014) 27(1) Journal of Ethnic and Migration Studies 37.

Huysman J. ‘Contested Community: Migration and the Question of the Political in the EU’ (2000) International Relations Theory and the Politics of European Integration 149.

Ignatieff M., ‘The Refugee as Invasive Other’ (2017) 84.1 Social Research: An International Quarterly 223.

Kampmark B., ‘The Influence of Right Wing Populism: Denmark, the EU and Immigration’(2015) Centre for Research and Globalization, retrieved from <https://www.globalresearch.ca/the-influence-of-right-wing-populism-denmark-the-eu-and-immigration/5458700> Accessed 7 June 2020.

Karolewski I. P. and Benedikter R., ‘Europe’s Migration Predicament: The European Union’s Refugees’ Relocation Scheme versus the Defiant Central Eastern European Viségrad Group’ (2018) Journal of Inter-Regional Studies: Regional and Global Perspectives 40.

Kim S, ‘Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context’ (2017) 30 Leiden Journal of International Law 49.

Konstadinides T., ‘*The Rule of Law in the European Union: The Internal Dimension*’ (2017) Bloomsbury Publishing 45.

Kyle J. and Gultchin L., *Populist in power around the world (*Tony Blair Institute for Global Change 2018).

Laclau E., *On populist reason* (Verso 2005).

Lauterpacht E. and Bethlehem D., ‘The scope and content of the principle of no-refoulement: opinion’ in Erika Feller, Volker Turk and Frances Nicholson (eds), Refugee Protection in International Law (Cambridge University Press, 2003).

Lax V.M., ‘Dismantling the Dublin System: M.S.S. v. Belgium and Greece’ (2012) 14 European Journal of Migration and Law 1-3.

Leconte C., ‘The EU Fundamental Rights Policy as a Source of Euroscepticism’ (2014) 15 Human Rights Review 83.

Lemmens P., 'The Relations between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights - Substantive Aspects' (2001) 8 Maastricht J Eur & Comp L 49.

Lock T., ‘The ECJ and the ECtHR: The Future Relationship between the Two European Courts’ (2009) 8 The Law & Practice of International Courts and Tribunals 375.

March L., ‘From Vanguard of the Proletariat to Vox Populi: Left-populism as a ‘shadow’ of contemporary socialism’ (2007) 27.1 Review of International Affairs, 63.

McDonnell D. and Bobba G., ‘Italy: a strong and enduring market for populism’ (2015) European populism in the shadow of the great recession 163.

Menendez A.J., ‘The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration’ (2016) 22;4 European Law Journal 388.

Mink J., 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment' (2012) 14 Eur J Migration & L 119.

Moffit B., *The global rise of populism: performance, political style and representation* (2016 Stanford University Press).

Moffitt B., ‘How to Perform a Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism’ (2015) 50 Government and Opposition 189.

Mouffe C., ‘In defence of left-wing populism’ *The Conversation* (29 April 2016) < https://theconversation.com/in-defence-of-left-wing-populism-55869> Accessed 8 June 2020.

Mouffe C., ‘The ‘End of Politics’ and the Challenge of Right-Wing Populism’ in *Populism and the Mirror of Democracy* (2005) 50, 155.

Mudde C. and Kaltwasser C. R., *Populism; a very short introduction* (Oxford University Press, 2017).

Mudde C., 'The Populist Zeitgeist' (2004) 39 (4) Government and Opposition 542.

Mudde C., *Populist radical right parties in Europe (2007)* 22.8 Cambridge University Press.

Müller J.W., *What is Populism?* (University of Pennsylvania Press 2016).

Murray P. and Longo M., 'Europe's Wicked Legitimacy Crisis: The Case of Refugees (2018) 40.4 Journal of European Integration 411.

Niemann A. and Zaun N., 'EU Refugee Policies and Politics in Times of Crisis: Theorethical and Empirical Perspectives' (2018) 56 Journal of Common Market Studies 3.

Otjes S. and Louwerse T., 'Populist in parliament: Comparing left-wing and right-wing populism in the Netherlands' (2015) 63.1 Political Studies 60.

Pasquino G., 'Populism and democracy' in *Twenty-First Centur*y *Populism* (Palgrave Macmillan 2008).

Pelinka A., 'Right wing Populism: Concept and Typology in Right-Wing Populism in Europe' *Politics and Discourse* (Bloomsbury 2013).

Peukert A. Hillgruber C., Foerste U. and Putzke H., 'To Allow or Refuse Entry: What Does the Law Demand in the Refugee Crisis at Europe's Internal State Borders?' (2017) 18 German Law Journal 617.

Pirro A. L. P. and Taggart P., 'The Populist Politics of Euroscepticism in Times of Crisis: A framework for Analysis (2016) 38(3) Politics 378.

Birkland T. A., 'Focusing events, mobilization and agenda setting' (1998) 18.1 Journal of Public Policy 53.

Poon J., ‘EU-Turkey Deal: Violation of, or Consistency with, International Law?’ 1(3) International Law 1195.

Prence M, ‘Torture as Jus Cogens Norm’ (2011) 7(2) Juridica 87.

Rech W., ‘Some Remarks on the EU’s Action on the Erosion of the Rule of Law in Poland and Hungary’ (2018) 26 Journal of Contemporary European Studies 334.

Reidy A., ‘A Guide to the Implementation of Article 3 of the European Convention on Human Rights’ (2003) 6 Human Rights handbooks 10.

Riedel R., ‘Nativism Versus Nationalism and Populism – Bridging the Gap’ (2018), 6(2) Central European Papers 18.

Ronzitti N., ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?’ (2009) 1 Bulletin of Italian Politics, 125.

Rosas A. ‘The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?’ (2017) 7 Przeglad Prawniczy Uniwersytety im. Adama Mickiewicza 7.

Rosenne S., *Practice and methods of international law (*Oceana Publications 1984) 55.

Ruy D., ‘Italian Election Results’ (Center For Strategic & International Studies (CSIS), March 7 2018) <https://www.csis.org/blogs/european-election-watch/italian-elections-results> Accessed 7 June 2020.

Sender O. and Wood M., ‘A Mystery No Longer? *Opinio Juris* and Other Theoretical Controversies Associated with Customary International Law’ (2017) 50 Israel Law Review 299.

Shelton D., *Normative Hierarchy in International Law*, American Journal of International law (2006) 291.

Spyros Pappas T. and Kreisi H., 'Populism and crisis: a fuzzy relationship' *European Populism in the Shadow of the Great Recession* (2015) 303.

Stanley B., 'The Thin Ideology of Populism' *(2008)* 13(1) Journal of political ideologies 95.

Taggart P. and Szcerbiak A., 'Contemporary Euroscepticism in the party system of the European Union candidate states of Central and Eastern Europe' (2004) 43.1 European Journal of Political Research 1.

Taggart P., *Populism* (Open University Press 2000).

Thielemann E., 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56 JCMS: Journal of Common Market Studies 63.

Tubakovic T., *A Dublin IV Recast: A New and Improved System?'* EGMONT Royal Institute for International Relations (2017).

Villa M., Gruijters R. and Steinhilper E., 'Outsourcing European border control: Recent trends in departures, deaths and search and rescue activities in the central Mediterranean' *Faculty of Law of the University of Oxford* (11 September 2018) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/09/outsourcing> Accessed 7 June 2020.

Vittori D., 'Podemos and the Five-Star Movement: Populist, Nationalist or What?' (2017) 9 Contemporary Italian Politics 142.

Wählisch M., 'EU Terrorist Listing. An Overview about Listing and Delisting Procedures' (2010) Berghof Peace Report 1.

Wodak R, Khosravinik M., and Mral B.(ed.), *Right-Wing populism in Europe: Politics and discourse (*A&C Black 2013).

Wouter K., *International Legal standards for the protection from refoulement: a legal analysis of the prohibition on refoulement contained in the Refugee Convention, the European Convention of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture.* (Intersentia, 2009).

Yilmaz F., 'Right-wing hegemony and immigration: How the populist far-right achieved hegemony through the immigration debate in Europe' (2012) 60(3) Current Sociology 368.

B. CASES

Chahal v The United Kingdom App no 22414/93 (ECtHR, 15 November 1996).

Commission v Poland C-192/18 (ECJ 2018).

Cruz Varas and others v Sweden App no. 46/1990/237/307 (ECtHR 20 March 1991).

Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR, 29 February 2012).

Ireland v the United Kingdom App no 5310/71 (ECtHR, 18 January 1978).

Joined Cases Slovakia and Hungary v Council C-643/15 and C-647/15 (ECJ 6 September 2017).

Joined Cases European Commission v Republic of Poland and others, C 715/17, C718/17 and C719/1 (ECJ 2 April 2020).

K.R.S v the United Kingdom App no 32733/08 (ECtHR 2 December 2008).

M.M.S. V Belgium and Greece App no 30696/09 (ECtHR 21 January 2011).

Paez v Sweden App no 29482/95 (ECtHR, 30 October 1997).

Ramzy v The Netherlands App no 25424/05 (ECtHR, 20 July 2010).

S.S., Italy and Amnesty International and Human Rights Watch, 'Written Submissions on Behalf of the Interveners App no 21660/18' <https://www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf> Accessed 8 June 2020.

Saadi v Italy App no 37201/06 (ECtHR, 28 February 2008).

Soering v The United Kingdom App no 14038/88 (ECHR, 7 July 1989).

T.I. v United Kingdom App No 43844/98 (ECtHR 7 March 2000).

Vilvarajah and others v The United Kingdom App no 13163/87 (20 October 1991).

C. LEGISLATION

Council Directive 2011/95/EU 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 (Qualification Directive).

Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedure Directive).

Council Directive 2013/33 EU of June 26 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive).

Council Regulation 604/2013/EU 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 (Dublin III Regulation).

Council Regulation 197/2016/COM Proposal for a Regulation of the European Parliament and of the Council 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) (Dublin IV Regulation).

D. TREATIES

Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common Borders [2000] OJ L 239/13 (Schengen Agreement).

Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

Consolidated Version of the Treaty of the European Union [2008] OJ C115/13.

Consolidated Versios of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 entry into force 3 September1953) (ECHR).

Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663 (1933 Refugee Convention).

Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic 2017. <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> Accessed 8 June 2020.

Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

Statute of the International Court of Justice (adopted 24 October 1945, entered into force 18 April 1946).

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR).

Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force on 27 January 1980).

E. NEWSPAPER ARTICLES

Abbasi K., Patel K. and Godlee F., 'Europe's refugee crisis: an urgent call for moral leadership' *BMJ* (2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4564068/> Accessed 12 June 2020.

BBC, 'Europe and Right-Wing Nationalism: A Country-By-Country Guide' *BBC* (13 November 2019) <https://www.bbc.com/news/world-europe-36130006> Accessed 7 June 2020.

BBC, 'Italy election: Populist Five Star and League vie for power' *BBC* (March 5 2018) <https://www.bbc.com/news/world-europe-43272700> Accessed 7 June 2020.

Dunai M. and Komuves A., 'Hungary will defend EU against migrant wave, Orban says' *Reuters* (4 March 2020) <https://www.reuters.com/article/us-europe-migrants-centraleurope/hungary-will-defend-eu-against-migrant-wave-orban-says-idUSKBN20R1H0> Accessed 7 June 2020.

The Economist, 'Italy's Five Star Movement has a deal to form a new government: a new collation leaves the far-right Northern League in the cold', *The Economist (*29 August 2019) . <https://www.economist.com/europe/2019/08/29/italys-five-star-movement-has-a-deal-to-form-a-new-government> Accessed 8 June 2020.

The Economist 'Viktor Orban fails to win his referendum against migrants' *The Economist* (3 October 2016). <https://www.economist.com/europe/2016/10/03/viktor-orban-fails-to-win-his-referendum-against-migrants> Accessed 7 June 2020.

Euractiv, 'Czech Republic, Hungary and Poland "breached EU law' by refusing refugees', *Euractiv* (1 November 2019) <https://www.euractiv.com/section/politics/news/czech-republic-hungary-and-poland-breached-eu-law-by-refusing-refugees/> Accessed June 7 2020.

European Parliament 'Rule of law in Poland and Hungary has worsened' *News European Parliament* (16 January 2020) <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened> Accessed 8 June 2020.

Foy H. and Buckley N, 'Orban and Kaczynski vow "cultural counter-revolution" to reform EU'. *Financial Times* (7 September 2016) <http://www.ft.com/cms/s/0/e825f7f4-74a3-11e6-bf48-b372cdb1043a.html#axzz4Jed295EY> Accessed 8 June 2020.

The Guardian, 'Migrant ship with 64 people denied safe port by Italy and Malta' *The Guardian* (4 April 2019) <https://www.theguardian.com/world/2019/apr/04/migrant-ship-storm-64-people-denied-safe-port-harbour-italy-malta> Accessed 7 June 2020

Giuffrida A., 'Italian PM resigns with attack on 'opportunist' Salvini, *the Guardian* (20 August 2019) <https://www.theguardian.com/world/2019/aug/20/italian-pm-expected-resign-giuseppe-conte> Accessed 8 June 2020.

The Huffington Post Italy, 'Beppe Grillo calls for 4 measures to protect Italy from the "comings and goings of terrorists". Immediately off the irregular ones and stop in Schengen' *The Huffington Post* (December 23 2016). <h https://www.huffingtonpost.it/2016/12/23/grillo-terrorismo-migrant_n_13813082.html Accessed 7 June 2020.

The Local 'Italy refuses entry to another migrant rescue ship', *The Local* (28 August 2019) <https://www.thelocal.it/20190828/italy-refuses-to-allow-another-ship-carrying-migrants-to-enter> 7 June 2020.

Mackey R., 'Hungarian Leader Rebuked for Saying Muslim Migrants Must Be Blocked 'to Keep Europe Christian' *New York Times* (3 September 2015) <https://www.nytimes.com/2015/09/04/world/europe/hungarian-leader-rebuked-for-saying-muslim-migrants-must-be-blocked-to-keep-europe-christian.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> Accessed June 7 2020.

Nelson S. S., 'Hungary Reduces Number of Asylum Seekers It Will Admit to 2 Per Day' *NPR* (3 February 2018) <https://www.npr.org/sections/parallels/2018/02/03/582800740/hungary-reduces-number-of-asylum-seekers-it-will-admit-to-2-per-day?t=1591185957324 > Accessed 7 June 2020.

Pai H. H, 'The refugee 'crisis' showed Europe's worst side to the world' *The Guardian* (2020) <https://www.theguardian.com/commentisfree/2020/jan/01/refugee-crisis-europe-mediterranean-racism-incarceration> Accessed 12 June 2020.

Perrigo B., 'The Far Right Lost Power in Italy Two Months Ago. So Why are Migrant Rescue Boats Still Being Refused Entry?' *Time Magazine* (29 October 2019). <https://time.com/5713279/italy-migrant-rescue-boats/> Accessed 7 June 2020.

Santora M., 'Poland Bashes Immigrants, but Quietly Takes Christian Ones', *New York Times* (26 March 2019). < https://www.nytimes.com/2019/03/26/world/europe/immigration-poland-ukraine-christian.html> Accessed 7 June 2020.

Stevis-Gridneff M. and Pronczuk M., 'E.U. Court Rules 3 Countries Violated Deal on Refugee Quotas' *New York Times* (2 April 2020). <https://www.nytimes.com/2020/04/02/world/europe/european-court-refugees-hungary-poland-czech-republic.html> Accessed 7 June 2020.

Za V. and Bolton A., 'Italian prosecutors widen investigation to include MSF over migrant rescues: source' *Reuters* (5 August 2017) < https://www.reuters.com/article/us-italy-migrants-medecins-sans-frontier-idUSKBN1AL0HZ?il=0> Accessed 8 June 2020.

F. OTHER

Amnesty International, 'Libya: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees' (Report) (20 January 2020) <https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/> Accessed 8 June 2020.

Copenhagen European Council, 'Presidency Conclusions' (21-22 June 1993) <https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> Accessed 8 June 2020.

Council of Europe, 'European Commission against Racism and Intolerance Second Report on Italy' (2001) <https://rm.coe.int/second-report-on-italy/16808b582e> Accessed 7 June 2020.

European Commission, 'Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice' (December 2017) <http://bit.ly/2j0Mlw8> Accessed June 7 2020.

European Commission Communication 2016/197 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' (6 April 2016).

European Commission Communication 2016/197 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' (6 April 2016).

European Commission 'Asylum Statistics – Number of Asylum Applicants (non-EU-27 citizens), EU-27, 2008-2019' (2020). <https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> Accessed June 7 2020.

European Commission 'Eurobarometer 83 "Public Opinion in the European Union."' (2015) http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_first_en.pdf Accessed 8 June 2020.

European Commission, 'European Commission takes Hungary to Court for Criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones' *European Commission* (25 July 2019).

< https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260 > Accessed June 2020.

European Commission, 'European Solidarity: A Refugee Relocation System' <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background information/docs/2_eu_solidarity_a_refugee_relocation_system_en.pdf> Accessed June 7 2020.

European Commission COM/301/ 2007/EC On the future Common European Asylum System' (Green Paper).

European Commission COM/286/2015/EC Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece - General Approach Annex.

European Council Decision 2015/1601 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece (22 September 2015).

European Council Decision (CFSP) 2020/20 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2019/1341.

European Council 'Timeline: Reform of EU asylum rules' <https://www.consilium.europa.eu/en/policies/ceas-reform/ceas-reform-timeline/> Accessed 7 June 2020

European Court of Justice, 'Opinion 2/13 Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (18 December 2014).

European Parliament Resolution 2017/2131 (15 November 2017) <(https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf> Accessed 8 June 2020.

Eurostat, 'Record number of over 1.2 million first time asylum seekers registered in 2015 (2016). <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> Accessed 12 June 2020.

Human Rights Watch, 'Pushed Back, Pushed Around; Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (2009) <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> Accessed 8 June 2020.

Hungarian Helsinki Committee, *Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States* (Report) (2017) < https://www.helsinki.hu/wp-content/uploads/pushed_back.pdf> Accessed 7 June 2020.

International Law Commission, Draft Conclusions and identification of customary international law, with commentaries (2018), UN Doc A/73/10.

International Law Commission, Seventieth Session (Report) (30 April – 1 June and 2 July – 10 August 2018) UN Doc A/73/1.

International Law Commission, Seventy-first Session (Report) *Chapter V Peremptory norms of general international law (jus cogens*) (29 April – 7 June and 8 July – 9 August) UN Doc A/74/10.

Maas S., Jurado E., Capdevilla M., Labayle M. and Hayward L., 'Evaluation of the Dublin III Regulation Final Report', (2015), European Commission DG Migration and Home Affairs.

Nicolleti M. 'Report of Parliamentary Assembly of the Council of Europe; Committee on Migration, Refugees and Displaced persons: After Dublin – the urgent need for a real European asylum system' (2015). <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22016&lang=en. Accessed June 7 2020.

UNGA Res 55/74 (2001).

UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (Geneva 2007).

UNHCR ‘Figures at Glance’ *UNHCR* (2020) https://www.unhcr.org/figures-at-a-glance.html Accessed 7 July 2020.

UNHCR, ‘Position on the return of asylum seekers to Greece under the “Dublin Regulation’ (Geneva 2008).

UNHCR ‘States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ (Geneva 2015).

UNHCR Standing Committee ‘Note on the Exclusion Clause’ UN Doc EC/47/SC/CR/29 (Geneva 1997).

UNHCR ‘The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis (1990) <https://www.refworld.org/docid/53e1dd114.html> accessed 24 March 2020.

UNHCR, ‘UNHCR interviews asylum seekers pushed back to Libya’ *UNHCR* (14 July 2009)< https://www.unhcr.org/news/briefing/2009/7/4a5c638b6/unhcr-interviews-asylum-seekers-pushed-libya.html> Accessed 8 June 2020.