Mutual trust as a general principle of EU law

Mutual trust as a general principle of EU law

External European asylum law through the lens of Member State cooperation

PROEFSCHRIFT

ter verkrijging van de graad van doctor

aan de Open Universiteit

op gezag van de rector magnificus

prof. dr. Th.J. Bastiaens

ten overstaan van een door het

College voor promoties ingestelde commissie

in het openbaar te verdedigen

op vrijdag 14 oktober 2022 te Heerlen

om 16.00 uur precies

door

Lynn Hillary

geboren op 5 augustus 1992 te Neerpelt

Promotores:

Prof. mr. dr. R. Ortlep, Open Universiteit en Universiteit van Amsterdam

Prof. mr. dr. C.M. Zoethout, Open Universiteit en Universiteit van Amsterdam

Leden beoordelingscommissie:

Prof. mr. dr. C.H. Slingenberg, Vrije Universiteit

Prof. mr. dr. R.J.G.M. Widdershoven, Universiteit Utrecht

Prof. mr. dr. J.W. Sap, Open Universiteit en Vrije Universiteit

Mr. dr. E.R. Brouwer, Universiteit Utrecht

Mr. dr. M. den Heijer, Universiteit van Amsterdam

Acknowledgements

The dissertation that lies before you is the result of the doctoral research I was lucky enough to conduct. It has been a mostly happy, stimulating and insightful journey for which I owe much to many. I will not try to cover the immense depth of my gratitude here but these acknowledgements are a start.

The first expression of gratitude without a doubt has to be extended to my promotores, Prof. mr. dr. Rolf Ortlep and Prof. mr. dr. Carla Zoethout. Your trust has helped me to enjoy the journey. Thank you, Carla, for your encouragements and your genuine concerns. Rolf, thank you for challenging me, and for putting things into perspective. I am eternally grateful for the intellectual luxury this research project has offered me.

I am also greatly indebted to the members of my assessment committee, Prof. mr. dr. Jan Willem Sap, Prof. mr. dr. Lieneke Slingenberg, Prof. mr. dr. Rob Widdershoven, mr. dr. Evelien Brouwer and mr. dr. Maarten den Heijer. Thank you for your engagement with my work. Your comments are not only helpful in respect to this dissertation, but also with a view to future research.

It is clear to anyone who knows me that I did not undertake the journey leading to this dissertation alone. Luckily, I have been fortunate enough to meet people on my professional path who are not only in possession of exciting minds, but also of kind hearts. A heartfelt thank you goes out to my current colleagues at the Universiteit van Amsterdam, my former colleagues at the Open Universiteit (both at the law faculty and at the Amsterdam SC) and at VluchtelingenWerk Nederland, and the people I was lucky enough to meet through the Netherlands Network for Human Rights Research (in particular the Migration & Borders working group), the Nederlands Tijdschrift voor de Mensenrechten, and the VU Master program on International Migration and Refugee Law. I owe special thanks to my paranymphs, Tom Hillary MD and mr. dr. Mirjam van Schaik, for the support on the day I get to defend what is written in the book lying before you, but also while writing it. Thank you for being my support system.

To my dear friends, back home and in my new home, I owe my balance. We are related by choice. Thank you for being more important and more present in my life than this research project.

Related by blood but no less by choice is my family. You have provided a safe haven and room to grow. My gratitude reaches beyond today's achievement and I hope you view my achievements as part of your own.

I do not just feel grateful for the journey taken, but also look forward to the road ahead and the person I would like to walk that road with. Wilfred, mijn dank gaat simpelweg uit naar dat jij bent. Here's to spending the rest of my perfectly imperfect journeys with you.

Amsterdam, September 2022

Table of contents

List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CALL	Belgian Council for Alien Law Litigation
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
EAW	European Arrest Warrant
EC	European Communities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	EU Fundamental Rights Agency
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization on Migration
UN	United Nations
UNHCR	UN Refugee Agency
Pact	New Pact on Migration and Asylum

Preface

With the fall of the pro-Western Afghan government and the reinstatement of Taliban rule in Afghanistan in 2021,[1] Europe's response once again seems to result in the deterrence of migration towards Europe, 'amid fears of a repeat of the 2015 migration crisis, when 1 million people came to Europe'.[2] In turn, this could result in the creation of asylum law that is applicable beyond the borders of Europe, i.e. externalization, that is to say, the creation of European asylum law that extends beyond the borders of Europe.[3] The 'migration crisis' refers to the 2015 rise in migratory movements towards Europe as a result of the war waging in Syria.[4] At that time, European asylum law was increasingly being externalized. One example was the EU-Turkey Deal, which is one of the case studies of external European asylum law in this study. From a European perspective, there are undeniable parallels between 2015 and the period following 2021 regarding the (expected) influx in migratory movements towards and asylum applications (to be) made in Europe. Most importantly, the European response seems largely similar in the sense that it is focused on deterring people on the move from reaching Europe and on providing protection in third countries.

However, also from a European perspective, the 2015 crisis has been observed to be a European governance crisis, instead of solely a migration crisis.[5] Therefore, I study the intra-European cooperation and interaction between the Member States of the European Union when they employ externalization strategies in asylum law. I use the principle of mutual trust as a lens through which to study various dynamics of European interstate cooperation in the context of external European asylum law. It is my expectation and hope that the findings, that are drawn from bringing together my study of external European asylum law and EU public law, will allow for broader conclusions on the further externalization of European asylum law and its implications on Member State cooperation dynamics and European public law.

---

[1] This situation differs from the 2022 Ukraine crisis, in which no legal instruments were created that extend beyond the borders of Europe. Instead, the Temporary Protection Directive 2001/55/EC (an instrument of *internal* EU asylum law) was activated.

[2] Andrew Rettman, 'EU prepares to keep out Afghan refugees' *euobserver* (31 Augustus 2021) <https://euobserver.com/world/152759?utm_source=euobs&utm_medium=email> accessed 31 August 2021

[3] Council of the EU, 'Statement on the situation in Afghanistan' 665/21 (31 August 2021)

[4] Elizabeth Ferris and Kemal Kirişci, *The consequences of chaos. Syria's humanitarian crisis and the failure to protect* (Brookings Institution Press 2016)

[5] E.g. Tanja Börzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics' [2016] Journal of Common Market Studies 8

In this study, I inquire upon how the externalization of European asylum law should influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how mutual trust – and its relation to other general principles of EU law – should influence external European asylum law.

Developments in case law and legal scholarship are taken into account up to January 1, 2022.

Chapter 1 Introduction

When acting internally (i.e. inside Europe), the Member States of the European Union (EU) are, pursuant to the principle of mutual trust, supposed to trust each other in complying with their obligations under EU law.[6] In this research, I study this concept of mutual trust, as a general principle of EU law, in the context of external European asylum law (understood here as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe).[7] I assess how the externalization of European asylum law should influence the relation between mutual trust and other general principles of EU law. Additionally, I explore if and how the potential external extension of mutual trust should influence the further externalization of asylum law. I do so in light of the legal function of mutual trust and its relation to fundamental rights and loyal cooperation.

1.1 Mutual trust and external European asylum law

The main subjects of this study are the principle of mutual trust and external European asylum law. Mutual trust was chosen as a topic because of the long-standing discussion in internal EU asylum law (i.e. asylum law applicable within the EU) regarding the relation between the presumption that Member States comply with EU law, on the one hand, and the protection of fundamental rights in practice, on the other. Since the interstate relations of the EU Member States rely heavily on the principle of mutual trust, especially in the context of asylum law, mutual trust is a pertinent lens to study their cooperation dynamics.

When this research first started, European asylum law was increasingly applied beyond the borders of Europe. Such externalization of European asylum law was boosted by several developments and the creation of multiple instruments of external European asylum law. This includes examples

[6] Court of Justice of the European Union Case C-46/76 *W.J.G. Bauhaus v The Netherlands State* [1977] para 22; Court of Justice of the European Union Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] para 19; Court of Justice of the European Union Case C-25/88 *Esther Renée Bouchara, née Wurmser* [1989] para 18; Court of Justice of the European Union Case C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 79

[7] My understanding of 'external European asylum law' is expanded upon in *Section 1.2.2.*

of cooperation with third countries such as the EU-Turkey Deal,[8] proposals for the external processing of applications for international protection in third countries,[9] or humanitarian corridors to Europe.[10] Such developments lead to a change in dynamics and different forms of cooperation and organization, not only between the EU and the third country concerned, but also among the Member States. Therefore, the externalization of European asylum law is not only an important evolution in European law and in asylum law. It also offers an interesting playing field to analyze the cooperation between the EU Member States.

The externalization of European asylum law could entail the external extension of the principle of mutual trust and, as a result, the extrapolation of the relation between mutual trust and general principles such as fundamental rights and loyal cooperation.

As mentioned earlier, an important illustration of the potential extrapolation of the relation between mutual trust and general principles, such as fundamental rights, can be found in the execution of the EU-Turkey Deal. This is the joint response of Turkey and Europe to the Syrian crisis with the goal to end irregular migration from Turkey to the EU.[11] The most prominent element of the deal is that third-country nationals (not being Turkish nationals) arriving on the 'hotspots' on the Greek Aegean islands would be returned to Turkey. In exchange for every Syrian returned from the Greek islands to Turkey, one Syrian refugee would be resettled from Turkey to the EU Member States.[12] The assumption that Turkey is a safe country for Syrian refugees was heavily criticized because of fundamental rights concerns.[13] Based on this situation, the question arises what the implications are for the principle of mutual trust between the Member States when they execute the EU-Turkey Deal. In other words, should the presumption still apply that, for example, the Netherlands, must trust Greece to comply with their obligations under EU law, including their fundamental rights obligations? Would this be advisable in view of *inter alia* the relation between mutual trust and fundamental rights existing currently in internal EU asylum law?

---

[8] See *Chapter 5, Section 5.4*.
[9] See Riona Moodley, 'Rethinking the Role of External Processing in the European Union: A Legal Perspective' [2017] Human Rights Defender 21
[10] See Jorrit Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' [2017] European Papers 571, p 577-587
[11] Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016) ; Council of the EU, 'EU-Turkey statement' 870/15 (29 November 2015)
[12] Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016)
[13] See *Chapter 5, Section 5.4.1.*

And how does this relate to the legal function of the principle of mutual trust? These are some of the issues I seek to examine when answering the general research question: How should the externalization of European asylum law influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how mutual trust – and its relation to other general principles of EU law – should influence external European asylum law. This includes the sub-questions of this study, which will be made explicit in *Section 1.3*.

Investigating these questions aims to draw conclusions on both the extension of mutual trust to external European asylum law and the desirability of the further externalization of European asylum law. This study concerns the fundamental rights protection of asylum applicants in Europe, but I also hope it to be broader and to deepen our understanding of the interaction between the EU Member States in the context of external European asylum law.

1.2 Main subjects of the study

Before discussing the research questions in *Section 1.3*, I will give a brief overview of the main subjects of this study. The aim of this section is to get a first grasp of these subjects that will later be explored in-depth.

1.2.1 Mutual Trust

The central concept of this study is mutual trust, sometimes also referred to as mutual confidence or interstate trust.[14] This principle finds its application in legal systems which rely heavily on intra-European cooperation for their functioning.

Asylum law

For example, the presumption of mutual trust lies at the basis of the Dublin system: the EU system of determining the Member State responsible for the assessment of an application for international protection (consisting of refugee and subsidiary protection) made in Europe.[15] The Dublin Regulation is an instrument of the Common European Asylum System (CEAS). The CEAS is also

[14] To be distinguished from mutual 'recognition' which is derived from mutual trust (or confidence), as will be explained in *Chapter 3, Section 3.4.*

[15] Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31

referred to in this study as internal EU asylum law, by which I mean asylum law which is not limited to the national level, but is rather created on or impacts the European level, and which is applicable *inside* Europe.

Criminal law

Another example of the application of mutual trust is to be found in internal EU criminal law, i.e. criminal law which is not limited to the national level, but is rather created on or impacts the European level, and which is applicable *inside* Europe. More specifically, mutual trust is applied in the EU system of arresting and transferring criminal suspects and sentenced persons between the Member States: the European Arrest Warrant (EAW) system.[16] However, the presumption of mutual trust is not uncontested, especially in view of the fundamental rights obligations of the Member States.

Fundamental rights

The discrepancy between the fundamental rights obligations of the Member States and the fundamental rights violations in practice became particularly evident in the Dublin system, when the Member States at the external borders of the EU were not able to process the rapidly growing number of applications for international protection, nor to provide adequate reception to the arriving asylum applicants. The European Court of Human Rights (ECtHR) decided in 2011 that, even though mutual trust is the cornerstone of the Dublin system, Member States may not blindly rely on the principle of mutual trust.[17] The Court of Justice of the European Union (CJEU) followed suit later that year in a similar case, the *N.S.* judgment.[18] Since 2011, the relation between the protection (or violation) of a fundamental right in practice, on the one hand, and the presumption that the Member States are supposed to trust one another in complying with their fundamental rights obligations, on the other hand, has been much debated in the context of the Dublin system.[19]

---

[16] 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1

[17] European Court of Human Rights (Grand Chamber) Case 30696/09 *M.S.S. v Belgium and Greece* [2011]

[18] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011]

[19] E.g. Susan Fratzke, *Not adding up. The fading promise of Europe's Dublin system* (Migration Policy Institute Europe 2015) ; Marie-Sophie Vachet, 'Proposition de refonte du règlement "Dublin": quelle efficacité pour quels enjeux?' [2018] La Revue des droits de l'homme 1; Hemme Battjes and others, *The Principle of Mutual Trust in*

The same holds true for the European Arrest Warrant system, in which the relation between mutual trust and fundamental rights obligations often concerns the detention conditions in another Member State. For example, in the *Aranyosi* case, the CJEU found for the first time that deficiencies in the detention system in Hungary potentially giving rise to a violation of Article 4 of the Charter of Fundamental Rights of the European Union (Charter), must be investigated before transferring the criminal suspect or sentenced person.[20] The relation between fundamental rights and mutual trust will be further studied in *Chapter 4*.

Member State cooperation dynamics

As mentioned before, I consider mutual trust a pertinent lens to study Member State cooperation dynamics because the Member States' interstate relations rely heavily on the principle of mutual trust. This is especially true in the context of internal EU asylum law, i.e. the CEAS. Therefore, the principle of mutual trust, which impacts heavily on the functioning of internal EU asylum law, will also be used as a lens through which to regard external European asylum law.

1.2.2 External European Asylum Law

Previously in this chapter, 'internal' EU asylum law has been used to refer to the asylum law applied *within* the EU. It consists of the CEAS, of which the Dublin system constitutes an important element. In addition to internal EU asylum law, a trend towards externalization has been and is currently taking place.[21]

External European asylum law may take many forms, differing in scope, purpose, policy format, actors, nature of interaction and the migration type targeted.[22] As such, it is a largely scattered field of law. In addition, there is no legal definition of 'external European asylum law'. Examples of external European asylum law (which are not discussed in this study) are the external processing

European Asylum, Migration, and Criminal law. Reconciling Trust and Fundamental Rights (Meijers Committee/FORUM Institute for Multicultural affairs 2011) ; Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' [2013] Utrecht Law Review 135

[20] Court of Justice of the European Union Case C-404/15 *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] para 94

[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final

[22] Ruben Zaiotti, 'Mapping remote control: the externalization of migration management in the 21st century' in Zaiotti (ed), *Externalizing Migration Management. Europe, North America and the spread of "remote control" practices* (Routledge 2016) 3-30, p 13

of applications for international protection, offshore interdiction, and readmission agreements with third countries.[23] The sources of external European asylum law that are studied in this study are agreements with third countries with an asylum component, and humanitarian visas. For each source, I have selected one case study, as will be explained in *Section 1.6.3.*

While concurrence exists on the existence of externalization, what exactly falls under 'external European asylum law' is not a settled matter. The term 'external European asylum law' is not a defined term under EU law. It is, however, useful to define the term in order to be able to understand and position this study on the topic of external European asylum law. Because of a general struggle in the ever-growing field of literature with defining and demarcating[24] the phenomenon known as external migration management, external (European) asylum law, or other designations of the same concept, some conceptualization of the concept is useful before studying its sources. Conceptualizing 'external European asylum law', as I will do below, allows me to align my research with other studies on similar topics and to avoid semantical confusion.

In this study, I understand 'External European asylum law' as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe.

The legal aspects …

As this study focuses on EU law and asylum law, the definition of external European asylum law, too, is limited to the *legal* aspects of proactively managing migration at its source. While the concept of external European asylum law builds upon the concept of migration management, its political or public administration aspects are not the focal point of this study.

---

[23] See Ruben Zaiotti (2016) p 14-21; Maarten den Heijer, *Europe and Extraterritorial Asylum* (PhD thesis, Leiden University 2011) p 177-197. For example, external processing involves 'the transfer of migrants to a foreign location and the subsequent processing of claims to protection', according to Den Heijer. Readmission agreements are agreements between one or more Member State and a third country with the aim to return people on the move from Europe to the third country, see IOM, 'Global Compact Thematic Paper | Readmission' (IOM) <https://www.iom.int/sites/g/files/tmzbdl486/files/our_work/ODG/GCM/IOM-Thematic-Paper-Readmission.pdf> accessed 23 March 2022

[24] E.g. Sergio Carrera and others, 'The external dimensions of EU migration and asylum policies in times of crisis' in Carrera and others (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 1-19, p 8-10

… of proactively managing migration at its source …

External European asylum law refers to the proactive management of migration at its source, meaning that it targets migratory movements outside of Europe which are (supposedly or expectedly) directed at reaching Europe.[25] It results in regulating and organizing those movements.

The conceptualization of external European asylum law in this study focuses on the *end-result* of migration management, rather than an intention to do so. In other words, if an instrument does not intend to manage migration, for example because its focal point is development cooperation, but it does *result* in migration management, it is regarded as an instrument of external European asylum law for the sake of this study. The result of an instrument is thus decisive for its falling under the definition of external European asylum law.

… by the EU and/or its Member States …

In the definition of external European asylum law, 'European' is understood as created *by the EU and/or its Member States.* As a result, external European asylum law is not limited to EU law.[26] It also includes the national laws of the EU Member States. Using such a broad understanding of European law reflects the political reality that the EU seldom acts independently when creating instruments that manage migration and are applicable beyond Europe.[27] Indeed, the instruments of external European asylum law are often the result of dynamics in which either both the Member States and the EU, or only one Member State, or more Member States, are involved. Both case studies of this chapter on the EU-Turkey Deal and the Belgian humanitarian visa practice are examples of dynamics between the EU and its Member States in the creation of external European asylum law. Reflecting such dynamics, the conceptualization of external European asylum law in this study is not limited to EU action and includes the potential of Member State action.

Throughout this study, 'European' in external European asylum law relates to instruments created by the EU *or its Member States.* As a result, external European asylum law is not limited to EU

[25] See Ruben Zaiotti (2016) p 8
[26] See also *Chapter 1, Section 1.6.3.*
[27] See Anna Triandafylliadon and Angeliki Dimitriadi, 'Migration Management at the Outposts of the European Union: The Case of Italy's and Greece's Borders' [2013] Griffith Law Review 598; Majd Achour and Thomas Spijkerboer, 'The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya' (EU Immigration and Asylum Law and Policy 2 June 2020) <https://eumigrationlawblog.eu/the-libyan-litigation-about-the-2017-memorandum-of-understanding-between-italy-and-libya/> accessed 23 November 2021

law. It may also include the national laws of the EU Member States. However, it does not include asylum law derived from the European Convention on Human Rights (ECHR). The understanding of 'European' in 'external European asylum law' and the reason for source selection will be expanded upon under *Section 1.6.3*.

… limited to international protection …

Instead of compassing all migratory movements, the concept of external European asylum law is limited to the legal aspects which are related to international protection, including asylum.[28] This narrows the scope of the definition of external European *asylum* law compared to external European *migration* law. The understanding of external European asylum law in this study is thus limited to the migratory movements of people on the move with international protection needs, further referred to as 'refugee' or 'asylum seeker'.

While the terms 'refugee' or 'asylum seeker' and the dichotomy between 'refugees' and other 'migrants' has been considered contaminated by authors such as Pijnenburg and Rijken,[29] I nonetheless use it in this study due to its conceptual clarity and clear demarcation. Most importantly, using international protection as a demarcation mirrors the approach of the study of mutual trust in internal EU asylum law in *Chapter 3*. Indeed, in the context of the Dublin Regulation, the concept of international protection also categorizes people and distinguishes between those third-country nationals who have applied for international protection (or have been granted international protection) and those who have not.

However, whenever I refer to the broader category of non-European nationals, regardless of geographical location and regardless of their international protection needs, I will use the terms 'people on the move'[30] or 'third-country nationals'.

In addition, externalization is often focused on populations instead of individuals, as observed by Spijkerboer.[31] In this study, however, external European asylum law is considered as a broader

[28] See the understanding in *Chapter 1* of 'asylum' in the context of internal (*Section 1.6.2*) and external (*Section 1.6.3*) asylum law.
[29] Annick Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration* (Intersentia 2021) p 8-9; Annick Pijnenburg and Conny Rijken, 'Moving beyond refugees and migrants: reconceptualising the rights of people on the move' [2021] Interventions 273, p 277-280
[30] Annick Pijnenburg and Conny Rijken [2021]
[31] Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' [2017] Journal of Refugee Studies 216, p 216

concept, which also encompasses the management of individual migratory movements towards Europe. While the majority of external European asylum law may still consist of deterrence measures focused on groups instead of individuals, policy documents show that it might increasingly consist of legal pathways towards Europe *for individuals*.[32] In order to reflect such developments, the definition of external European asylum law in this study is not limited to the management of the migratory movements of groups but also includes the management of the migratory movements of individuals.

… and results in instruments …

According to Carrera, Santos Vara and Strik, external European migration and asylum policies consist of various 'patterns of cooperation in EU migration management policies in the scope of third-country cooperation'.[33] Carrera, Santos Vara and Strik thus only include (bilateral or multilateral) cooperation with third countries. Broadening the scope of my definition compared to Carrera, Santos Vara and Strik's, I consider external European asylum law as including but not limited to third-country cooperation; my understanding of external European asylum law also includes unilateral instruments and actions, such as resettlement or offshore interdiction. I have chosen such a broader approach to the concept of external European asylum law because of the political reality that unilateral actions, too, are influential in managing migration at its source.[34] For example, according to the European Asylum Support Office (EASO), examples of external European Asylum law include migration management in third countries and setting up legal pathways to Europe.[35]

… the application of which extends beyond the borders of Europe

[32] Luc Leboeuf and Marie-Claire Foblets, 'Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation' in Leboeuf and Foblets (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2019) 12-45, p 19-20; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final p 22-24
[33] Sergio Carrera and others (2019) p 1-2
[34] See Andrea Terlizzi, 'Narratives in power and policy design: the case of border management and external migration controls in Italy' [2021] Policy Sciences 749, p 768
[35] 'EASO External Cooperation Strategy' (EASO February 2019) <https://www.easo.europa.eu/sites/default/files/easo-external-cooperation-strategy.pdf> accessed 23 November 2021

In this study, 'external' European asylum law or the 'externalization' of European asylum law refers to the application of European asylum law that extends beyond Europe. Thus, the external component of this definition differentiates external European asylum law from the Common European Asylum System, which is referred to in this study as internal EU asylum law, i.e. applicable within the EU.

In line with the element of the definition of external European asylum law concerning 'proactively managing migration at its source', the end-result of the instrument regarding its external extension is also considered decisive. If the application of an instrument *results in an extension beyond Europe*, this falls under my understanding of external European asylum law. This means that, for a source to fall under the definition of 'external European asylum law' used in this study, the source has to extend beyond Europe. In other words, it relies on a manifestation outside the borders of Europe.[36] For example, humanitarian visas are granted by an embassy outside of the EU, or the EU-Turkey Deal partly relies upon implementation of several measures in Turkey. Such an external extension suffices for a source to fall under this definition, regardless of the initial intentions on the spatial scope of application of that instrument.

In addition to my understanding of an extension beyond the borders of Europe, I build on the work by general external EU law scholarship for the conceptualization of external European asylum law. Based on Wessel, I differentiate between the internal and external dimension of external EU law. According to Wessel, the *internal* dimension of external EU law is 'the set of rules which govern the constitutional and institutional legal organization of this legal entity in pursuit of its interests in the world', whereas the *external* dimension of external EU law refers to 'the rules governing the relationship of the European Union with the international legal order in which it is active'.[37] In line with Wessel's understanding of the internal and external dimension of external EU law, and made specific to external European asylum law, I identify the 'set of rules which govern the constitutional and institutional legal organization of this legal entity in pursuit of its interests in the world' to proactively manage migration at its source as the *internal* dimension of external European asylum law. The *external* dimension of external European asylum law is understood as

[36] External extension, as understood in this study, is distinguishable from extraterritorial effects, such as international actors being 'subject to EU law, including for activities that partly take place outside of the EU' whenever they are active in the EU, for example the internal market: Ramses Wessel, 'The EU and International Law' in Wessel and Larik (eds), *EU External Relations Law. Text, Cases and Materials* (Hart 2020) 139-173, p 154

[37] Ramses Wessel (2020) p 1

'the rules governing the relationship of the European Union with the international legal order in which it is active' when it proactively manages migration at its source.

The focus of the general research question of this study is on the *internal* dimension of external European asylum law. The study of mutual trust, the central concept of this study, concerns the organization of the relationships amongst the Member States. After having studied mutual trust in internal EU law in light of the general principles of EU law in *Part I,* I also study this principle in relation to the internal dimension of external European asylum law. *Part II* thus studies the constitutional and institutional legal organization of the EU legal system in the context of the EU pursuing its migration management interests on the international stage. More specifically, *Chapter 6* will study several legal consequences of externalization through the lens of mutual trust.

Before being able to do so, I first describe two case studies of the *external* dimension of external European asylum law in the current chapter. Meaning, in *Chapter 5*, I study the relationship of the EU and the Member States with the international legal order in which the EU is active when it is pursuing its migration management interests. As such, *Chapter 5* outlines the context and sets the stage for the study of several legal consequences of the externalization of European asylum law in *Chapter 6*.

The first source of external European asylum that I study here are agreements with third countries with an asylum component. To study this source, I have selected the case study of the aforementioned EU-Turkey Deal. It is a plan of action of the EU (and/or its) Member States and the Turkish government. The main goal of the plan is to respond to the Syrian crisis and to end irregular migration through Turkey to the EU.[38] As such, one of the aims of the EU-Turkey Deal is to decrease the number of applications for international protection made in Europe.

The second source of external European asylum law, selected for this study, consists of humanitarian visas. These are visas with which a third-country national is granted permission to enter a Member State in order to apply for a residence permit, for example based on their

[38] Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016) ; Council of the EU, 'EU-Turkey statement' 870/15 (29 November 2015) ; EU-Turkey joint action plan [2015] MEMO/15/5860

qualification as a refugee.[39] The selected case study for this source is the Belgian humanitarian visa practice.

The selection criteria for the two sources of external European asylum law and the related case studies will be explained in *Section 1.6.3.*

1.2.3 General Principles of EU Law

In addition to the fact that its application is sometimes contested, the constitutional status of the principle of mutual trust in EU law is unclear. Legal scholarship is diverging on the qualification of mutual trust as a general principle of EU law. Some authors have accepted its fundamental importance for the EU legal order.[40] Going a step further and accepting it as a general principle of EU law would render it part of EU primary law and grant it alone-standing value. Others have rebutted its status as a general principle of EU law because of its undefined status in EU law and its rebuttal by certain fundamental rights, such as Article 4 of the Charter.[41] To the best of my knowledge, no recent research on the constitutional status in EU law of the principle of mutual trust has been conducted based on a systemic and overhauling study of the defining characteristics of general principles of EU law.[42] Therefore, I aim to provide a deepened understanding of the general principles of EU law before assessing whether mutual trust constitutes a general principle of EU law, or not.

Studying mutual trust in light of general principles of EU law adds to understanding the EU legal order as one with constitutional standing, in line with Von Bogdandy: ‘the conception of primary

---

[39] 'Glossary on Migration' (IOM 2019) <https://www.iom.int/glossary-migration-2019> accessed 23 November 2021, p 97-98

[40] Court of Justice of the European Union (Full Court) Case *Opinion 2/13* [2014] para 191; Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' [2017] European Papers 75; Damien Gerard, 'Mutal Trust as Constitutionalism?' (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law, Florence, 2016)

[41] Evelien Brouwer, 'Mutual trust and judicial control in the Area of Freedom, Security, and Justice: an anatomy of trust' (Mapping mutual trust: understanding and framing the role of mutual trust in EU law, Florence, 2016) p 49-56; Luc Leboeuf, *Le droit européen de l'asile au défi de la confiance mutuelle* (Anthemis 2016) p 49-59

[42] This study adds to previous legal scholarship on general principles of EU law, such as Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006) ; Takis Tridimas, *The General Principles of EU law* (Oxford University Press 2006) ; Armin Cuyvers, 'General Principles of EU Law' in Cuyvers and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 217-228; Nicole Lazzerini, '"Please, Handle with Care!"—Some Considerations on the Approach of the European Court of Justice to the Direct Effect of General Principles of European Union Law' in Pineschi (ed), *General Principles of Law. The Role of the Judiciary* (Springer 2015) 145-168; Koen Lenaerts, 'Beginselen van behoorlijk bestuur in de Europese Unie' in Opdebeek and Van Damme (eds), *Beginselen van behoorlijk bestuur* (die Keure 2006) 67-98

law as constitutional law defines it as the framework for political struggle, thematises foundations, aims at self-assurance and mediates between societal and legal discourses'.[43]

The qualification of a norm as a general principle of EU law thus matters because general principles are a part of EU primary law. As a result of the qualification of a norm as a general principle of EU law, that norm will fulfill certain functions in the EU legal order. General principles do not only influence the interpretation of the Treaties on the (Functioning) of the European Union (T(F)EU or Treaties) and serve as a ground for review of secondary law, they can also serve as ground rules for the creation of secondary law.[44] Consequently, inquiring on the status of mutual trust as a general principle of EU law will lead to findings on the functions that the principle of mutual trust may fulfill. In this study, I hope to provide an insight into mutual trust as a general principle of EU law that is relevant to the cooperation dynamics between the EU Member States, including but not limited to their cooperation in the context of external European asylum law.

1.3 Research questions

General research question

In this study, I answer the question of how the externalization of European asylum law should influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how mutual trust – and its relation to other general principles of EU law – should influence external European asylum law.

Alteration of the general research question

Originally, the research question was focused solely on the tension between mutual trust and fundamental rights. However, when studying the status of the principle of mutual trust as a general principle of EU law, I realized that the original approach to the general research question would only ever offer a largely incomplete answer.

[43] Armin von Bogdandy, 'Founding principles' in von Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart 2010) 11-54, p 12
[44] See *Chapter 2, Section 2.2.3.*

Firstly, it has been observed by other authors that the limitation of mutual trust by certain fundamental rights (in particular Article 4 of the Charter) is better expressed as a safety valve than as a tension.[45] Moreover, I aimed to investigate the relation between mutual trust and fundamental rights *as a general principle*, not limited to a certain material fundamental right that may or may not function as a limitation to mutual trust.

Secondly, it became clear when studying mutual trust in internal EU asylum and criminal law that the relation between mutual trust and loyal cooperation was equally important. If this were already clear in *Part I* on internal EU law, it would most likely also be relevant to the assessment of mutual trust in the context of external European asylum law in *Part II*, I reasoned.

Thus, a reevaluation of the general research question led to replacing the term 'tension' by 'relation' and to expanding the scope to the question from the relation of mutual trust with 'other general principles of EU law', including but not limited to fundamental rights.

Sub-questions

In order to answer the general research question, the following sub-questions will be answered first:

1. What are the defining characteristics of a general principle of EU law?
2. What is the spatial scope of application of general principles of EU law?
3. What legal function does the principle of mutual trust fulfill within the EU?
4. What are the legal trigger factors of mutual trust?
5. Should the principle of mutual trust qualify as a general principle of EU law and how should it relate to (other) general principles of EU law?
6. How can the Member States cooperate externally in the field of European asylum law?
7. What is the rationale behind the externalization of European asylum law?
8. What are the legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and of its relation to other general principles of EU law?

[45] See *Chapter 3.*

In *Section 1.7* on the Roadmap: structure of the study, I will explain which sub-questions I will answer in which chapters and why these sub-questions matter to the answering of the general research question.

1.4 Hypotheses

The hypotheses formulated in this section are tentative assumptions about the concept of mutual trust, in light of general principles of EU law, and in the context of external European asylum law. These hypotheses are based on the information available at the beginning of the research trajectory in the fall of 2018. The hypotheses construe my expectations that existed before conducting the study. They ensure that these suppositions can be tested after having conducted the research. *Section 7.3* of the concluding chapter will test the validity of the hypotheses against the answers to the sub-questions.

The hypotheses in this dissertation are statements about a relationship between elements of this study. Testing the hypotheses in this study entails a reliance on the legal sources available and my analysis of such legal sources, as opposed to a reliance on empirical experiments. This distinguishes the methodological use of hypotheses in this study from the way they are often-employed in social sciences.[46]

The formulating of hypotheses at the beginning of the study and testing their validity at the end of the study should be regarded as a guide to my discovery and thought process, in other words: the road taken. They aim to provide insight into the research conducted in this study and therefore increase its reproducibility.[47] As such, the four hypotheses below should be regarded as the starting point for the research.

1.4.1 Hypothesis 1: Mutual trust should be regarded as a general principle of EU law

Currently, the status of mutual trust within the legal order of the EU is unclear. The CJEU has framed mutual trust as a principle of constitutional value in Opinion 2/13 on, broadly speaking,

[46] For example, see Michael Scriven, 'Evaluation Research' in Outhwaite and Turner (eds), *The SAGE Handbook of Social Science Methodology* (SAGE Publications 2007) 523-533

[47] On the importance of making legal research methods explicit, see Hervé Thijssen, *De juridische dissertatie onder de loep. De verantwoording van methodologische keuzes in juridische dissertaties* (Boom Juridische Uitgevers 2009) p 43-47

the relationship between the CJEU and the ECtHR.[48] As an aftermath of Opinion 2/13, some scholars have argued that mutual trust is a general principle of EU law, whereas others have rebutted its status as a general principle.[49] To study this, I will study the legal trigger factors of mutual trust, which is considered here as the activating circumstance or provision, meaning that which makes the principle of mutual trust applicable in the studied context.

Based on the fact that the CJEU has recognized the constitutional value of the principle of mutual trust, it is my hypothesis that mutual trust does constitute a general principle of EU law. In order to test this hypothesis, I will answer the previously formulated sub-questions:

- What are the defining characteristics of a general principle of EU law?
- What legal function does the principle of mutual trust fulfill within the EU?
- What are the legal trigger factors of mutual trust?
- Should the principle of mutual trust qualify as a general principle of EU law and how should it relate to (other) general principles of EU law?

1.4.2 Hypothesis 2: Externalizing European asylum law cannot circumvent the constitutional structure of the EU

It has been argued that avoiding the 'burden' of having to comply with general principles of EU law, including fundamental rights, is one of the underlying political objectives to the externalization of European asylum law.[50] If this is the case, externalizing European asylum law is arguably at least partly aimed at circumventing the constitutional structure of the EU. Thus, the second hypothesis depends on the outcome of the study on the rationale behind the externalization of European asylum law.

Additionally, the second hypothesis is based on the presumption that the constitutional structure of the EU applies as much in the context of external European asylum law as it does in the context of internal EU law. If this presumption is valid, simply externalizing European asylum law would

[48] *Opinion 2/13* [2014] para 168

[49] For authors who have a more positive attitude towards regarding mutual trust as a 'structural' or general principle of EU law, see Sacha Prechal [2017] ; Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 69-79. For authors problematizing the categorization of mutual trust as a general principle, see Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 59 - 68; Luc Leboeuf (2016) p 49-59

[50] See Annick Pijnenburg (2021) p 51 and the sources referenced there in footnote 77

be insufficient to circumvent the general principles of EU law, as this would be prevented by judicial review based on general principles of EU law. This hypothesis builds upon previous scholars, such as Moreno-Lax, who argues that the fundamental rights obligations of the Member States under EU law are 'inescapable'.[51]

'Circumventing' in this hypothesis refers to policies constructed with an aim to avoid triggering norms of EU primary law. However, even if policies are indeed aimed at avoiding to trigger norms of EU primary law, judicial review based on the general principles of EU law in the field of external European asylum law may protect the constitutional structure of the EU against its potential circumventing. Thus, this hypothesis should be understood as referring to an inability to circumvent the constitutional structure of the EU *because of judicial review*, not because of a political inability to circumvent the constitutional structure. In other words, the word 'cannot' should be understood in the sense of prevented or sanctioned by judicial review, not as a political inability.

The validity of the second hypothesis will be evaluated in light of the answers to the following sub-questions:

- What is the spatial scope of application of general principles of EU law?
- What is the rationale behind the externalization of European asylum law?
- What are the legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and of its relation to other general principles of EU law?

1.4.3 Hypothesis 3: Some sources of external European asylum law trigger the external extension of the principle of mutual trust to that field of law

Mutual trust is applied in internal EU asylum law: in the Common European Asylum System. In addition, it is my assumption that, if mutual trust should be considered as a general principle of EU law, and if general principles should apply externally, and depending on the specifics of the Member State cooperation in a certain source of external European asylum law, the application of mutual trust may extend to external European asylum law. This hypothesis adds to the second hypothesis because, in case the second hypothesis is proven invalid, the third hypothesis may still

[51] Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford Academic 2017) p 471-473

be confirmed. The validity of this hypothesis depends on the following factors: a) the source of external European asylum law concerned, b) the trigger factors of the principle of mutual trust, c) the status of the principle of mutual trust as a general principle of EU law, and d) the applicability of the general principles of EU law in the field of external European asylum law. To test the validity of the third hypothesis, I will answer the following sub-questions:

- What are the legal trigger factors of mutual trust?
- How can the Member States cooperate externally in the field of European asylum law?
- Should the principle of mutual trust qualify as a general principle of EU law?

1.4.4 Hypothesis 4: The limitation of mutual trust by certain fundamental rights will increase as European asylum law further externalizes

The hypothesis that the limitation of mutual trust by certain fundamental rights would increase, if European asylum law further externalizes, is based on the current situation in internal EU asylum law. Therein, the fundamental rights obligations of the Member States often limit the application of the principle of mutual trust and complicate the cooperation between the Member States, as has been touched upon in *Section 1.2.1.* This will be studied in *Chapter 3* (*Section 3.3* on mutual trust in asylum law and *Section 3.4* on mutual trust in criminal law) and *Chapter 4* (*Section 4.4.1* on the relation between mutual trust and fundamental rights). It is my expectation that the externalization of European asylum law will not solve such issues and, on the contrary, may even intensify them. The validity of this hypothesis will be tested against the answers to the following sub-questions:

- How should the principle of mutual trust relate to (other) general principles of EU law?
- How can the Member States cooperate externally in the field of European asylum law?
- What are the legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and of its relation to other general principles of EU law?

1.5 Scientific contribution

First of all, in this study, I develop a framework on the defining characteristics of general principles of EU law to be applied to the principle of mutual trust. Doing so deepens our understanding of the general principles of EU law. This framework also offers the benefit of broader application; it could also be employed to assess the constitutional status of other norms under EU law.

In addition, the research on the role of the principle of mutual trust aims to add to the literature on mutual trust. As the importance of this principle extends throughout EU law, the systemic approach to mutual trust in light of general principles of EU law that is taken in this study may not only further our understanding of mutual trust – as a lens through which we can study Member State cooperation dynamics – but also of the EU legal order in which it exists.

Moreover, this study applies the acquired knowledge of mutual trust to the field of external European asylum law. This is a part of asylum law that, despite its topical value, remains fairly uncharted territory in the sense that there is limited literature available focusing on the *concept* of external European asylum law.[52] Thus, the conceptualization of external European asylum law is one of the contributions I aim to make to the academic debate.

Lastly, it has to be noted that, as of yet, there is limited legal research that combines studies of external European asylum law and EU public law.[53] Therefore, and probably most importantly, the added value of this research is that it studies mutual trust in light of general principles of EU law *and* in the context of external European asylum law.

It is my expectation and hope that the findings, that are drawn from bringing together my inquiries on the principle of mutual trust, on general principles of EU law, and on external European asylum law, will allow for broader conclusions on the further externalization of European asylum law and its implications on Member State cooperation dynamics and EU public law.

1.6 Focus, delimitations, and sources

In this section, I will give an overview of the methodology used to study the main subjects of the study. This includes the reasons for certain delimitations, the focal points, and the sources that will be studied.[54] This will be done following the order of the structure of the study (see *Section 1.7)*: the focal points, delimitations, and sources regarding general principles of EU law will be clarified

[52] For an overview of scholars who engage with concepts similar or related to external European asylum law, see *Chapter 5, Section 5.1.*
[53] One example of research, which does do so, is Sergio Carrera and others, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019)
[54] This section is to be read in conjunction with *Section 1.4* on the hypotheses.

in *Section 1.6.1*, regarding mutual trust in *Section 1.6.2*, and regarding external European asylum law in *Section 1.6.3*.

1.6.1 General Principles of EU Law

General principles

Because of the practical importance of the principle of mutual trust – which is the central concept of this study and the reason for inquiring on general principles of EU law – I have chosen a positive law approach to general principles of EU law. Consequently, the philosophical foundations of the general principles of EU law are not included in this study and the strict distinction between principles and rules will not lie at the basis of the discussion on general principles of EU law.[55]

Examples of general principles of EU law

Chapter 2 on general principles of EU law will specifically zoom in on CJEU case law. A framework concerning the defining characteristics of general principles of EU law will be distilled from the case law of the CJEU on general principles of EU law. In order to do so, I have chosen to work with two examples of general principles of EU law.

The selected examples are the general principle of loyal cooperation and the general principle of fundamental rights. Working with examples has the benefit of increasing our understanding of reality while still being manageable. In other words, studying the principles of loyal cooperation and of fundamental rights and afterwards making an abstraction of the studied general principles offers a broad understanding of general principles of EU law, without having to study *all* general principles of EU law. Studying examples offers the benefit of delving into the depths of these contexts, instead of a broader approach such as a structured case law analysis.[56]

In order to give a realistic overview of what general principles of EU law look like and, at the same time, reaching conclusions that are directly relevant to the general research question, I have used a sampling strategy of critical examples.[57] Critical examples are understood here as examples of

[55] See Chapter 2*, Section 2.2.2* and the sources referenced there.
[56] Frederik Peeraer and Rob van Gestel, 'Systematische jurisprudentieanalyse als uitdaging voor onderwijs en onderzoek' in Verbruggen (ed), *Methoden van systematische rechtspraakanalyse. Tussen juridische dogmatiek en data science* (Boom 2021) 185-2011, p 189
[57] See Jennifer Platt, 'Case study' in Outhwaite and Turner (eds), *The SAGE Handbook of Social Science Methodology* (SAGE Publications 2007) 100-118, p 114

general principles of EU law that have a big impact on our understanding of the field of general principles of EU law in general.

I consider both loyal cooperation and fundamental rights to be critical examples because they are particularly important to the development of general principles of EU law in general and they have impacted the constitutionalization of the EU legal order.[58] They highlight vital information on what a general principle of EU law might look like. Loyalty does so because it shows that a general principle of EU law can be written down in the Treaties without being limited to or confined by the black-letter law.[59] On the contrary, fundamental rights highlight the exact opposite: that general principles of EU law may be found and developed by the CJEU before being codified. The general principle of fundamental rights protection under EU law was indeed first developed in the case law before being codified.[60] Studying these two diverging examples allows me to understand general principles of EU law more fully than I would have been able to if I would have selected two similar representative examples.[61]

Because loyal cooperation and fundamental rights are critical examples of general principles of EU law, they are arguably both essential to the constitutional order of the Union. As a result thereof, loyal cooperation, fundamental rights and mutual trust are also intertwined:[62] loyalty lies at the basis of mutual trust[63] and fundamental rights have been considered as a safety valve to mutual trust.[64] This will further be developed in *Chapter 4, Section 4.4* on the relation between mutual trust and other general principles of EU law.

Case selection

In order to develop a framework on general principles of EU law, this study will mainly be based on the large body of CJEU case law on the general principles of fundamental rights and of loyal

[58] See Ben Smulders, 'De loyale samenwerkingsverplichting tussen de EU en haar Lidstaten: bespiegelingen over de praktische uitvoering van deze kernnorm' in Campo and others (eds), *Loyale Samenwerking binnen de EU. Liber Amicorum voor Ivo van der Steen* (Boom juridisch 2020) 15-22
[59] See Rick Lawson, 'O campo preto. Op zoek naar een Portugese Zwartveld' in Campo and others (eds), *Loyale Samenwerking binnen de EU. Liber Amicorum voor Ivo van der Steen* (Boom juridisch 2020) 23-37, p 29-30
[60] Takis Tridimas (2006)
[61] See Jennifer Platt (2007) p 114 and the sources references there
[62] Cecilia Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise des valeurs* (Bruylant 2020) p 463-464
[63] Court of Justice of the European Union Case C-359/16 *Altun* [2018] para 40
[64] Sacha Prechal [2017] p 85-90

cooperation. I will primarily focus on the principles of loyalty and of fundamental rights as these are the selected examples of general principles of EU law.

The case law for the research on general principles is selected based on two criteria: firstly, the most reported cases in academic literature, and secondly, additional cases that appeared after filling in the search terms 'loyal cooperation', 'loyalty', 'fundamental rights' and 'general principle' in the CURIA search form of the CJEU. A further selection has taken place based on whether or not these judgments help us understand the general field of general principles of EU law. In other words, they either represent average or classic examples of judgments on general principles of EU law. Only such judgments will be included in the study in order to increase the understanding of general principles of EU law.

In line with the general focus of this study on EU law, the study of the case law on general principles does not encompass ECtHR case law, except when necessary to understand the case law of the CJEU on fundamental rights. Similarly, domestic (case) law on general principles is only touched upon where this clarifies the existence or application of a general principle of EU law. Both for ECtHR and for domestic case law, this will be done when a CJEU judgment refers to national or ECtHR judgements. The study of the defining characteristics of general principles of EU law will also be based on existing literature, which will help understand the context of general principles in the EU.

Loyal cooperation as a general principle of EU law

In addition to the mentioned selection of loyal cooperation as a critical example of general principles of EU law, this selection is based on the premise that the principle of loyal cooperation constitutes a general principle of EU law. This is founded on previous scholarship such as Temple Lang and Gormley.[65]

[65] For authors viewing loyalty as a general principle of EU law, see John Temple Lang, 'Article 10 EC - The Most Important "General Principle" of Community Law' in Bernitz and others (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 75-114; Laurence Gormley, 'Some Further Reflections on the Development of General Principles of Law Within Article 10 EC' in Bernitz and others (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 303-314; Geert De Baere and Timothy Roes, 'EU Loyalty as Good Faith' [2015] International and Comparative Law Quarterly 829, p 834-837

Their views were adopted here despite Klamert arguing that loyalty is not a *general* principle of EU law.[66] Klamert reframes the constitutionalizing case law of the CJEU around the generally accepted functions of general principles of EU law (gap-filling, aid to interpretation, and ground for review).[67] They do so '[i]n order to assess whether loyalty is […] substantially different from genuine general principles'.[68] They consider loyalty to not be a 'genuine' general principle of EU law because it does not fulfil all these functions. This is a functions-centered approach in which the qualification of a norm as a general principle of EU law depends on the functions that norm fulfills. In my opinion, this is unconvincing. Such a functions-centered approach looks at general principles the wrong way around; it reduces general principles to their functions. Instead, I submit that the functions of general principles of EU law should be viewed as consequences of their qualification as a general principle, as will be expanded upon in *Chapter 2, Section 2.2.3* and *2.5.1*. Moreover, Klamert does not consider the weight of the principle of loyal cooperation, whereas this is a widely accepted attribute of general principles in legal scholarship.[69] Thus, this study starts from the premise that loyal cooperation constitutes a general principle of EU law.

Fundamental rights as a general principle of EU law

Often, fundamental rights are regarded from the protection for individuals they entail, instead of using the obligations for states, stemming from fundamental rights, as the starting point of research. However, centering the study of fundamental rights on the obligations of the Member States has additional value to this study because its main research topic is the principle of mutual trust, which is a lens through which we can study EU Member State cooperation dynamics. Indeed, mutual trust is closely intertwined with interstate relations, instead of being individual and rights-based. Consequently, it makes sense for this study to also regard the general principle of fundamental rights from the point of view of the Member States' obligations.

The study on fundamental rights in this study is limited to fundamental rights as a general principle of EU law and the obligations stemming from it, instead of focusing on the substantive rights. The idea that Member States are under an obligation to protect fundamental rights is – in and by itself

[66] Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) p 245-251
[67] The functions of general principles of EU law are discussed in *Chapter 2, Section 2.2.3.*
[68] Marcus Klamert (2014) p 246-247
[69] Rob Widdershoven, 'Een ervaring als staatsraad advocaat-generaal: op zoek naar een rechtsbeginsel' in Bosma and others (eds), *De conclusie voorbij. Liber amicorum aangeboden aan Jaap Polak* (Ars Aequi Libri 2017) 87-101; Takis Tridimas (2006)

– a general principle of EU law. In this research project the 'general principle of fundamental rights' consists therefore of the principle that EU law indeed obliges the Member States to protect fundamental rights. The general principle of fundamental rights precedes the Charter and may even go beyond the protection offered by the Charter, as will be studied in *Chapter 2, Section 2.4*.

For the sake of consistency and in line with the general focus of this study on EU law, the 'fundamental rights' in this study are limited to fundamental rights under EU law and in principle exclude (international) human rights, such as the human rights protected by the ECHR.

The myriad substantive fundamental rights, such as the principle of *non-refoulement*[70] protected by Article 4 of the Charter, are in principle not the subject of this research. They are not necessary for answering the general research question. Indeed, I regard the general principle of fundamental rights in this study in light of its relation to mutual trust and the obligations of the Member States, rather than conducting a substantive study on the protection of individual fundamental rights in Europe.

However, if and when necessary to understand the *general principle* of fundamental rights or the limitations to the principle of mutual trust, the prohibition of refoulement as protected by Article 4 of the Charter will be used as an example.[71] *Non-refoulement* is chosen because of its absolute character,[72] and its connection with asylum law. Its absolute character has allowed the CJEU and national courts, in following of the ECtHR, to view it as a limitation to the principle of mutual trust. The intrinsic connection between Article 4 of the Charter and *non-refoulement* in asylum law makes it a pertinent example of fundamental rights for this research because asylum law (both internal EU asylum law, which is applicable within the EU, and external European asylum law, which is applicable beyond Europe) is used in this study as a context to study mutual trust.

---

[70] The principle of *non-refoulement* is '[t]he prohibition for States to extradite, deport, expel or otherwise return a person to a country where his or her life or freedom would be threatened, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel, inhuman and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm.' 'Glossary on Migration' (IOM 2019). See also Violeta Moreno-Lax (2017) p 281-289

[71] Art. 4 Charter of Fundamental Rights of the European Union [2000] OJ 2000/C 364/01: '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.'

[72] See Clare Moran, 'Strengthening the principle of non-refoulement' [2021] The international journal of human rights 1032; Michael Addo and Nicholas Grief, 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?' [1998] European Journal of International Law 510

Legitimacy issue

In this study, I will examine the legitimacy issue of general principles, in order to help us understand how the general principles of EU law have developed through the case law of the CJEU. A full discussion of legitimacy lies beyond the scope of this study because it is not strictly necessary to answer the general research question. That being noted, the role of the CJEU in the creation or finding of general principles of EU law helps us understand the process of creation of general principles of EU law and situate them within the EU legal order. In *Chapter 2, Section 2.2.4,* I will explain why this role of the CJEU could be regarded as peculiar, by touching upon the legitimacy issue, which the process of creation of general principles may bring about. The discussion on this issue will be limited to presenting the different points of view in legal scholarship on the legitimacy issue in the context of general principles of EU law.

EU law

The study of general principles will be limited to EU law. This delimitation results from the subject of study because the general principles of EU law are specific to the legal system of the EU. International, domestic and comparative law do not lie at the core of this study and will only be touched upon where necessary to understand the case law of the CJEU, that is, when the CJEU or its Advocate Generals refer to general principles of the national legal order of a Member State or of the international legal order.

1.6.2 Mutual Trust

Asylum law

The principle of mutual trust will be studied in the context of internal EU law, i.e. EU law which is applicable within the EU. More specifically, the study of mutual trust in *Chapter 3* concerns, firstly, the Dublin system. This is an instrument of the Common European Asylum System, also referred to in this study as 'internal' European or EU asylum law. The emphasis on the CEAS follows from the focal point of this research: the extension of mutual trust to the field of external European asylum law – as opposed to *internal* EU asylum law.

It has to be noted here that, in this study, the term asylum law is used in a broad sense to refer to legal instruments related to or regulating international protection, which consists of refugee

protection[73] or 'subsidiary protection' under human rights law.[74] This understanding of 'international protection' is in line with the EU Qualification Directive.[75]

Criminal law

In addition to asylum law, other areas of EU law are also relevant to this study because mutual trust has a broader reach in the EU legal order. The study on the principle of mutual trust would be incomplete without a broader understanding of this principle in other fields of EU law.

As an example of a field of law in which mutual trust plays an important role, I selected criminal law, more specifically, the European Arrest Warrant system. This selection was made because the relationship between fundamental rights and mutual trust in the European Arrest Warrant system has, similarly to the context of the Dublin system, led to discussion. This has been caused by multiple limitations of mutual trust based on the (potential) violation in practice of a certain fundamental right.[76] Thus, the EAW system was selected as the second example to study mutual trust in internal EU law.

Other contexts

It has to be acknowledged here that mutual trust also plays an important role in other fields of law within the EU legal system, such as the internal market. However, I have chosen not to include the internal market because the relation between mutual trust and fundamental rights may well be considered different from asylum law. Brouwer considers it to be different in the sense that mutual trust in the internal market often leads to the protection of individual rights, whereas mutual trust in the European Arrest Warrant system and the Dublin system aims to protect systemic and

[73] Art. 2(e) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337

[74] Art. 2(f) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337

[75] Art. 2(a) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337

[76] See *Chapter 3, Section 3.4* and the literature and case law referenced there.

Member State interests.[77] The potential extrapolation of the relation between mutual trust and fundamental rights in internal EU asylum law, to external European asylum law, provided a certain sense of urgency for this study.[78] Therefore, I have chosen the other example of a context to study mutual trust in this study, i.e. the EAW system, to be in line with the context of the Dublin system.

Other contexts within the AFSJ, such as family law, are not studied here. The developments in criminal and asylum law seem to be more influential to our understanding of mutual trust as a principle of EU law because of the interaction of mutual trust with fundamental rights in those fields of law.[79]

Such other contexts are only touched upon in this study where it is necessary to comprehend the broader context in which the principle of mutual trust exists.[80] Because mutual trust, particularly in the internal market, has been heavily researched,[81] I rely on previous research on mutual trust in those other contexts wherever relevant for answering the sub-questions.

EU law

While comparative analyses of the application of mutual trust in the domestic legal systems of the EU Member States could undoubtedly offer an added benefit to the study of EU law, I chose not to do so here because the focus of this study is on EU public law. Due to size and time restraints, the study of mutual trust in the domestic law of the Member States has taken a backseat and will only be touched upon if and where necessary to understand the development of the principle of mutual trust or to frame the discussion on EU law. As a result, I do not steer into the terrain of comparative legal analysis in this study.

Sources

To assess the development of the principle of mutual trust in the EU, its legal function in the EU legal order, its qualification as a general principle of EU law, and its relationship with fundamental

[77] Evelien Brouwer [2013] p 137
[78] See *Section 1.2.1.*
[79] For a similar approach, see Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice. A Role for Proportionality?* (Hart Publishing 2019) p 6-7
[80] For example, see *Chapter 4, Section 4.3.3* on the broad application of mutual trust throughout EU law.
[81] E.g. Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' [2017] European Papers 93; Xandra Kramer, 'Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights' [2013] Netherlands International Law Review 343

rights and loyalty, I will draw from the comprehensive existing legal scholarship, EU legislation and CJEU case law on mutual trust. Sources of domestic systems and of the ECHR and ECtHR case law are only studied in as far as this sheds a light on (the application of) EU legislation or CJEU case law.

Mutual trust as a general principle of EU law

In order to assess whether the principle of mutual trust is a general principle of EU law, the framework developed in *Chapter 2* will be applied to the principle of mutual trust in *Chapter 4*. The assessment of the status of mutual trust is limited to this framework. For the same reasons as mentioned with respect to the selection criteria for the examples of general principles of EU law in *Section 1.6.1*, the general principles of EU law in the research on the relationship between the principle of mutual trust and other general principles of EU law, are limited to the principle of loyal cooperation and fundamental rights.

1.6.3 External European Asylum Law

Sources

As noted in *Section 1.2.2*, external European asylum law is a largely scattered field of law and consists of a vast array of sources. It would transcend the purpose of this study to discuss all sources of external European asylum law. Therefore, I have limited my research to two sources: agreements with third countries with an asylum component, and humanitarian visas. These two sources of external European asylum law were chosen because of what they represent within the field of external European asylum law.

Cooperation with third countries (including agreements with an asylum component) is one of the key elements of the external dimension of European asylum law[82] and is therefore typical for the field.

Humanitarian visas were chosen because they are said not to be part of a deterrence strategy. While this is currently an atypical source, it is arguably what external European asylum law might

[82] See 'External Dimension' (EASO) <www.easo.europa.eu/operational-support/external-dimension> accessed 23 November 2021 ; 'EASO External Cooperation Strategy' (EASO February 2019)

increasingly consist of, according to authors such as Gammeltoft-Hansen and Tan.[83] In addition, humanitarian visas were chosen as a source of external European asylum law because it is the playing field of an interesting interaction between the various legal systems which operate within the European legal context, namely those of the EU and of the individual Member States; while national practices of humanitarian visas are formally not a part of EU law, they may rely on EU law to set up such national systems. These systems may, in turn, result in European case law and, as a consequence thereof, may result in the adaptation of humanitarian visa systems in other Member States and perhaps also on the EU level. That this is the case for the chosen case study on the Belgian humanitarian visa practice will be further explained hereafter and in *Chapter 5, Section 5.4.*

Case studies

As noted by Platt, '[h]ypothesis-tested research cannot start without some sense of what the realities are that need to be accounted for.'[84] These realities are partly found in two specific case studies of the selected sources of external European asylum law. Of each source, I have selected one example as a case study: the EU-Turkey Deal as a case study for agreements with third countries with an asylum component, and the Belgian humanitarian visa practice as a case study for humanitarian visas. The study on the context of external European asylum law is thus limited to two case studies. To ensure the feasibility of this study, the number of case studies was limited to one case study per source.

The sampling strategy used to select the case studies was that of critical cases. A case is considered critical here if it has had a considerable impact on other cases within the same source (or is foreseen to have such impact), or if the case is prevalent within the source. The generalization that will follow from these case studies is a legal theoretical endeavor, not an empirical one. As a result, I view the analysis and comparison of the case studies of external European asylum law in *Chapter 5* as 'tentative until further data have been collected'[85] – that is, tentative until compared with more

[83] Thomas Gammeltoft-Hansen and Nikolas Tan, 'The End of the Deterrrence Paradigm? Future Directions for Global Refugee Policy' [2017] Journal on Migration and Human Security 28, p 40-45; Thomas Gammeltoft-Hansen and Nikolas Tan, 'Beyond the deterrence paradigm in global refugee policy' [2016] Suffolk Transnational Law Review 637, p 648-649; Luc Leboeuf and Marie-Claire Foblets (2019) p 19-20; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final p 22-24
[84] Jennifer Platt (2007) p 112
[85] Jennifer Platt (2007) p 114 and the sources referenced there

case studies on more sources of external European asylum law. As such, any findings resulting from the case studies should be interpreted with caution, given that they result from a limited number of case studies, studied through the particular lens of mutual trust.

It has to be noted here that both case studies are not, strictly speaking, EU law. However, their falling under EU law has been much-debated.[86] The benefit of including national instruments in this study is that they offer an extra dimension as opposed to instruments created on the EU level. Scholars such as Melin have argued that the Member State cooperation in the field of asylum or migration lacks uniformity.[87] Rather, there is a practice of creating instruments on the national level, which, to some extent, reflects policy created on the EU level.[88] Therefore, in this study, the case studies are a reflection of such practice by studying instruments that, strictly speaking, do not fall under EU law but are in fact closely intertwined with EU law and a result of Member State cooperation. This is especially true for the case studies of the EU-Turkey Deal and the Belgian humanitarian visa practice, since they showcase that the domestic instruments of the Member States are closely intertwined with European policies on the externalization of asylum law.

Agreements with third countries with asylum components: the EU-Turkey Deal

Agreements with third countries with asylum components are the first source of external European asylum law studied in this research. I consider this source to consist of three elements: an agreement; with a third country; with an asylum component. The term agreement not only includes formal international agreements but also non-formal soft law. In order to be conceived as a form of this source of external European asylum law, the agreement has to be concluded between one or multiple third countries on the one side, and either the EU, or multiple or all of the Member States, or the EU in combination with its Member States, on the other side. In addition, the agreement has to have an asylum component, implying some influence on the way third-country nationals apply for and are granted international protection, including asylum. The EU and its Member States have often taken recourse to third country cooperation to attain migration

[86] See *Chapter 5, Section 5.3* and *5.4.*
[87] Pauline Melin, 'The Global Compact for Migration: Lessons for the Unity of EU Representation' [2019] European Journal of Migration and Law 194, p 194-214
[88] See Andrea Terlizzi [2021] p 768; Lynn Hillary, 'Down the Drain with General Principles of EU Law? The EU-Turkey Deal and "Pseudo-Authorship"' [2021] European Journal of Migration and Law 127, p 133-134 and 140-144

management, for example the 2021 Joint Declaration on Migration Cooperation between Afghanistan and the EU.[89]

The selected case study of an agreement with a third country with an asylum component is the EU-Turkey Deal. Indeed, it is an agreement between the EU (and/or the Member States) and Turkey. In addition, the asylum component of the EU-Turkey Deal consists of the division made in the Deal between asylum seekers (i.e. people in need of international protection) and other people on the move, on the one hand, and the mechanism focused on the protection of Syrians (who often qualify for international protection due to the general situation in their country of origin) on the other.

The EU-Turkey Deal is a critical case because it is considered a blueprint for other migration management deals.[90] Especially in light of the focus on similar deals in the 2020 EU New Pact on Migration and Asylum,[91] it is foreseen to have considerable impact on other agreements with third countries with an asylum element. The EU-Turkey Deal will be studied from an EU perspective, as EU law is the general focus of this study.[92]

Humanitarian visas: the Belgian humanitarian visa practice

The second selected source of external European asylum law in this study consists of humanitarian visas. The humanitarian visa – is defined in the Glossary on Migration of the International Organization on Migration (IOM), as a

> 'visa granting access to and temporary stay in the issuing State to a person on humanitarian grounds for a variable duration as specified in the applicable national or regional law, often aimed at complying with relevant human rights and refugee law.'[93]

[89] Joint Declaration on Migration Cooperation between Afghanistan and the EU [2021] 5223/21 ADD 1; See also Joint Way Forward on migration issues between Afghanistan and the EU [2016] ; The Joint Way Forward is available at <https://eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf>.
[90] Tineke Strik, 'De externe dimensie van het EU migratiebeleid: uit het oog uit het recht?' [2018] Nederlands Tijdschrift voor de Mensenrechten 64, p 83
[91] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final, p 16
[92] For a study on the EU-Turkey Deal from a Turkish perspective, see Gerda Heck and Sabine Hess, 'Tracing the Effects of the EU-Turkey Deal. The Momentum of the Multi-Layered Turkish Border Regime' [2017] movements 35
[93] 'Glossary on Migration' (IOM 2019), p 97-98

The main difference between the often-discussed[94] system of resettlement[95] and the humanitarian visa system is that a humanitarian visa only allows third-country nationals to submit an application for international protection once they arrive in the EU Member State, whereas resettlement would lead to the recognition of the third-country national as a refugee and direct granting of a residence permit upon arrival in the Member State. Moreover, humanitarian visas allow the person concerned to directly petition the government involved and request international protection, whereas this is usually not possible in the context of resettlement, wherein the United Nations Refugee Agency (UNHCR) often preselects the resettlement candidates.[96] However, as I will exemplify in Chapter 5*, Section 5.4* on the Belgian humanitarian visa practice, the theoretical distinction between humanitarian visas and resettlement is sometimes blurred in practice when states employ a combination of both humanitarian visas and resettlement in one practice of creating legal pathways.

Despite several proposals,[97] no overarching European humanitarian visa system exists.[98] Since no humanitarian visa system exists on the EU level, I have chosen a case study for this source based on Member State domestic law. While the CJEU ruled in 2017 that the Belgian humanitarian visa system does not fall under the scope of EU law, it is arguably closely intertwined with EU law, as will be discussed in *Chapter 5*. The Belgian humanitarian visa practice provides an interesting insight in the interdependence and coexistence of national and EU law. Indeed, this case study offers the benefit of showing how Member State cooperation dynamics are influenced by instruments that, according to the CJEU, do not fall under EU law. According to the CJEU, and despite humanitarian visas not falling under EU law, the Member States are allowed to set up national humanitarian visa schemes.[99] Certain Member States have humanitarian visa practices in

[94] E.g. Adèle Garnier and others, *Refugee resettlement: power, politics, and humanitarian governance* (Oxford University Press 2018)
[95] Resettlement is defined in the IOM Glossary on Migration as the 'transfer of refugees from the country in which they have sought protection to another State that has agreed to admit them – as refugees – with permanent residence status.' 'Glossary on Migration' (IOM 2019) p 184
[96] See also Luc Leboeuf and Marie-Claire Foblets (2019) p 27
[97] Eugenia Relaño Pastor, 'EU Initiatives on a European Humanitarian Visa' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 341-361
[98] Wouter van Ballegooij and Cecilia Navarra, 'Humanitarian visas. European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (Rapporteur: Juan Fernando Ló pez Aguilar)' (European Parliamentary Research Service PE 621.823 22 November 2018) <https://op.europa.eu/en/publication-detail/-/publication/a3b57ef6-d66d-11e8-9424-01aa75ed71a1/language-en/format-PDF> accessed 23 November 2021 ; Eugenia Relaño Pastor (2020) p 363-365
[99] Court of Justice of the European Union Case C-638/16 PPU *X and X v Belgium* [2017] para 51

place, such as Belgium, Italy and Germany.[100] Because the practice of humanitarian visas in Belgium[101] instigated CJEU and ECtHR case law,[102] it has influenced such national practices and will arguably influence any future European humanitarian visa system. Therefore, the Belgian domestic practice regarding humanitarian visas was selected as a case study.

Multidimensional approach

Both case studies will be supported by legal scholarship and a multidimensional approach. As will be explained in *Chapter 5, Section 5.2,* this multidimensional model is drawn from political science, and allows an inquiry of and comparison between the spatial, relational, functional and instrumental dimensions of the case studies of external European asylum law.

While the methodology in this study remains legal doctrinal, the multidimensional approach offers the benefit of making case studies of a largely scattered and diverse field comparable. Zaiotti's approach is conceptual and therefore a viable alternative to a potentially more intuitive approach to the sources of external European asylum law. As a result, a study resulting from the multidimensional approach is also applicable to other sources and case studies of external European asylum law. Using this approach thus has the ability of making this research comparable with other research on external European asylum law. As observed by Martin in their commentary on Zaiotti's multidimensional model, the dimensions of external European asylum law, distinguished by Zaiotti, are 'particularly useful for understanding the broad scope of governance'. They allow for a critical analysis of various instruments of external European asylum law, which Martin refers to as 'the items within the "policy tool-box"' used by governments in the field of external European asylum law.[103]

European law

[100] Katia Bianchini, 'Humanitarian Admission to Italy through Humanitarian Visas and Corridors' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 157-197; Pauline Endres de Oliveira, 'Humanitarian Admission to Germany – Access vs. Rights?' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 199-224; Serge Bodart, 'Humanitarian Admission to Belgium' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 225-237

[101] Astrid Declercq, 'Het humanitair visum: balanceren tussen soevereine migratiecontrole en respect voor de mensenrechten' [2017] Tijdschrift voor Vreemdelingenrecht 118

[102] *X and X v Belgium* [2017] ; European Court of Human Rights Case 3599/18 *M.N. v Belgium* [2020]

[103] Daniel Martin, 'Book Review: Ruben Zaiotti (ed), Externalizing Migration Management. Europe, North America and the spread of "remote control" practices (Routledge 2016)' [2016] Sociological Research Online 219, p 219

As noted before, 'European' is understood in my definition of 'external European asylum law' as including but not limited to EU law. Rather, I use it to refer to sources of both EU law and domestic Member State law. In my opinion, this reflects the reality of externalization dynamics more accurately due to the Member States' active involvement in the creation and forming of EU asylum law. Thus, external 'European' asylum law in this study refers to the law created on the EU level and, in as far as it may impact EU law, on the Member State level, too. As a result, 'European' asylum law is used here as being broader than 'EU' asylum law.

In line with the general focus of this study on EU law, the case law of the ECtHR is only discussed to provide context and background to help us understand EU asylum law and the related national asylum law with an impact on the European level.

Asylum law

As with the approach to the terms related to asylum in the context of internal EU asylum law (see *Section 1.6.2*), I use asylum law as referring to or regulating 'international protection', in line with the Qualification Directive.[104]

1.7 Roadmap: structure of the study

Lastly, this section gives an overview of the structure of the study by introducing each chapter and clarifying which sub-questions I will answer in this chapter.

Part I: Exploring mutual trust as a general principle of EU law concerns the internal application of mutual trust. It inquires on general principles of EU law, the principle of mutual trust, and the qualification of mutual trust as a general principle of EU law. *Part I* consists of Chapters 2, 3 and 4.

Chapter 2: General principles of EU law

As noted in *Section 1.2.3*, the qualification of the principle of mutual trust as a general principle of EU law depends on its fulfilling the defining characteristics of general principles of EU law.

[104] Art. 2(a) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337

Thus, to inquire on the status of mutual trust as a general principle of EU law, the doctrine of general principles of EU law will be studied and a framework on their defining characteristics will be developed in *Chapter 2*. This will be based on the case law of the CJEU on the principle of loyal cooperation and fundamental rights.[105] I will distill the common denominators from the case law in order to make explicit the defining characteristics of the general principles of EU law and their spatial scope of application. In *Chapter 2*, I will answer the following sub-questions:

1. What are the defining characteristics of a general principle of EU law?
2. What is the spatial scope of application of general principles of EU law?

Chapter 3: Mutual trust

In *Chapter 3*, I examine the application of the principle of mutual trust in internal EU law, meaning its application in the context of EU law that is applicable within the EU. More specifically, *Chapter 3* concerns the Dublin system – an instrument of internal EU asylum law – and the European Arrest Warrant system – an instrument of internal EU criminal law.[106] In both systems, the principle of mutual trust plays an important role. After an examination of the legal function of mutual trust, I will discuss its trigger factors in the Dublin and EAW systems and its interaction with its limitations. The following sub-questions lie at the basis of *Chapter 3:*

3. What legal function does the principle of mutual trust fulfill within the EU?
4. What are the legal trigger factors of mutual trust?

Chapter 4: Mutual trust – a general principle of EU law

Next, I bring together the previous two substantive chapters by assessing the principle of mutual trust, as discussed in *Chapter 3*, against the background of the framework developed in *Chapter 2*. It will inquire on the qualification of mutual trust as a general principle of EU law and on its relation to the general principles of loyal cooperation and of fundamental rights. I will answer the following sub-question in *Chapter 4*:

[105] The selection criteria for these two examples of general principles of EU law will be explained in *Section 1.6.1.*
[106] The selection criteria for these two examples of fields in which mutual trust plays an important role will be explained in *Section 1.6.2.*

5. Should the principle of mutual trust qualify as a general principle of EU law and how should it relate to (other) general principles of EU law?

Part II: Mutual trust in the context of external European asylum law concerns the externalization of European asylum law and the role of mutual trust in that legal context. It studies two case studies of external European asylum law and the legal consequences of such externalization. *Part II* consists of Chapters 5 and 6.

Chapter 5: External European asylum law

The context of external European asylum law will be assessed in *Chapter 5*. Before assessing the ways the Member States may cooperate in the context of external European asylum law and which considerations may lie at the basis of such externalization, I aim to understand what 'external European asylum law' consists of. Therefore, *Chapter 5* will conceptualize external European asylum law. Next, I explore two case studies of the sources of external European asylum law. The two selected case studies are the EU-Turkey Deal and the Belgian humanitarian visa practice.[107] I study how the Member States cooperate in the case studies, after which the question is answered of why they chose to do so. In doing so, *Chapter 5* will answer the following sub-questions:

6. How can the Member States cooperate externally in the field of European asylum law?
7. What is the rationale behind the externalization of European asylum law?

Chapter 6: Consequences of externalization

Several legal consequences of the externalization of European asylum law will be examined, firstly, in light of the legal function of mutual trust, and secondly, in light of the relation between the principle of mutual trust and fundamental rights, on the one hand, and loyal cooperation, on the other. *Chapter 6* will bring together the conclusions of the previous chapters by answering the following sub-question:

8. What are the legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and of its relation to other general principles of EU law?

[107] The selection criteria for these two case studies of external European asylum law will be explained in *Section 1.6.3.*

After *Part II*, *Chapter 7* concludes the study by reflecting on the road taken and by taking a look at the road ahead.

Chapter 7: Conclusion and recommendations

The concluding chapter will give an overview of the key findings of the research conducted in each chapter. Based thereon, the hypotheses (formulated in *Section 1.4*) will be tested against the answers to the sub-questions. This will lead to answering the general research question. Based thereon, I will answer the general research question:

> How should the externalization of European asylum law influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how should mutual trust – and its relation to other general principles of EU law – influence external European asylum law?

Lastly, in *Chapter 7,* I will formulate recommendations to remedy the issues that will be identified in this study on mutual trust, as a general principle of EU law, and in the context of external European asylum law.

Part I: Exploring mutual trust as a general principle of EU law

Part I of this study concerns the constitutionalization of the principle of mutual trust within the EU legal order. I first develop a framework on the defining characteristics and the spatial scope of application of general principles of EU law (*Chapter 2*). Secondly, I assess the legal function of mutual trust and its trigger factors in the context of internal EU asylum and criminal law (*Chapter 3*). Lastly, and based upon *Chapter 2* and *Chapter 3*, *Chapter 4* analyses the constitutional status of mutual trust. Therein, I argue that the principle of mutual trust should be considered as a general principle of EU law and I study how mutual trust, as a general principle of EU law, should relate to other general principles of EU law.

Chapter 2 General principles of EU law

2.1 Introduction

General principles of EU law are the stardust of the EU;[108] the fundamental, somewhat elusive building material with which the entire universe of EU law was created.

Since one of the sub-questions to be answered in this study concerns the constitutional status of mutual trust in EU law, I preliminarily study the general principles of EU law. The first key objective of the current chapter is to systematically map the defining characteristics of such principles. Answering this sub-question will be the starting point for an analysis of the constitutional status of mutual trust under EU law (*Chapter 4)* by applying the here developed framework to my findings on the principle of mutual trust in internal EU law, i.e. EU law that is applied inside Europe (*Chapter 3)*.

In my opinion, a systemic approach to general principles is required in order to determine the constitutional status of a principle in the EU legal system, that is, to answer the question of when a principle forms part of EU primary law in addition to governing the relations between the different entities in the Union and/or limiting the powers of those entities. In that sense, general principles of law are 'constitutional requirements'.[109] The qualification of a norm as a general principle of EU law matters because of the far-reaching consequences such a qualification entails compared to a norm which is not considered a general principle. Most importantly, general principles are a part of EU primary law.[110] As will be expanded upon in *Section 2.2.3,* it is generally accepted that they, firstly, influence the interpretation of EU law. Secondly, they have a gap-filling function. Thirdly, they serve as a ground for review of secondary law. Moreover, they can serve as ground rules for the creation of new law.[111]

[108] Similarly, Cuyvers regards general principles as 'the dark matter of EU law'. See Armin Cuyvers (2017) p 217
[109] John Temple Lang, 'Emerging European General Principles in Private Law' in Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 65-117, p 65; Court of Justice of the European Union Case C-174/08 *NCC Construction Danmark* [2009] paras 41-42
[110] Rob Widdershoven (2017) p 91
[111] See, *inter alia*, Takis Tridimas (2006) p 17-35; Jacobine van den Brink and others, 'General Principles of Law' in Jans and others (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 135-260, p 139-140; Takis Tridimas, 'The general principles of EU law and the Europeanisation of national laws' [2020] Review of European Administrative Law 5, p 20-21

Apart from *why* a systemic approach to general principles is relevant, this study has to deal with the question of *how* to distinguish the defining characteristics of general principles from other, subsidiary characteristics. The approach taken here is to distill the relevant characteristics of two selected general principles from the case law of the CJEU. The general principles of loyal cooperation and of fundamental rights will serve as the two examples from which to distill the common denominators. An abstraction will be made. In other words, I will distill the common denominators of the selected principles regarding the defining characteristics of general principles of EU law.

As explained in *Chapter 1, Section 1.6.1*, the principles of loyal cooperation and of fundamental rights were selected because they are critical examples of general principles of EU law and they are both essential to the constitutional order of the European Union.

The second objective of this chapter is to answer the question what the spatial scope of application is of general principles of EU law, in order to apply these findings to the principle of mutual trust and its potential extension to external European asylum law.

The significance of the second objective of this chapter is that the spatial scope of application of general principles of EU law bears importance for *Part II* of this study on external European asylum law. Therefore, I will investigate case law and legislation on the two selected principles, loyal cooperation and fundamental rights, to assess the potential external extension of general principles of EU law. The inquiry on the spatial scope of application of loyal cooperation and fundamental rights thus aims at a conclusion that has broader relevance to the external scope of application of general principles of EU law.

In this chapter, I first give a general overview of the development of general principles of EU law in the case law of the CJEU and in legal scholarship (*Section 2.2.1* and *2.2.2*). This is followed by a study on the functions of general principles and an overview of the discussion on the legitimacy issue that arises in the context of general principles of EU law (*Section 2.2.3* and *2.2.4*). Next, two examples of general principles of EU law will be covered. The legal framework will be laid down for the principle of loyal cooperation (*Section 2.3*) and the principle of fundamental rights

protection (*Section 2.4*).[112] To conclude, I distill their common denominators with regard to the defining characteristics of general principles of EU law (*Section 2.5.1*) and their spatial scope of application (*Section 2.5.2*).

2.2 General overview

2.2.1 CJEU case law

Before trying to grasp the defining characteristics of general principles of EU law, I describe their development in the case law in this section. The CJEU case law has played a significant role for the existence of general principles.[113]

The development of general principles of EU law (then: EC law) started in the hands of the CJEU in the 1950s. One of the first examples of the CJEU applying a general principle of EU law is the case of the *Fédération charbonnière Belgique.* This judgment concerned the principle of proportionality. The Court ruled that 'in accordance with a generally accepted rule of law such an indirect reaction by the High Authority [of the European Coal and Steel Community] to illegal action on the part of the undertakings must be in proportion to the scale of that action.'[114] Without going into detail on the facts of the case, it has to be noted that this judgment is important because it sets the tone when it comes to the finding of general principles of EU law in subsequent CJEU case law,[115] specifically when it comes to the protection of individual rights.

Legal basis

The legal basis for the application of general principles of EU law by the CJEU is now Article 19(1) TEU, which stipulates that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'. The term 'law' in this provision is generally accepted to

[112] As mentioned before, loyal cooperation and fundamental rights were chosen because they are critical case studies of general principles of EU law. At the same time, they are intertwined with the principle of mutual trust. Loyalty lies at the basis of mutual trust and the substantive fundamental rights can be said to be a safety valve to mutual trust. See *Chapter 1, Section 1.6.1.*

[113] Rolf Ortlep and Rob Widdershoven, 'European Administrative Law' in Seerden (ed), *Comparative Administrative Law* (Intersentia 2018) 267-356, p 299

[114] Court of Justice of the European Union Case C-8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1956] p 299

[115] Paul Craig, 'General Principles of Law: Treaty, Historical, and Normative Foundations' in Ziegler and others (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Press 2019), p 11-13, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3414315>

include principles that have constitutional status under EU law, i.e. general principles of EU law.[116] However, as pointed out by Craig, the inclusion of general principles in the term 'law' in Article 19(1) is not self-evident. In order to support the reading of Article 19(1) TEU that includes general principles of EU law, one needs to first assess Article 263(2) TFEU. Therein, it is laid down that the CJEU shall have jurisdiction to review the therein named acts against *inter alia* 'infringement of the Treaties or of any rule of law relating to their application'. Craig argues that the phrase 'any rule of law relating to its application' offers the legal basis for the review of acts against general principles of EU law and that this, in turn, strengthens the case for reading the term 'law' of Article 19 TEU as including general principles of EU law.[117]

Characteristics

Relying implicitly on Article 19 TEU as a legal basis, the CJEU has developed a rich body of case law on general principles of EU law. As to the characteristics of general principles of EU law – one of the eventual focal points of this chapter – the Court has for example assessed them in the context of abuse of rights. In the 2017 *Cussens* judgment, the Court concluded that 'the principle that abusive practices are prohibited' indeed 'displays the general, comprehensive character which is naturally inherent in general principles of EU law'.[118] The Court concluded that this is the case because the principle of abuse of rights, firstly, is applied in multiple fields of EU law and, secondly, because it 'is applied to the rights and advantages provided for by EU law irrespective of whether those rights and advantages have their basis in the Treaties, […] in a regulation […] or in a directive.'[119]

As noted by Tridimas: 'Given the importance attached to the general principles by the case law, it is somewhat surprising that some 60 years after the establishment of the EEC the meaning of the term general principles still preoccupies us.'[120] However, given that the CJEU case law does not give a definitive answer as to what distinguishes general principles of EU law from other norms under EU law, I aim to develop a framework on the defining characteristics of general principles

[116] Jacobine van den Brink and others (2015) p 135-260; Rolf Ortlep and Rob Widdershoven (2018) p 299
[117] Paul Craig (2019) p 2-5; Takis Tridimas [2020] p 18
[118] Court of Justice of the European Union Case C-251/16 *Edward Cussens a.o. v T.G. Brosnan* [2017] para 31
[119] *Edward Cussens a.o. v T.G. Brosnan* [2017] para 27-30; Wouter Blokland, 'Het verbod op misbruik: een algemeen beginsel van unierecht dat de EU en de lidstaten tegen de burger beschermt' [2018] Nederlands Tijdschrift voor Europees Recht 80
[120] Takis Tridimas [2020] p 8

of EU law in this chapter. I will do so in in *Section 2.5.1*, based on the two selected examples of general principles of EU law: loyal cooperation (*Section 2.3)* and fundamental rights (*Section 2.4*).

Material scope of application

In addition to judgments inspecting the characteristics of general principles of EU law, the CJEU has commented in its case law on their scope of application. This became a topic of discussion in 2018 in a case concerning general salary-reduction measures in Portugal. In *Associação Sindical dos Juízes Portugueses,*[121] also known as the *ASJP* or *Portuguese Judges* case, the CJEU decided on the material scope of application of the principle of judicial independence. The Court considered this principle to constitute a general principle of EU law closely linked with the rule of law, the principle of loyal cooperation and mutual trust.[122]

In this case, action was brought against the Portuguese law which lay at the basis of the salary reduction of Portuguese judges. Preliminary questions were referred on its accordance with the principle of effective judicial protection as enshrined in Article 19(1) TEU and the Charter.[123] The Court regards the general principle of effective judicial protection as requiring that 'the Member State concerned must ensure that [a] court meets the requirements essential to effective judicial protection'.[124] More specifically, independence is key in order to reach effective judicial protection.[125] Indeed, the principle of judicial independence must be respected by any national measure in a field covered by EU law, whenever a court or tribunal 'come[s] within its judicial system in the fields covered by [EU] law'.[126] In view of the independence requirement, the Court's consideration of the facts of the case was such that the salary-reduction measures in Portugal were not in violation of the principle of effective judicial protection. While the CJEU did not preclude the general salary-reduction measures, it found that Article 19(1) TEU 'relates to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter'.[127]

[121] Court of Justice of the European Union Case C-64/16 *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018]
[122] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] paras 29-36
[123] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] paras 11-18
[124] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] para 40
[125] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] paras 43-45
[126] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] para 37
[127] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] para 29

As pointed out in various commentaries on the *Portuguese Judges* judgment,[128] this provides the principle of effective judicial protection – as a general principle of EU law – with a much wider material scope of application than it has under Article 47 of the Charter. In other words, Article 19 TEU may give rise to CJEU jurisdiction in cases falling under 'fields covered by EU law'[129] which fall outside the scope of Article 51 of the Charter. That would imply that the CJEU could decide on cases even when the Member States are *not* implementing EU law.[130] Pech and Platon argue that the general principle of judicial protection as enshrined in Article 19(1) TEU 'may therefore be "triggered" in a much broader set of national situations than Article 47 [of the Charter] and in areas where there is very little to no EU acquis'.[131]

Other examples of such broadening of the material scope of application of the general principle of effective judicial protection are to be found in the CJEU case law on the independence of the Polish judiciary in light of the rule of law. Therein, the Court has confirmed multiple times that the general principle of effective judicial protection, which is closely intertwined with the rule of law, is applicable in the fields covered by EU law.[132]

In sum

In sum, the CJEU and its case law have strongly influenced the development and existence of general principles of EU law. Not only did CJEU case law instigate the understanding of the EU as a legal order with general principles, it also fleshed out the material scope of application of general principles of EU law.[133]

---

[128] E.g. Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' [2018] European Papers 395; Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses (case note)' [2018] European Constitutional Law Review 662

[129] *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] para 34

[130] Matteo Bonelli and Monica Claes [2018] p 630-631

[131] Laurent Pech and Sébastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juízes Portugueses' (EU Law Analysis 13 March 2018) <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> accessed 22 November 2021 ; Takis Tridimas [2020]

[132] Court of Justice of the European Union Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019] para 54; Court of Justice of the European Union Case C-192/18 *Commission v Poland* [2019] para 101; Court of Justice of the European Union Case C-585/18, C-624/18 and C-625/15 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* [2019] para 168; Court of Justice of the European Union Case C-558/18 and C-563/18 *Miasto Łowicz* [2020] para 33; Court of Justice of the European Union Case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* [2021] para 53

[133] As will be discussed in *Section 2.3.3, 2.4.1* and *2.5.2*, this is also true for the spatial scope of application of general principles of EU law.

2.2.2 Legal scholarship

In addition to the CJEU case law on general principles of EU law, legal scholarship has played its own part in the development of general principles overall and of general principles of EU law specifically.

Principles and rules

Regarding the overall study of general principles of law, Widdershoven has identified several guidelines for the judicial qualification of general principles of law.[134] Based on *inter alia* Soeteman,[135] Tridimas[136] and Dworkin,[137] Widdershoven argues that general principles of law are sometimes distinguished from rules. The latter supposedly have a concrete character and determine the outcome of a dispute, whereas the former offer a course of thought that might lead to multiple solutions. This makes general principles of law flexible and open-ended. Moreover, general principles have a certain weight added to them and they are legal norms.[138] That being noted, a stringent distinction between rules and principles has become obsolete. Rules are often vague to such a degree that they look like principles and many principles are concrete enough to be considered rules, Widdershoven observes.[139] Since this study is not founded on legal philosophical theories, the strict distinction between principles and rules will further be abandoned, as noted in *Chapter 1, Section 1.6.1*.

Development

From a more practical point of view, and focused on general principles *of EU law*, I deduct from the literature that most general principles of EU law are expressed first by the CJEU and over time many (albeit not all) have been codified in primary law.[140] Cuyvers mentions examples such as the principle of loyal cooperation and fundamental rights. On the contrary, other important

[134] Rob Widdershoven (2017)
[135] Arend Soeteman, 'Hercules aan het werk. Over de rol van rechtsbeginselen in het recht' [1991] Ars Aequi
[136] Takis Tridimas (2006)
[137] Ronald Dworkin, *Taking rights seriously* (Harvard University Press 1978) ; Ronald Dworkin, *Law's empire* (Harvard University Press 1986)
[138] Rob Widdershoven (2017) p 88-92
[139] Rob Widdershoven (2017) p 89 ; Arend Soeteman [1991] p 33; See also Hans Gribnau, 'Eenheid en verscheidenheid door rechtsbeginselen' in Gaakeer and Loth (eds), *Eenheid en verscheidenheid in recht en rechtswetenschap* (Kluwer 2002) 43-65, p 55-56
[140] Rolf Ortlep and Rob Widdershoven (2018) p 299-301; Armin Cuyvers (2017) p 217-228

principles of EU law, such as direct effect, supremacy and effectiveness, still have no Treaty basis and rely solely on case law.[141]

Tridimas distinguishes four conceptions of general principles of EU law of which the first two are most important in his opinion. The first conception concerns rule of law commands that are common to the constitutional traditions of the Member States, for example the protection of fundamental rights obligations under EU law. The second conception regards principles as a form of constitutional identity. Autonomy and effectiveness are examples of the second conception, although the case law of the CJEU does not often frame them as 'general' principles. Thirdly, Tridimas speaks of fundamental maxims, which are guidelines that apply to all areas of law, such as the prohibition of abuse of rights. The fourth and last conception of principles under EU law are principles in the specific context of the Charter of Fundamental Rights.[142]

Definition

Over 60 years since the emergence of the CJEU case law on general principles of EU law, it is clear that the CJEU has become more active in finding and using general principles.[143] It is less clear, however, what constitutes a general principle of EU law. In other words, what differentiates a general principle from a 'regular' norm; what are the defining characteristics of a general principle of EU law? A preliminary study on this question may be found by looking at the various scholars who have developed a definition of a general principle of EU law.

Lazzerini defines a general principle as a legally-binding, sometimes unwritten source of EU law that was shaped by the CJEU, which has drawn these principles from the legal orders of the Member States or international law instruments.[144] Cuyvers argues that general principles are unwritten and created by the CJEU, although sometimes codified.[145] Both Lazzerini and Cuyvers seem to agree with Groussot's view that it is the CJEU that acknowledges the constitutional (or foundational) character of a norm.

---

[141] Armin Cuyvers (2017) p 217-228
[142] Takis Tridimas, 'Keynote speech: Introduction: Europeanisation of Administrative law through general principles of law' (Conference on the Europeanisation of national administrative law through general principles of law: from resistance to voluntary adoption, Leiden, 2019) ; Takis Tridimas [2020] p 9-17
[143] Ulrich Everling, 'The European Union as a Federal Association of States and Citizens' in von Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart 2010) 701-734, p 724; Paul Craig (2019) p 20-22
[144] Nicole Lazzerini (2015) p 145-147
[145] Armin Cuyvers (2017) p 217-228

Contrary to this view stands Tridimas, who views the process of creation of general principles of EU law in such a way that the decisive acknowledgement of the constitutional status of a principle lies with the Member States, the Treaties, and the CJEU. Tridimas contends that a general principle of EU law is a general proposition of law of some importance from which concrete rules derive. The generalness of the principle is attributed to the general acceptance of the norm in a legal order and the fact that it transcends a specific area of law. The importance of a principle is demonstrated by its reflection of a core value of the legal order. At the same time, Tridimas distinguishes attributes of general principles of EU law: A general principle must be in accordance with the Treaties and be widely accepted in one way or another by the Member States.[146]

Lastly, Von Bogdandy defines a general principle based on the way the Treaty-makers (i.e. the collective of the Member States when drawing up the T(F)EU) have approached the term 'principles' in the Treaties. Von Bogdandy considers general principles to fall under EU primary law and defines EU primary law as constitutional law.[147] Since Von Bogdandy's focus is on the Treaty-makers, the decisive acknowledgment of a general principle of EU law seems to lie with the Member States in their capacity as Treaty-makers, not the CJEU.

Defining characteristics

As will be explained further when I discuss the defining characteristics of general principles of EU law (distilled from the materials of this chapter, in *Section 2.5.1*), my point of view on the decisive acknowledgment of the constitutional status of a principle, lies somewhere in between the previously mentioned views of Groussot, Cuyvers, Lazzerini, Tridimas and Von Bogdandy. When it comes to introducing *new* general principles of EU law – principles that are not in any way linked to pre-existing written norms of EU law, international law or domestic law of the Member States – I agree with von Bogdandy that it is up to the Treaty-makers to do so by incorporating the new general principle of EU law in the Treaties and laying down its constitutional status therein. However, in practice, the CJEU, too, can develop and acknowledge general principles of EU law. As a result thereof, the acknowledgement of a norm as a general principle of EU law will in most cases and most likely be the result of a complex set of interactions between the CJEU, the Treaty-makers and the Member States' legal orders. It is my finding in this chapter that general principles

[146] Takis Tridimas (2006) p 1-29
[147] Armin von Bogdandy (2010) p 12

of EU law are not created out of thin air, but that they are found by the CJEU in the internal sources of EU law (through what I call 'specification') and in the external sources of EU law (through what I call 'reflection'). These terms will be further explained in *Section 2.5.1.2.*

For example, the principle of loyal cooperation has had a legal basis in the Treaties since 1957 but it was the case law of the CJEU that identified loyal cooperation as a general principle of EU law.[148] In that sense, the decisive acknowledgement of which norms are to be qualified as general principles of EU law lies thus not solely with the Treaty-makers, but also with the CJEU.

In addition to the decisive acknowledgement of the constitutional status of a general principle of EU law, Von Bogdandy notices that the attribution of constitutional status to a principle entails enhanced significance and has a 'reflective connotation'. Such general principles of EU law lay down general requirements. He argues that the qualification of a norm as a general principle of EU law does not necessarily bring about any tangible legal consequences.[149] In my opinion, the contrary may be argued based on the various functions that general principles of EU law fulfill, as will be discussed in the next section.

2.2.3 Functions

More so than the defining characteristics of the general principles of EU law, their functions have been discussed extensively. I submit here that while the defining characteristics are decisive for the qualification of a norm as a general principle, their functions are merely the result of such qualification.

While this chapter is not focused on the functions of general principles of EU law, it remains important to understand the role they fulfill in EU public law – and the primary focus of legal scholarship on their functions – before turning to their defining characteristics. With regards to the functions of general principles of EU law, consensus exists, firstly, on the gap-filling function, secondly, on the interpretative function, and thirdly, on the function of general principles of EU law as a ground for review.[150]

---

[148] The role of the CJEU in the development of loyalty as a general principle of EU law will be expanded upon in *Section 2.3.3.*
[149] Armin von Bogdandy (2010) p 20-21
[150] Takis Tridimas (2006) p 29-35; Nicole Lazzerini (2015) ; Armin Cuyvers (2017) p 219-220 Wouter Blokland [2018] p 83

Gap-filling

General principles of EU law help the Court of Justice fill normative gaps. Normative gaps or *lacunae* occur when parts of society have not been regulated and they become apparent when these unregulated areas become the subject of a real-life dispute.[151] The fact that *lacunae* exist in EU law is not surprising due to the 'compromise nature' of EU law, meaning that EU law, and consequently the Court of Justice, often searches for a compromise between the different legal traditions of the Member States and international law. Moreover, the EU is a relatively young legal order. As observed by Van den Brink and others, this inevitably leads to gaps and inconsistencies.[152] When normative gaps arise, the court will 'resolve the case by deducing from the existing rules a rule which is in conformity with the underlying premises on which the legal system is based' as conveyed by Tridimas.[153]

Rule of interpretation

As a rule of interpretation, the CJEU has clarified on multiple occasions that the interpretation of a (secondary) rule of EU law, or of national law implementing EU law, must be compatible with the Treaties and the general principles of EU law.[154] General principles of EU law, therefore, play a substantive role with regard to the application of regulations and the application and implementation of directives that lack clarity or specificity.[155] The rule of consistent interpretation is derived from the hierarchy of norms in the EU legal order.[156]

For example, in the *Roquette Frères* case, the Court interpreted a Regulation provision in conformity with the general principle of then Community law 'affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person […].' The CJEU concluded that EU law precludes review by the national courts

[151] Daniël Overgaauw, *A Polyphony of Principles* (PhD thesis, University of Groningen 2022) p 61
[152] Jacobine van den Brink and others (2015) p 139-140
[153] Takis Tridimas (2006) p 17-19. Although diverging opinions exist within legal theory on judicial review based on general principles, this discussion lies outside the scope of this study. See *Section 2.2.2.*
[154] Court of Justice of the European Union Case C-314/89 *Rauh* [1991] para 17; Court of Justice of the European Union Case C-201/85 and C-202/85 *Klensch* [1986] para 21; Court of Justice of the European Union Case C-218/82 *Commission v Council* [1983] para 15; Court of Justice of the European Union Case C-94/00 *Roquette Frères* [2002] paras 25-26; Court of Justice of the European Union Case C-46/87 and C-227/88 *Hoechst* [1989] para 19
[155] Jacobine van den Brink and others (2015)
[156] Sim Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts* (PhD thesis, Utrecht University 2019) p 21-84; See also Takis Tridimas (2006) p 29-31; e.g. *Klensch* [1986] para 21

'beyond what is required by the foregoing general principle'.[157] According to the CJEU, the requirements concerning the interpretation of a Regulation must be in line with the general principle of EU law concerned.[158]

There are, however, limits to the interpretative function of general principles of EU law. A *contra legem* interpretation based on general principles or adding new provisions to the text of secondary EU law is not permitted.[159] That being noted, no definite answer exists to the question when an interpretation must be considered *contra legem.*[160] One example of the thin line between using general principles of EU law as a rule of interpretation and using them to justify a *contra legem* interpretation, is the *Kadi* case on sanctions against individuals suspected of terrorism. The EU froze their assets based on a 'sanctions list' of the United Nations Security Council. The applicant claimed before the CJEU that this was in violation of the fundamental right to a fair trial and an effective remedy, protected under EU law. The CJEU was thus confronted with a supposed conflict between EU law and international law. The Court concluded that a UN resolution may not trump the principles that form part of the very foundations of the EU legal order, thereby giving prevalence to the general principle of fundamental rights protection under EU law over a UN resolution.[161] Such a prevalence was not laid down in the Treaties or elsewhere in EU primary law and therefore may be considered as not self-evident.[162]

Ground for review

Lastly, general principles of EU law fulfill a function in the review of EU law.[163] Exemplary is the CJEU judgment in *Ruckdeschel*, also known as the *Quellmehl* cases.[164] In these cases, the applicants relied upon Article 40(3) of the Treaty establishing the European Economic Community (EEC) for arguing that the subsidy provisions concerned violated the prohibition of discrimination. Although these provisions did not clearly refer to the relationship between different sectors in the

[157] *Roquette Frères* [2002] para 99
[158] *Roquette Frères* [2002] para 99
[159] Takis Tridimas (2006) p 29-31; e.g. Court of Justice of the European Union Case C-37/89 *Weiser* [1990] Opinion of AG Darmon, p 2415
[160] Takis Tridimas (2006) p 29-31
[161] Court of Justice of the European Union Case C-402/05 P and C-415/05 P *Kadi* [2008] para 304; Armin Cuyvers (2017) p 224-226
[162] See also Takis Tridimas (2006) p 29-31; Court of Justice of the European Union Case C-120/86 *Mulder* [1988] paras 21-28; Court of Justice of the European Union Case C-170/86 *von Deetzen* [1988] paras 12-17
[163] Paul Craig (2019) p 19-20; Takis Tridimas (2006) p 33-34
[164] Court of Justice of the European Union Case C-177/76 and C-16/77 *Ruckdeschel (Quellmehl)* [1977]

sphere of processed agricultural products, the CJEU accepted that the prohibition of discrimination laid down in the Treaty was 'merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.' As a result, the contested subsidy was reviewed against the general principle of equality.[165]

The review based on general principles of EU law concerns any action of EU institutions, bodies, offices and agencies that intends to produce legal effects *vis-à-vis* third parties, as well as actions of the Member States when they fall under the scope of EU law.[166] With the exception of the actions of the Member States, the review may only be exercised by the CJEU as domestic courts cannot annul EU law.[167] General principles of EU law may also serve as a ground for review of international agreements.[168]

In sum

The foregoing aims to show that general principles of EU law are often considered in light of their functions, namely the gap-filling function, the interpretative function and the function of general principles of EU law as a ground for review. This is mostly true for both the development of general principles in CJEU case law and in legal scholarship. However, as mentioned before, the functions of general principles of EU law are not the main focus of this chapter. Instead, their functions help us understand why it is important for a norm to be qualified as a general principle of EU law.

The qualification of a norm as a general principle of EU law, I submit, should only be done based on the defining characteristics of general principles of EU law. Their functions are not defining characteristics but rather consequences of their qualification as such. A framework on the defining characteristics of general principles of EU law will be developed in *Section 2.5.1*, based on the common denominators of loyal cooperation and fundamental rights.

[165] *Ruckdeschel (Quellmehl)* [1977] para 7; Paul Craig (2019) p 19-20; Takis Tridimas (2006) p 33-34
[166] Art. 263 and 267 of Treaty on the Functioning of the European Union [2012] C 326/47; Jacobine van den Brink and others (2015) p 139-140; Takis Tridimas (2006) p 31-35
[167] Takis Tridimas (2006) p 35; Court of Justice of the European Union Case C-314/85 *Foto-Frost* [1987] para 14-15
[168] E.g. *Kadi* [2008]

2.2.4 Legitimacy issue

Before delving into the selected examples of general principles of EU in order to assess their common denominators, I study the potential legitimacy issue of general principles of EU law in this section. I do so because it may shed a light on the role of the CJEU in the development or the finding of general principles of EU law. Because of the noted importance of the CJEU in that process,[169] discussing the legitimacy issue is relevant to the sub-question on the defining characteristics of general principles of EU law. However, a full discussion of legitimacy lies beyond the scope of this study. The discussion on this issue is therefore limited to presenting several points of view in legal scholarship regarding the legitimacy of the general principles of EU law as developed by the CJEU.

Legitimacy

The notion of legitimacy originates from the idea that the 'power of the ruler needs to justify itself *vis-à-vis* the individuals that are subject to it'.[170] Generally speaking, legitimacy is understood to be a belief, held by individuals, about the rightfulness of a rule or ruler. The notion of legitimacy is largely subjective and individual and it may have collective effects when the perception is shared widely in a certain society.[171] This last element is what Verhoeven calls social legitimacy, referring to a 'broad […] societal acceptance of or loyalty to the system'. She also identifies a formal element of legitimacy, requiring all rules to originate from a basic norm, through a certain procedure. Formal legitimacy validates the rule or the system 'in a juridical sense'.[172] In other words, formal legitimacy depends on the process of creation. I understand the term 'process of creation' as the practice or procedure followed to create a norm. From a democratic point of view, it is beneficial for social regulation if legitimacy (i.e. a belief about the rightfulness of a rule) and legality (i.e. the following of a certain process of creation) coincide. However, Hurd clarifies that it is important to distinguish these concepts. Not all legal acts are necessarily legitimate, and vice versa.[173]

---

[169] See *Section 2.2.2.*
[170] Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International 2002) p 9
[171] Ian Hurd, 'Legitimacy' (Encyclopedia Princetoniensis) <https://pesd.princeton.edu/node/516#:-:text=legitimacy> accessed 22 November 2021
[172] Amaryllis Verhoeven (2002) p 10-11
[173] Ian Hurd, 'Legitimacy' (Encyclopedia Princetoniensis)

What is it that makes a person or a group of people believe that a rule or ruler is legitimate? Based on research by Hurd and Verhoeven, I will shortly mention three possible models answering this question. In the next paragraphs, these models aim to help us understand judicial legitimacy in the context of the general principles of EU law. Firstly, legitimacy can bear a *self-serving* notion, meaning that a person will find a rule legitimate if it benefits them, in line with rational-choice theory. A second model concerns *consent* and is based upon democratic theory. In that sense, legitimacy is regarded as a contract transferring authority between a person and a ruler.[174] Thirdly, legitimacy can also be regarded by an individual in light of their 'assessment of the fairness of the *decision-making procedures* used by authorities and institutions'. Tyler argues that the perceived fairness of the procedures leading to the rules often have the ability to produce legitimacy.[175]

Judicial legitimacy

Based on the foregoing paragraphs, I understand judicial legitimacy as the belief that the decisions of judges are rightful and that they are either self-serving or grounded in the law. This is relevant to the study of general principles of EU law, since many of these principles are arguably judge-made law. The CJEU finds the general principles of EU law in the domestic law of the Member States[176] and in the structure of the EU as a supranational order.[177] At such times, the CJEU is not strictly applying or interpreting written law. Therefore, a legitimacy issue might arise when the CJEU finds general principles of EU law. According to Gibson and Caldeira, however, it is not required that a person believes that judges 'merely "apply" the law in some sort of mechanical and discretionless process' in order for them to find a judicial decision legitimate. On the contrary, they have found that judicial legitimacy depends to a larger extent on the 'discretion [of judges] being exercised in a principled, rather than strategic, way'.[178]

[174] Ian Hurd, 'Legitimacy' (Encyclopedia Princetoniensis); Amaryllis Verhoeven (2002) p 10-11
[175] Tom Tyler, 'A psychological perspective on the legitimacy of institutions and authorities' in Jost and Major (eds), *The psychology of legitimacy: emerging perspectives on ideology, justice, and intergroup relations* (Cambridge University Press 2001), p 416
[176] Especially France and Germany have influenced the CJEU case law on general principles of EU law, although not one member state can 'claim overriding influence' on the development of general principles and EU public law in general, according to Tridimas (Takis Tridimas (2006) p 23-25)
[177] With regard to the principle of loyal cooperation, see Court of Justice of the European Union Case C-33/76 *Rewe-Zentralfinanz* [1976] para 5
[178] James Gibson and Gregory Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court' [2011] Law & Society Review 195, p 213-214

Legitimacy of general principles of EU law as developed by the CJEU

The foregoing paragraphs in this section being more general, this paragraph focuses specifically on the legitimacy of general principles of EU law as developed by the CJEU.

Craig recognizes that judicial review based on general principles of EU law is defensible. Formally, there is Treaty legitimacy, based on Article 19(1) TEU and Article 263(2) TFEU, as discussed in *Section 2.2.1*. Substantially, general principles may serve to reassure Member States and national courts that the power of the EU would remain subject to judicial scrutiny. Nevertheless, Craig emphasizes the problematic side of the review function of general principles, since general principles of EU law 'accord the CJEU with very considerable power' in relation to the EU legislator. Craig stresses that, even though the CJEU has rarely annulled legislative acts for non-compliance with general principles of EU law, these concerns should be taken seriously, especially with regards to the intensity of review based on general principles of EU law.[179]

Groussot argues that the creation of the general principles of EU law by the CJEU is justified as general principles do not 'fall from heaven'.[180] He argues that the development of general principles of EU law must be seen as 'adding flesh to the bones' of EU law, which has not been done in a vacuum. Rather, it finds 'its roots in the national law of the Member States and international law, more particularly the ECHR'.[181] Groussot calls this process 'legitimate judicial activism, though influenced by policy considerations'.[182] Hartley agrees with this in the sense that it is impossible for legislation or other written sources of law to provide an answer to every question of law that arises in a legal order. Judges are therefore obliged to create rules of law to decide the issues before them, he argues. However, Hartley acknowledges that, if the law-creating role of the judge is too apparent, this may be problematic. It may be seen as 'trespassing' on the domain of the legislature.[183]

In sum

[179] Paul Craig (2019) p 22-25
[180] Xavier Groussot (2006) p 9-13; Xavier Groussot and others, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Vogenauer and Weatherill (eds), *General Principles of Law. European and Comparative Perspectives* (Hart Publishing 2017) 102-135, p 104
[181] Xavier Groussot and others (2017) p 104
[182] Xavier Groussot (2006) p 9
[183] Trevor Hartley, *The Foundations of European Union Law* (Oxford University Press 2014) p 144-146

In sum, there seems to be consensus in legal scholarship that the finding of general principles of EU law by the CJEU may be problematic in terms of legitimacy. Yet, the judicial finding of general principles may be legitimate in as far as the creation of new principles and the intensity of review based on these principles remain limited. The previous overview is relevant because of the important role of the CJEU in the acknowledgement of norms as general principles of EU law and in their development. The finding of this section is relevant to the framework of the defining characteristics of general principles of EU law, more specifically the characteristic of legitimacy based on reflection or specification (*Section 2.5.1.2*).

2.3 Loyal cooperation

One of the general principles of EU law studied in this chapter is loyal cooperation. The study of the principle of loyal cooperation, also known as 'sincere cooperation' or plainly 'loyalty',[184] serves the larger purpose of this chapter: Identifying the defining characteristics and the spatial scope of application of general principles of EU law. Loyalty thus forms an example of general principles of EU law, which allows me to distill the common denominators of general principles in *Section 2.5.*

As explained in *Chapter 1, Section 1.6.1*, this section on the principle of loyal cooperation is based on the premise that loyal cooperation constitutes a general principle of EU law.

2.3.1 Treaties

The principle of sincere cooperation is currently laid down in Article 4(3) TEU and requires the Union and the Member States to 'assist each other in carrying out tasks which flow from the Treaties' and places a positive and a negative obligation on the Member States with regards to the fulfilment of the Treaties or the Union's objectives. This involves the Member States both actively having to apply EU law in the manner that is most in line with the EU's objectives, as well as having to refrain from acting if this would harm the EU's objectives.[185] As noted by Von

[184] 'Loyal cooperation', 'sincere cooperation' and 'loyalty' are the terms that will be used in this study, although the principle of loyal cooperation has been referred to under various other names. See Geert De Baere and Timothy Roes [2015] p 829

[185] Marcus Klamert (2014) p 10-14; Sacha Prechal, 'Europeanisation of National Administrative Law' in Jans and others (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 39-70, p 41-42; Geert De Baere and Timothy Roes [2015] p 830-834; Koen Lenaerts and Piet Van Nuffel, *Europees recht* (Intersentia 2017) p 65-112; Armin von Bogdandy (2010) p 41-42

Bogdandy, the principle of loyalty is 'key to understanding the Union' as it shapes the relationships between the myriad public authorities operating in the European legal system.[186] Its rationale is arguably 'the uniform and effective application of Union law' in the context of 'a system of shared […] governance,' according to Widdershoven.[187]

Lenaerts and Van Nuffel identify various positive obligations and derogative requirements of which the principle of loyal cooperation lies at the basis. The Member States and the EU institutions have to abide by these positive obligations, independent of the applicability of any EU law provision. Examples are the duty to cooperate between the Member States and between the different EU institutions. In addition, the Member States and the EU institutions are prohibited to act in such a way that would constitute abuse of power. They have to respect the interests of the Union and institutional balance.[188]

Contrary to other general principles, loyal cooperation was not first developed by the CJEU and later codified. On the contrary, loyal cooperation has had a legal basis since 1957. Article 5 of the Treaty establishing the European Economic Community mentioned the duty of the Member States to

> 'take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community, […] to facilitate the achievement of the Community's aims [and to] abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.'

A similar wording could later be found in Article 10 of the Treaty on the European Communities.[189]

2.3.2 National and international law

Even though such a principle as loyal cooperation exists under EU law due to the *sui generis* nature of the EU, it draws from other principles under national and international law.

---

[186] Armin von Bogdandy (2010) p 41-42
[187] Rob Widdershoven, 'Acting apart together. Loyale samenwerking tussen bestuurlijke instanties en de positie van de burger' [2015] SEW Tijdschrift voor Europees en economisch recht 561, p 565
[188] Koen Lenaerts and Piet Van Nuffel (2017) p 65-112
[189] Marcus Klamert (2014) p 10-14; Geert De Baere and Timothy Roes [2015] p 830-834

The national concept most referred to when discussing EU loyalty is the principle of federal fidelity, the German *Bundestreue* being the most well-known example.[190] *Bundestreue* has a long-standing tradition under German law, dating back to 1916 when it regulated the relationship between the German Empire and the individual states. In current times, it is a principle construed by the *Bundesverfassungsgericht*, the German Constitutional Court, in order to regulate the relationship between the federal level of the *Bund* and the state level of the *Länder*. Both the *Länder* and the *Bund* are obliged to cooperate, contribute to and maintain the interests of the federation and its states.[191] As noted by Klamert as well as De Baere and Roes, the German concept of exclusive versus competing (*konkurrierende)* competences between the *Länder* and the *Bund* resonates with the competence division between the EU and the Member States under EU law. In both legal systems, a loyalty clause has been developed in order to lead this competence division in the right direction.[192] Similarly, in the Belgian federal structure, a loyalty principle was introduced in 2014 in the Constitution. It requires the communities and the federal level of government to observe federal loyalty in order to avoid conflicts of interests.[193] It can thus be concluded that parallels exist between the EU principle of loyal cooperation and the German principle of *Bundestreue* or federal fidelity.[194]

2.3.3 CJEU case law

Despite its firm basis in written EU primary law, the role of the CJEU in the development of the principle of loyal cooperation should not be underestimated. Most importantly, the case law made its mark on the (indirect) recognition of loyal cooperation as a general principle, its content, its scope of application, and its relation to other norms under EU law.

Reverse vertical obligations

[190] Geert De Baere and Timothy Roes [2015] p 855-857; Frederico Casolari, 'The principle of loyal cooperation: a "master key" for EU external representation?' [2012] CLEER Working Papers 11
[191] Marcus Klamert (2014) p 55-57; German Constitutional Court Case 2 BvG 1/55 *Reichskonkordat* [1957]
[192] Geert De Baere and Timothy Roes [2015] p 855-857; Marcus Klamert (2014) p 55-57
[193] Art. 143(1) Belgian Constitution; see also Belgian Constitutional Court Case 124/210 [2010] par B.39.1
[194] Parallels can also be found between the EU principle of loyal cooperation and the international principle of good faith, although the literature is diverging on this matter. See Manfred Dauses, 'Quelques réflexions sur la signification et la portée de l'article 5 du traité CEE' in Bieber and Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts: Die Auslegung des Europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe* (Nomos Verlagsgesellschaft 1987) ; Geert De Baere and Timothy Roes [2015]

For example, the 2007 Lisbon Treaty added the 'reverse vertical' obligations of loyalty of the Union towards the Member States. As a result, loyalty was no longer limited to obligations of the Member States towards the Union. This reverse vertical obligation of loyalty of the Union towards the Member States was a codification of CJEU case law. Therein, the Court widened the content of the written contraction of the principle of loyal cooperation. In the 1990 *Zwartveld* judgment, the Court first reached the conclusion that the EU institutions cannot neglect the duty of sincere cooperation, which flows from what is now Article 4(3) TEU. The *Zwartveld* case concerns the black fish market in the Netherlands and the inspection thereof by the Commission. It inquires whether the results of such an inspection have to be shared with the judicial authorities of the Member State concerned. The Court based itself on loyalty to conclude that the Commission is indeed obliged to do so. Generally, it was decided that every EU institution must abide by the mutual duties of sincere cooperation.[195]

General principle of EU law

Not only has the CJEU expanded the scope of application of the principle of loyalty. On multiple occasions, the CJEU has recognized loyalty as a principle of EU law of general application.[196]

According to Advocate General Szpunar, loyal cooperation is 'central to the EU legal order' and 'sets out to ensure the functioning of the European Union'.[197] The Advocate General argued so in their Opinion to the 2019 *European Commission v Germany* case. In the *European Commission v Germany* judgment, the CJEU expanded the content of the principle of loyal cooperation in the area of the EU's external relations. The facts of the case are as follows. In preparation for a meeting of an international organization, that the individual Member States *and* the EU were members of, the Council established the division of competence between the EU and the Member States in

[195] Court of Justice of the European Union Case C-2/88 *Zwartveld* [1990] paras 1 and 17.
In paragraph 17 of the *Zwartveld* case, the CJEU ruled as follows: 'In that community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings (see the judgment in Case 68/88 Commission v Greece [1989] ECR 2965, at p . 2984, paragraph 23) but also imposes on Member States and the Community institutions mutual duties of sincere cooperation (see the judgment in Case 230/81 Luxembourg v European Parliament [1983] ECR 255, paragraph 37).'
[196] E.g. *Rewe-Zentralfinanz* [1976] para 5; Court of Justice of the European Union Case C-45/76 *Comet* [1976] para 12
[197] Court of Justice of the European Union Case C-620/16 *European Commission v Germany* [2019] Opinion AG Szpunar para 88

Decision 2014/699/EU. However, Germany did not comply with this Decision and did not vote accordingly. The Court ruled that, since

> 'the Federal Republic of Germany has not maintained before the Court that it had informed the competent bodies of the [international organization] of the content of the declaration of 17 September 2015, or that it had clarified to the [international organization] its future conduct within that body' it follows that 'that Member State harmed the effectiveness of the international action of the European Union, as well as the latter's credibility and reputation on the international stage.' [198]

In turn, this led the CJEU to conclude that Germany 'failed to fulfil its obligations under that decision and Article 4(3) TEU'.[199] In the Opinion to this case, Advocate General Szpunar argues that the reputation and credibility of the EU on the international stage constitutes a *distinct* legal interest falling under the principle of loyalty, which transcends the relevant Council Decision.[200]

Spatial scope of application

The CJEU also expanded the spatial scope of application of the principle of loyalty. In its *ERTA* judgment, the CJEU concluded that the international commitments of the Member States may not interfere with EU law.[201] Another consequence of this *ERTA* principle is that it establishes exclusivity for the EU.[202] In the words of the CJEU:

> 'each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. […] With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations.'[203]

[198] *European Commission v Germany* [2019] para 97
[199] *European Commission v Germany* [2019] paras 97-100
[200] *European Commission v Germany* [2019] Opinion AG Szpunar para 96
[201] Court of Justice of the European Union Case C-22/70 *Commission v Council (ERTA)* [1971] paras 17-19 and 30-32
[202] Paula García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' [2018] Common Market Law Review 157, p 165
[203] *Commission v Council (ERTA)* [1971] paras 17 and 19

Even in later judgments, according to Klamert, the Court confirmed that the principle of loyal cooperation is the basis for the *ERTA* principle (or *ERTA* doctrine).[204] The principle of loyalty thus extends beyond Europe in the sense that it requires the Member States *also on the international stage* to ensure the fulfillment of the obligations arising out of the Treaties and to refrain from any measures which could jeopardize the attainment of the EU's objectives. Specifically on the international stage, the principle of loyal cooperation obliges the Member States and the and the EU institutions to 'act in defence of the EU's common interests'.[205]

Relation to other norms

In addition to the scope of application of the principle of loyal cooperation, the CJEU has incorporated the relation between loyalty and other norms under EU law in its case law. For instance, the 2018 *Altun* judgment[206] concerned the relationship between the principle of loyalty and the principle of mutual trust. In *Altun*, the CJEU regards the principle of mutual trust as the corollary of the principle of loyal cooperation. This is interesting because, as will be explained in *Chapter 3*, mutual trust encompasses the relationship between the Member States. The term loyalty covers a broader scope of relationships, such as the relationship between each Member States and each EU institutions, between the EU institutions, and between the Member States. Although these principles refer to different relationships within the EU system, *Altun* clarifies that they are not isolated principles. 'Indeed,' as the CJEU puts it, 'the principle of sincere cooperation also implies that of mutual trust.'[207]

Factually, the *Altun* case concerns the social security inspectorate of Belgium that conducted an investigation into the employment of the staff of a company incorporated under Belgian law that is active in the construction sector in Belgium. The cause for investigation was the supposed contraction by the company of all of its work to Bulgarian undertakings and the lack of declaration of the use of such posted workers. The Belgian social security inspectorate claimed these workers did not have the required permits to work in Belgium. The CJEU accepted that the principle of

[204] Marcus Klamert (2014) p 73-75. See the *Open Skies* cases: Court of Justice of the European Union Case C-523/04 *Commission of the European Communities v the Netherlands (Open Skies)* [2007] paras 74-76; Court of Justice of the European Union Case C-467/98 *Commission of the European Communities v Denmark (Open Skies)* [2002] paras 110-112
[205] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2011) p 359, see also p 337-338
[206] *Altun* [2018]
[207] *Altun* [2018] para 40

loyal cooperation, laid down in Article 4(3) TEU, requires the issuing institution – in this case, the Belgian social security inspectorate – to carry out a proper assessment and to ensure the proper application of EU law.

The Court concludes that the principle of loyal cooperation implies mutual trust: the Belgian social security inspectorate must take into account the fact that that worker is already subject to the social security legislation of Bulgaria. Be that as it may, the Belgian institutions are required to carry out a diligent examination of the application of its own social security system. Therefore, they are allowed to withdraw the certificate if there are grounds to doubt the accuracy of the facts on which the certificate is based.[208] The CJEU notes that

> 'it follows from the principle of sincere cooperation that any institution of a Member State must carry out a diligent examination of the application of its own social security system. It also follows from that principle that the institutions of the other Member States are entitled to expect the institution of the Member State concerned to fulfil that obligation.'[209]

This is the case, according to Advocate General Saugmandsgaard Øe, because '[i]t is essential that the principle of sincere cooperation between Member States not become a matter of blind trust which facilitates fraudulent conduct.'[210]

Sometimes, a principle is identified as lying at the basis of a general principle of EU law, such as the CJEU's finding in *Altun* that mutual trust is derived from loyal cooperation.[211] I argue here that such an observation is, in and by itself, insufficient to automatically qualify the derived principle (mutual trust *in casu*) as a general principle of EU law. Still, it may serve as an indication. If a norm is derived from a general principle of EU law, this is cause for further inquiry on the constitutional status of the derived norm. The inquiry itself, however, should be based on the defining characteristics of general principles of EU law. I will inquire further on the status of mutual trust as a general principle of EU law in *Chapter 4*, based on the framework of defining characters of general principles of EU law identified later in this chapter (*Section 2.5.1*).

---

[208] *Altun* [2018] paras 37-40
[209] *Altun* [2018] para 42
[210] *Altun* [2018] Opinion AG Saugmandsgaard Øe para 70
[211] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 76-79; *Altun* [2018] para 40

In sum

To conclude, the principle of loyal or sincere cooperation, which is laid down in Article 4(3) TEU and already existed in earlier versions of the Treaty, is considered fundamental to understanding the EU legal system.[212] In addition, similarities can be found between loyalty and principles under national law, such as the German principle of *Bundestreue*. The principle of loyalty is not only applicable whenever the Member States or the EU institutions act under EU law but also when their actions could jeopardize the attainment of the EU's objectives. Lastly, the studied case law shows that loyal cooperation, despite its firm foundation in the Treaties, was molded into the form it has now by the CJEU. Its case law is most important with regard to its content,[213] its scope of application[214] and the relation between the general principle of loyalty and other norms under EU law.[215] These findings will be used in *Section 2.5* to distill the common denominators of loyal cooperation and fundamental rights – the latter I will study in the next section.

2.4 Fundamental rights

The second general principle of EU law studied in this chapter is the principle of fundamental rights. Parallel to the study of the principle of loyal cooperation in *Section 2.3*, the characteristics of the general principle of fundamental rights will function here as an example of general principles of EU law in order to later find the common denominators between loyalty and fundamental rights. This is done with the purpose of identifying the defining characteristics and the spatial scope of application of general principles of EU law in general (*Section 2.5*).

This section begins from the idea that the Member States are under an obligation to protect fundamental rights and that this constitutes – in and by itself – a general principle of EU law. Fundamental rights are generally considered 'a special group of general principles of EU law' in the sense that there was no explicit statutory basis for fundamental rights protection in the beginning of the European project but that the CJEU filled in this gap.[216] As explained in *Chapter 1, Section 1.6.1,* I use the term 'general principle of fundamental rights' in this study as referring

[212] Armin von Bogdandy (2010) p 41-42
[213] See the discussion on the reverse vertical obligations stemming from loyalty in *Section 2.3.3*; *Zwartveld* [1990]
[214] See the discussion on the spatial scope of application of loyalty in *Section 2.3.3*; *European Commission v Germany* [2019]
[215] See the discussion on the relationship between loyalty and mutual trust in *Section 2.3.3; Altun* [2018]
[216] Rolf Ortlep and Rob Widdershoven (2018) p 300

to the principle that EU law indeed obliges the Member States to respect, protect and uphold fundamental rights.

2.4.1 CJEU case law

The development of fundamental rights protection in EU law was instigated by the courts. In response to national courts, the CJEU developed the general principle of fundamental rights by obliging the Member States to respect and uphold fundamental rights when they are applying Union law.[217]

However self-evident the central role of fundamental rights in Union law may seem at present time,[218] this was not quite so in the beginning of the European project. The predecessor of the EU was established for solely economic purposes. Parallel to the European Communities (the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community), the ECHR was brought to life in order to safeguard human rights in Europe. This was done in the aftermath of the Second World War and was done deliberately in a structure separate from the European Communities.

In the absence of any legislative initiative at the EU level and after the *Stork*[219] and *Geitling*[220] judgments, in which the CJEU denied fundamental rights protection under EU law,[221] the domestic (constitutional) courts of the Member States engaged in a judicial dialogue with the CJEU. The first result of that judicial dialogue is the ground-breaking *Internationale Handelsgesellschaft* judgment of 1970.[222] This judgment was not only seminal in respect to the protection of fundamental rights under EU law, it also enhanced the use of general principles of EU law.[223] The CJEU ruled that, despite the fact that fundamental rights enshrined in national law cannot overrule the Treaties, 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice' and must, therefore, be ensured within the EU.[224]

---

[217] Takis Tridimas (2006) p 298-336; Jacobine van den Brink and others (2015) p 135-260
[218] Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Peers and others (eds), *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing 2014) 1559-1594, p 1571
[219] Court of Justice of the European Union Case C-1/58 *Stork* [1959]
[220] Court of Justice of the European Union Case C-36/59, C-37/59, C-38/59 and C-40/59 *Geitling* [1960]
[221] Armin Cuyvers (2017) p 217-218
[222] Court of Justice of the European Union Case C-11/70 *Internationale Handelsgesellschaft* [1970]
[223] Paul Craig (2019) p 16
[224] *Internationale Handelsgesellschaft* [1970] paras 3-4

Advocate General Dutheillet de Lamothe considered in their Opinion to the *Internationale Handelsgesellschaft* case that fundamental principles of national legal systems

> 'contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.'[225]

The *Internationale Handelsgesellschaft* and *Nold* judgments were affirmed by the CJEU many times afterwards.[226]

In sum, the CJEU's main motive for accommodating fundamental rights protection in the form of a general principle of EU law, was the fact that these rights were already granted such a prominent place in the constitutional laws of the Member States and were also part of the connective tissue of the EU legal order. Therefore, the principle that EU law protects the fundamental rights of individuals was considered a general principle of EU law. In this sense, the general principle of fundamental rights under EU law is a reflection of the fundamental rights obligations of the Member States under national and international law.[227]

2.4.2 EU law and (inter)national law

The origin of the general principle of fundamental rights protection under EU law is relevant to the framework on defining characteristics of general principles of EU law, more specifically the characteristic of legitimacy based on specification or reflection in *Section 2.5.1.2.* Therefore, this section gives an overview of the origin of fundamental rights that the CJEU found in its case law, with a focus on the Court's approach to the origin of these fundamental rights obligations.

In the line of case law of the 1970s and 1980s on fundamental rights as a general principle, the CJEU rarely expands on the question on what basis a certain fundamental right should be protected

[225] *Internationale Handelsgesellschaft* [1970] Opinion of AG Dutheillet de Lamothe, p 1146-1147
[226] E.g. Court of Justice of the European Union Case C-44/79 *Hauer* [1979] paras 14-15; Court of Justice of the European Union Case C-222/84 *Johnston* [1986] paras 9-19; Court of Justice of the European Union Case C-222/86 *Heylens* [1987] para 14; Court of Justice of the European Union Case C-5/88 *Wachauf* [1989] paras 17-18; *Hoechst* [1989] paras 12-20; Court of Justice of the European Union Case C-274/99 *Connolly v Commission* [2001] para 37
[227] See also *Section 2.5.1.2* on the reflection of the general principle of EU law of fundamental rights in the national laws of the Member States.

under EU law.[228] The approach of the CJEU to fundamental rights as a general principle remained rather unsystematic up until the *Orkem* judgment. Therein, the CJEU approached the question whether the right to abstain from self-incrimination for companies in commercial proceedings constitutes a general principle of EU law in a more methodological manner. In the absence of a written expression in EU secondary law of such a right, the CJEU considered that

> 'it is appropriate to consider whether and to what extent the general principles of Community law, of which fundamental rights form an integral part and in the light of which all Community legislation must be interpreted, require, as the applicant claims, recognition of the right not to supply information capable of being used in order to establish, against the person supplying it, the existence of an infringement of the competition rules.'[229]

In order to do so, the CJEU turned to the laws of the Member States, the ECHR and the International Covenant on Civil and Political Rights (ICCPR). With regard to the legal systems of the Member States, it conducted a comparative investigation and concluded that, in general, the laws of the Member States do not grant a right to abstain from self-incrimination to companies in commercial proceedings. Article 6 of the ECHR, although applicable to companies in commercial proceedings, also does not include a right to abstain from self-incrimination for companies in commercial proceedings. The other international agreement referred to by the CJEU, the ICCPR, does uphold the right not to give evidence against oneself, but is not applicable to companies or to commercial proceedings. Therefore, the CJEU concludes that the right to abstain from self-incrimination for companies in commercial proceedings does not constitute a general principle of EU law.[230]

The CJEU used another, albeit equally structured approach in *Jippes* in 2001. In the context of the measures against the foot-and-mouth-disease, the applicants in *Jippes* argued the existence of a general principle of animal welfare under EU law.[231] To answer the question whether such a principle exists, the CJEU relied on EU primary and secondary law and its own case law. The Court concluded that none of these sources of EU law contain an indication that a general principle

[228] Nicole Lazzerini (2015) p 147
[229] Court of Justice of the European Union Case C-347/87 *Orkem* [1989] para 28
[230] *Orkem* [1989] paras 28-31
[231] Court of Justice of the European Union Case C-189/01 *Jippes* [2001] para 8

of animal welfare exists under EU law.[232] Remarkably, the CJEU did not refer to the constitutional traditions of the Member States or international treaties to substantiate this conclusion.

The sources of EU law that were investigated in *Jippes* differ from *Orkem*, where the focus was on national and international law rather than the EU legal order. Nevertheless, the approach taken is similar. This approach is deductive and involves the CJEU no longer simply mentioning the national laws of the Member States and/or international treaties, but expressly investigating the sources that may point the CJEU to concluding that a principle has constitutional status under EU law. As observed by Tridimas, this stands in sharp contrast with the CJEU's approach in the 1960s and 1970s, when the Court recognized general principles 'despite statutory guidance'.[233]

2.4.3 Codification in the Treaties and the Charter

As exemplified in the previous sections, the development of fundamental rights protection under EU law, as a general principle of EU law, is attributable to the CJEU. As observed by Lenaerts and Gutiérrez-Fons, 'an unwritten catalogue of fundamental rights has been incorporated into the constitutional fabric of the EU legal order' in the shape of general principles of EU law.[234]

In addition to this unwritten catalogue, the CJEU case law influenced the EU legislator, leading to a codification of fundamental rights under EU law. For example, the 1977 *Nold* judgment led to a joint declaration of the European Parliament, the Council and the Commission in which the premise of fundamental rights protection under EU law was recognized.[235] This is an early example of the influence of the CJEU case law on fundamental rights protection on the legislator, affirming the constitutional status and legitimacy of the principle.

At that time, no formal protection of fundamental rights was enshrined in written EU law. This changed later with Article 6 of the TEU and the Charter of Fundamental Rights. By endowing on fundamental rights a constitutional value in the EU legal order, Article 6 TEU has been paramount to the development and recognition of fundamental rights in the EU. It codifies the case law stating

[232] *Jippes* [2001] paras 71-79
[233] Takis Tridimas (2006) p 27
[234] Koen Lenaerts and José Antonio Gutiérrez-Fons (2014) p 1559
[235] Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the protection of human rights and fundamental freedoms [1977] OJ C 103/1

that fundamental rights constitute a general principle of EU law.[236] In addition to Article 6 TEU, the Charter of Fundamental Rights of the EU was presented as the EU set of fundamental rights. The Charter became legally binding in 2009 after the entry into force of the Lisbon Treaty.[237]

These legislative initiatives, in turn, influenced the case law of the CJEU. In general, the Court now mostly refers to the relevant article of the Charter when applicable, instead of the general principle of fundamental rights.[238] This happened even before the Charter became binding.[239]

However, the CJEU in some cases still chooses to rely on fundamental rights as a general principle of EU law.[240] It is understood that the Court may find added value in the general principle of fundamental rights because of the narrow wording of some rights of the Charter. By relying on the general principle instead of the Charter, the CJEU seems to acquire some leeway.[241] As such, the general principle of fundamental rights has not been overthrown by the introduction of the Charter and is still relevant for legal practice, as will be discussed in *Section 2.5.1.1*.

In sum

The foregoing sections study the general principle that fundamental rights are to be protected under EU law. This principle was developed by the CJEU, despite no legal basis for fundamental rights protection existing in EU law at that time. The CJEU's case law concerns the status of fundamental rights as a general principle under EU law, its content and scope of application.[242] While the CJEU acknowledges the importance of fundamental rights for the EU legal system, it often refers to the national legal systems of the Member States as the basis of the general principle. Yet, the studied case law shows that the methods used by the CJEU to identify a certain right as falling under the general principle of fundamental rights, are often-flimsy. In most cases, especially before the

[236] Malu Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) p 110-114; Jacobine van den Brink and others (2015) p 142-145
[237] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01
[238] Jacobine van den Brink and others (2015) p 142-145
[239] Court of Justice of the European Union Case C-387/02 *Berlusconi and others* [2005] Opinion AG Kokott, para 141
[240] See the case law on the applicability of the principle of good administration to the Member States. E.g. Court of Justice of the European Union Case C-141/12 and C-372/12 *YS* [2014] paras 68-69; Court of Justice of the European Union Case C-249/13 *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques* [2014] paras 32-34
[241] Malu Beijer (2017) p 110-114; Jacobine van den Brink and others (2015) p 142-145; Chiara Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing 2018) p 118-119
[242] See the discussions on the following cases in *Section 2.4.1*: *Geitling* [1960] ; *Stork* [1959] ; *Internationale Handelsgesellschaft* [1970] ; *Internationale Handelsgesellschaft* [1970]

1980s, the CJEU remains unclear as to which source of law the general principle of EU law concerned relates to.[243] Even though the general principle of fundamental rights under EU law was first developed judicially, it was later codified in the Charter and Article 6 TEU. Currently, the legislative developments influence the CJEU case law on fundamental rights, and *vice versa*.

2.5 Common denominators

Based on the previously discussed examples of general principles of EU law, loyal cooperation and fundamental rights, I will next distill their common denominators. I will identify their shared features concerning their defining characteristics (*Section 2.5.1*) and their spatial scope of application (*Section 2.5.2*). In each section, I will make an abstraction of these common denominators. While a further study of other examples of general principles of EU law could highlight other defining characteristics and other features on the external extension of general principles of EU law, loyal cooperation and fundamental rights are critical examples of general principles of EU law.[244] They therefore offer the benefit of developing a framework that deepens our understanding of the broad field of general principles of EU law. This allows me to draw conclusions on the defining characteristics and the spatial scope of application which aims to be valid for all general principles of EU law.

2.5.1 Defining characteristics

From the discussed case law and literature, I distill four characteristics that define fundamental rights protection and loyal cooperation as general principles of EU law. This section firstly argues that general principles exist independently of any written EU law (*Section 2.5.1.1*). Secondly, they derive their legitimacy from their 'specification' within EU law and/or 'reflection' outside of EU law (*Section 2.5.1.2*). Thirdly, they are applicable throughout the broad spectrum of EU law (*Section 2.5.1.3*). Lastly, there must be a certain weight attached to a norm for it to be considered a general principle of EU law (*Section 2.5.1.4*). These defining characteristics are the identified requirements for the qualification of a norm as a general principle of EU law.

[243] See the discussion on the methodology used in *Jippes* and *Orkem* in *Section 2.4.1*: *Jippes* [2001] ; *Orkem* [1989] . See also Takis Tridimas (2006) p 27
[244] See *Chapter 1, Section 1.6.1.*

It is the thesis of this chapter that fulfilling these four characteristics distinguish general principles, such as loyalty and fundamental rights, from other norms under EU law and are therefore defining. Admittedly, general principles may have other attributes, such as being unwritten, or first being developed by the CJEU and later codified. However, based on the research of this chapter, these attributes do not *define* a norm as a general principle of EU law. They do not distinguish general principles of EU law from other norms and are not discussed as *defining* characteristics in this section.

In the following sections, the four defining characteristics are identified as common denominators of the general principles of fundamental rights and loyal cooperation. If a certain norm of EU law fulfills these four defining characteristics cumulatively, I argue that the norm should be considered as a general principle of EU law.

2.5.1.1 Independent of written EU law

General principles of EU law underpin written EU law. As argued by Lenaerts and Gutiérrez-Fons, the written law is merely an expression of the general principle, not the source of it.[245] This characteristic has also been acknowledged by the CJEU in the *Cussens* judgment.[246]

Fundamental rights

The studied CJEU case law on fundamental rights shows that the existence of the principle of fundamental rights protection is not dependent on the existence of written law. Any written law on fundamental rights is a manifestation of the general principle of EU law concerning fundamental rights protection. Based on the early case law on the establishment of the general principle of fundamental rights, it can even be argued that the general principle of fundamental rights protection exists *regardless* of written law.[247] For example, in the *P v S* case, the CJEU considered that Council Directive 76/2007/EEC on the implementation of the principle of equal treatment for men and women is merely the expression of the principle of equality, which is a general principle of EU law.[248] Similarly, in the previously discussed *Quellmehl* cases, the Court considered the

[245] Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Role of General Principles of EU Law' in Arnull (ed), *A Constitutional Order of States?* (Hart Publishing 2011) 179-197, p 179; See also *Altun* [2018] Opinion AG Saugmandsgaard Øe para 42; Similarly, see Hans Gribnau (2002) p 48-49
[246] *Edward Cussens a.o. v T.G. Brosnan* [2017] paras 27-30; see *Section 2.2.1.*
[247] *Internationale Handelsgesellschaft* [1970] para 4; Court of Justice of the European Union Case C-4/73 *Nold* [1977] paras 12-14; Chiara Amalfitano (2018) p 119-120
[248] Court of Justice of the European Union Case C-13/94 *P v S* [1996] para 18

prohibition of discrimination in the Treaties as merely a written enunciation of the general principle of equality.[249]

Loyal cooperation

Even though loyal cooperation is a slightly divergent principle, in the sense that it has always had a firm written foundation in the Treaties, a similar observation can be made here. This became clear in for example the *Zwartveld* judgment, as discussed in *Section 2.3.3*. Therein, the CJEU expanded the content of the principle of loyalty to 'reverse' vertical loyalty.[250] In other words, the content of the principle of loyal cooperation does not depend solely on its wording in the Treaties.

In sum

Based on the foregoing common denominator of fundamental rights and loyal cooperation, I argue that the meaning and content of a general principle can go beyond what is laid down in written law.

2.5.1.2 Legitimacy based on specification and/or reflection

The second defining characteristic of general principles that I identify in this study is that they derive their legitimacy from 'specification' within EU law and/or 'reflection' outside of EU law. I submit here that, in view of and in addition to the previously discussed literature on their legitimacy (*Section 2.2.4)*, the focus of the development of general principles of EU law should be on their specification and reflection rather than on their process of creation.

Specification, reflection and process of creation

Throughout this study, I use the term 'specification' to refer to the various ways in which general principles can form the basis for rules and principles *within* EU primary and secondary law.

The term 'reflection' concerns the counterparts, so to speak, of principles in legal systems *outside* of the EU, i.e. in the national laws of the Member States and in international law.

The term 'process of creation' is understood as the practice or procedure followed to create a norm.

Fundamental rights

[249] *Ruckdeschel (Quellmehl)* [1977] para 7
[250] *Zwartveld* [1990]

In the case of the general principle of fundamental rights, legitimacy is derived mainly from its reflection. This reflection is found, in most cases discussed above, in the common legal traditions of the Member States and/or international human rights treaties. The reference to the laws of the Member States has been prevalent to the development of fundamental rights obligations under EU law, perhaps because this development was instigated by the domestic courts.[251] However, in several cases, the legitimacy of the protection of fundamental rights could also be inferred from the specification of the fundamental right in question within EU law by referring to written EU primary and secondary law. The specification of the general principles of fundamental rights in primary law was most evident after the entry into force of the Charter.[252] Another example of the specification of the general principle of fundamental rights is the obligation in EU secondary law to let the 'best interests of the child' be a primary consideration in the context of the assessment of an application for international protection.[253]

Loyal cooperation

More so than the general principle of fundamental rights, loyal cooperation is a consequence of the *sui generis* constitutional structure of the EU. As observed by Klamert, the principle of loyal cooperation 'has been deduced from the premises on which the Union law regime is based'.[254] De Baere and Roes mention examples of expression of loyalty in the Treaties, such as the obligation to refer questions for a preliminary ruling to the CJEU, and in (secondary) EU law, such as the duty for the Member States to consult, assist and support in EU external action.[255] These are examples of the phenomenon I qualify as specification.

While loyalty may seem solely derived from the structure of the EU, there is some reflection in principles of the constitutional systems of the Member States. Even though Klamert states that the CJEU has not inferred the principle of loyal cooperation from the legal systems of the Member

[251] Armin Cuyvers (2017) p 217-228
[252] Jacobine van den Brink and others (2015) p 146-156
[253] Art. 20(5) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337
[254] Marcus Klamert (2014) p 244
[255] Marcus Klamert (2014) p 173-182; Geert De Baere and Timothy Roes [2015] p 835

States,[256] parallels can be found between EU loyalty and the German and Belgian federal fidelity principles, as explained in *Section 2.3.2*.[257]

Distinction with first characteristic: Independent of written EU law

A certain paradox may seem to exist between the first defining characteristic of general principles of EU law, that it is independent of written EU law, and the second defining characteristic, that it infers its legitimacy from 'specification' within EU law and/or 'reflection' outside of EU law. Especially the specification within EU primary or secondary law may seem contradictory to the characteristic that a general principle of EU law exists independently of written EU law. However, as I view these characteristics, the general principle of EU law does not depend on written law for its *application* but it does depend on such written law for its *legitimacy*.

Distinction with EU legislation

In clarification of the foregoing, it is important to note that I distinguish the process of creation of general principles of EU law from the process of creation of the decisions of the EU legislator. Such a distinction is important because the a general principle is not determined and adopted by a predetermined competent authority.[258] Whereas the general principles of EU law are in legal practice mainly developed in the case law of the CJEU, the decisions of the EU legislator are the product of a democratic decision-making process (and, as a result thereof, generally perceived as fair).[259] Thus, the decisions of the EU legislator are considered legitimate *because of* their process of creation. Put differently: Although specification and reflection may also occur in other sources of EU law such as Directives and Regulations, I submit here that their legitimacy is not *dependent* on this specification or reflection, contrary to the legitimacy of general principles of EU law that are developed, created or acknowledged by the CJEU. General principles can be legitimized exactly because of the existence of similar norms to be found outside and inside EU law.[260] A general principle of EU law is, contrary to the decisions of the EU legislator, not to be abided by because it is found or created by the CJEU. The legitimacy of a general principle of EU law is a

[256] Marcus Klamert (2014) p 244
[257] Geert De Baere and Timothy Roes [2015] p 855-857
[258] Hans Gribnau (2002) p 54-55
[259] Ian Hurd, 'Legitimacy' (Encyclopedia Princetoniensis); see *Section 2.2.4* on legitimacy.
[260] This holds true despite general principles of EU law existing independently of these written norms inside and outside EU law. Such written norms provide legitimacy to the general principle of EU law, without the general principle being limited to its written contraction.

result of specification or reflection. The idea behind the CJEU legitimately finding a general principle is thus that it existed in EU law all along, hidden in plain sight. In other words, specification in EU law or reflection outside of EU law is where the legitimacy of general principles of EU law originates – regardless of its process of creation.

In sum

In sum, both the general principle of loyal cooperation and the general principle of fundamental rights draw inspiration from and are influenced by national and international law, as well as other written sources within EU law. This does not imply that they are not specific to the EU, but rather that they are the result of a reconciliation of the diverging legal influences of national and international law on the EU legal system, as well as a consequence of the EU being a fairly new legal order. These reasons add to why the CJEU may find, develop and acknowledge general principles of EU law, and do so legitimately – based on specification and reflection.

Based on the foregoing, I argue that the legitimacy based on specification and/or reflection differentiates general principles of EU law not only from EU legislation but also from other unwritten norms that are not general principles.

2.5.1.3 Broad application

The third defining characteristic of general principles of EU law that this section identifies, is the fact that these principles are applied broadly throughout EU law. This is far from a newly identified characteristic. Not only did the CJEU acknowledge this characteristic in the *Cussens* case,[261] it has been argued before by other authors. For instance, Tridimas argued that the generalness of general principles of EU law lie partly in the fact that a general principle 'transcends a specific area and applies to several areas of law'.[262] In addition, Ortlep and Widdershoven observe that general principles of EU law 'apply "in general" [and] offer a standard for the assessment of measures in the various fields of law'.[263]

Application in multiple fields of EU law

[261] *Edward Cussens a.o. v T.G. Brosnan* [2017] paras 27-30
[262] Takis Tridimas [2020] p 9
[263] Rolf Ortlep and Rob Widdershoven (2018) p 299

The common denominator found here is the broad application of general principles of EU law: They are not limited to one particular field of EU law. As far as the studied case law goes, it is in my opinion not required that a principle is applied throughout all of EU law, as long as its application is not restricted to one or two fields of EU law.

Fundamental rights

For instance, the general principle of fundamental rights protection under EU law is applied throughout multiple fields of EU law, such as trade law,[264] labor law,[265] the common foreign and security policy[266] and data protection law.[267]

Loyal cooperation

With regards to the general principle of loyalty, the studied case law shows this principle is also applied in a wide variety of fields of EU law, such as social security law,[268] criminal law,[269] customs duties,[270] state aid[271] and EU institutional law.[272]

In sum

Based on the foregoing common denominator of fundamental rights and loyal cooperation, I argue that general principles of EU law are applied broadly throughout EU law.

2.5.1.4 Weight

As the last defining characteristic identified in this study, I argue that general principles of EU law have a certain weight attached to them.[273]

Tridimas describes the weight characteristic as general principles of EU law being the 'core value' of a field of law or of the legal system as a whole.[274] The weight characteristic of general principles of EU law has an importance element to it. Based on the studied case law on loyalty and

[264] *Internationale Handelsgesellschaft* [1970] ; *Jippes* [2001]
[265] *Johnston* [1986] ; *P v S* [1996]
[266] *Kadi* [2008]
[267] *YS* [2014]
[268] *Altun* [2018]
[269] *Zwartveld* [1990] ; Court of Justice of the European Union Case C-105/03 *Maria Pupino* [2005]
[270] *Rewe-Zentralfinanz* [1976] ; *Comet* [1976]
[271] Court of Justice of the European Union Case C-404/97 *Commission v Portugal* [2000]
[272] Court of Justice of the European Union Case C-73/17 *France v Parliament* [2018]
[273] Rob Widdershoven (2017) ; Takis Tridimas (2006)
[274] Takis Tridimas (2006) p 1

fundamental rights, I agree with Tridimas' proposition that this importance stands in relation to a whole legal system; in order to be qualified as a general principle of EU law, a norm has to be of fundamental importance to the EU legal system.[275]

Weight in multiple fields of EU law

The weight characteristic of general principles of EU law is closely related to the broad application characteristic (*Section 2.5.1.3*) in the sense that both defining characteristics concern the connection between the EU legal system and its general principles. Similarly to what is argued in the section on the broad application of general principles of EU law, I submit here that, in order for a norm to be considered a general principle, it is required to reflect a core value of more than one or two fields of EU law. Based on the studied case law, I argue that it would be insufficient for a norm to reflect the core value of only one field of EU law: a norm has to have added weight in *multiple* fields of EU law in order to qualify as a general principle of EU law.

This conclusion was deducted from CJEU case law. For example, the CJEU concluded in the *Jippes* judgment[276] that the principle of animal welfare was not a general principle of EU law. Even though the CJEU did not explicitly decide so, it can in my opinion be deduced from the judgement that animal welfare could be regarded a core value in the context of controlling foot-and-mouth-disease and the corresponding EU law provisions.[277] The way I read *Jippes*, it was not enough for the principle of animal welfare to have added weight in only one field of EU law – in this case, solely in the context of provisions on the foot-and-mouth-disease – to be considered a general principle of EU law. Even though the principle of animal welfare was *applicable* in other domains, such as the internal market, agriculture, transport and research policies,[278] the Court arguably did not find it *of fundamental importance* to these other fields of law. This affirms that, although the weight and the broad application of general principles of EU law are related, they are distinct characteristics.

While a broad application is a defining characteristic for general principles of EU law, the weight characteristic is an additional requirement. In other words, it is insufficient for a norm to be broadly

[275] Takis Tridimas (2006) p 1
[276] *Jippes* [2001]
[277] *Jippes* [2001] paras 11-22
[278] *Jippes* [2001] paras 26-27

applicable throughout the EU legal system. In order to be qualified as a general principle of EU law, this norm must also have added weight with regard to multiple fields of law in that legal system.

Fundamental rights and loyal cooperation

Both studied examples of general principles of EU law, fundamental rights and loyal cooperation, fulfill the weight characteristic. Indeed, the principle that fundamental rights ought to be protected constitutes 'an essential part of any democratic system', as mentioned by Advocate General Tesauro.[279] Similarly, the principle of loyal cooperation is considered essential in order to understand the EU legal order, as argued by Von Bogdandy.[280]

In sum

Based on the identified common denominator of fundamental rights and loyal cooperation, and in addition to other legal scholarship, I argue here that the fourth defining characteristic of general principles of EU law is that they have a certain weight attached to them.

In sum: defining characteristics of general principles of EU law

In sum, this section has shown that general principles of EU law can be recognized based on their four defining characteristics: general principles of EU law exist independently of written EU law, they derive their legitimacy from their 'specification' within EU law and/or 'reflection' outside of EU law, they are applicable throughout the broad spectrum of EU law, and they have a certain weight attached to them. Based on the studied examples of general principles of EU law, I argue that fulfilling these four defining characteristics differentiates general principles of EU law from other norms. In other words, if a norm fulfills all four characteristics, I argue that it should be considered as a general principle of EU law. This finding is relevant to the sub-question on the qualification of mutual trust as a general principle of EU law, which I will study in *Chapter 4.*

[279] Court of Justice of the European Union Case C-58/94 *Netherlands v Council* [1996] Opinion AG Tesauro, para 16

[280] Armin von Bogdandy (2010) p 41-42

2.5.2 Spatial scope of application

After having identified the defining characteristics of general principles of EU law, in this section, I will study their scope of application. The same examples of general principles of EU law, loyal cooperation and fundamental rights, will be used in this section to understand the spatial scope of application of general principles of EU law.

Fundamental rights

With regard to the spatial scope of application of fundamental rights, the importance of the Charter is self-evident as the primary codification of fundamental rights under EU law. Since the Charter makes no explicit distinction between its application inside or outside of Europe, the scope of application of fundamental rights depends solely on the implementation of EU law by the Member States or on any action undertaken by the EU institutions or bodies.[281] Even though the Charter is based on and influenced by the ECHR and ECtHR case law, the Charter still depends on the application of EU law rather than the territorial jurisdiction clause of Article 1 of the ECHR.[282] The pertinent question with regard to fundamental rights under the Charter is thus whether EU law is implemented by the Member States.

According to Bartels, the application of the Charter can be said to extend beyond Europe in certain cases.[283] For example, in the *Al-Qaeda* case of 2012, the CJEU decided on a case that concerned the amendment of the Council Regulation 881/2002. This Regulation imposed certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, based on UN Security Council measures. The alteration of Regulation 881/2002 was due to the previously discussed *Kadi* judgment and concerned the protection of fundamental rights.[284] In the *Al-Qaeda* case, the European Parliament submitted that the amendment of Regulation 881/2002 could not validly be based on Article 215 TFEU (measures concerning the economic and financial relations with third countries) as the Regulation itself was

[281] Court of Justice of the European Union Case C-2/92 *Bostock* [1994] para 16; Art. 51(1) Charter of Fundamental Rights of the European Union [2000] OJ 2000/C 364/01; Maarten den Heijer (2011) p 199
[282] For a discussion on the territorial jurisdiction clause of the ECtHR in external European asylum law, see Maarten den Heijer (2011) p 21-64
[283] Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' [2015] The European Journal of International Law 1071, p 1075-1078
[284] Court of Justice of the European Union Case C-130/10 *European Parliament v Council of the European Union (Al-Qaeda)* [2012] paras 2-5

based on the legal basis for the prevention of terrorism and related activities (now laid down in Article 75 TFEU).[285] In light of the *Al-Qaeda* case, the Parliament argued that 'it would be contrary to Union law for it to be possible for measures to be adopted that impinge directly on the fundamental rights of individuals and groups by means of a procedure excluding the Parliament's participation.' In response, the CJEU concluded that 'the duty to respect fundamental rights is imposed […] on all the institutions and bodies of the Union'.[286] Therefore, Bartels argues that

> 'the Court had general [Common Foreign and Security Policy: CFSP] measures in mind, and the statement can be taken as an acknowledgement that such measures are subject to EU fundamental rights. Furthermore, given the nature of CFSP measures, this could also be taken as an indication that fundamental rights have some extraterritorial application.'[287]

Similarly, in its *Mugraby* judgment,[288] the CJEU implicitly accepted that the EU could be held responsible for a human rights violation by a third party in a third country.[289] The *Mugraby* case concerned a human rights lawyer in Lebanon who was prevented from practicing as a lawyer by the Lebanese authorities on account of their critical attitude. They called on the Commission and the Council to suspend the implementation of the ongoing economic aid to Lebanon because, so they argued, Lebanon had violated the human rights clause of the EU-Lebanon Association Agreement.[290] While the CJEU in the end did not accept their claim and did not accept responsibility of the EU in light of the human rights violations allegedly committed by Lebanon,[291] the possibility of responsibility itself was not questioned.[292] In other words, the *possibility* of the external application of the Charter was implicitly accepted. If this were not the case, it could be assumed that the Court would have dismissed the case on the ground of the Charter not being applicable to the case.

---

[285] *European Parliament v Council of the European Union (Al-Qaeda)* [2012] para 12
[286] *European Parliament v Council of the European Union (Al-Qaeda)* [2012] para 83; see also Lorand Bartels [2015]
[287] Lorand Bartels [2015] p 1076
[288] Court of Justice of the European Union Case C-581/11 P *Muhamad Mugraby v Council of the European Union and European Commission* [2012]
[289] Lorand Bartels [2015] p 1076
[290] *Muhamad Mugraby v Council of the European Union and European Commission* [2012] paras 1-11
[291] The grounds of appeal were dismissed as clearly inadmissible or as clearly unfounded. *Muhamad Mugraby v Council of the European Union and European Commission* [2012] paras 47, 51, 55, 61, 64, 73, 76 and 84
[292] Lorand Bartels [2015] p 1076-1077

Based on CJEU case law, Bartels concludes that there is a possibility of the rights in the Charter applying externally. However, he is less confident of the enforcement of the rights in the Charter because of the requirement of individual concern.[293]

Be that as it may, and while the spatial scope of application of the Charter is relevant, it does not necessarily give a definite answer to the question on the external application of the *general principle* of fundamental rights protection under EU law. Indeed, as was shown above, the content and the scope of application of the rights protected by the Charter were originally based on the general principle of fundamental rights obligations, not the other way around. Therefore, I now focus on the scope of application of the general principle itself, which was the subject of the previously discussed *Kadi* judgment.[294] In *Kadi,* the CJEU decided that the EU has to abide by its general principle of fundamental rights protection, not just when acting in the internal sphere of EU law, but also when acting internationally.[295] This 2008 judgment dates from before the entry into force of the Charter, implying that the Court's reasoning was based on the general principle of fundamental rights, not the Charter.

This still-standing distinction between the general principle of fundamental rights and the individual rights protected by the Charter has been confirmed by the CJEU in 2021 *Repubblika* judgment. Therein, the Court observed on the distinction between the *general principle* of effective judicial protection, enshrined in Article 19(1) TEU, and the *right* to effective judicial protection, enshrined in Article 47 of the Charter:

> 'while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.'[296]

The finding in the *Kadi* judgement on the spatial scope of application of the *general principle* of fundamental rights (supported by the reaffirmed distinction between the general principle of

[293] Lorand Bartels [2015] p 1087-1090
[294] See *Section 2.2.3.*
[295] *Kadi* [2008] para 304
[296] Court of Justice of the European Union Case C-896/19 *Repubblika* [2021] para 52

fundamental rights and the Charter in the *Repubblika* judgment) thus leads to the conclusion that the general principle of fundamental rights protection may apply externally, i.e. extend beyond the borders of Europe.

Loyal cooperation

Less ambiguity exists with regard to the spatial scope of application of the principle of loyalty. It is generally accepted that loyal cooperation extends to the external sphere of EU law when the Member States act outside the territory of the EU and their action might influence the EU's (external) policy.[297] Presumably, there is less ambiguity on the external extension of loyalty (as compared to the external extension of fundamental rights) because of the CJEU's clear stance on this matter.

The 2019 *European Commission v Germany* case, which is discussed in *Section 2.3.3* of this chapter, is a clear example of the external extension of the general principle of loyalty. Generally speaking, this judgment shows that if a Member State harms the effectiveness of the international action of the EU and the Union's credibility and reputation on the international stage, this amounts to a failure to fulfil its obligations under the principle of loyalty and, in the specific case of *European Commission v Germany*, of the relevant Council Decision 2014/99.[298]

Moreover, in the field of external EU law, the principle of loyal cooperation has led to the so-called implied external powers or *ERTA* doctrine,[299] i.e. that the 'Member States may lose the power to conclude international agreements if and when the EU has acted internally on the matter'.[300] The general principle of loyalty obliges the Member States not to use their competences to such an extent that they detract from the meaning of the external policy of the EU or from the meaning of internal EU law.[301] As loyalty lies at the basis of the *ERTA* doctrine, the principle of loyal cooperation should apply externally whenever the external action of the Member State(s) might impact internal or external EU law.

---

[297] Koen Lenaerts and Piet Van Nuffel (2017) p 65-112; Marcus Klamert (2014) p 73-75
[298] *European Commission v Germany* [2019] paras 1 and 97-100
[299] *Commission v Council (ERTA)* [1971] paras 17-19 and 30-32
[300] Merijn Chamon, 'Implied exclusive powers in the ECJ'S post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine' [2018] Common Market Law Review 1101, p 1101
[301] See also Court of Justice of the European Union Case *Opinion 1/03* [2006] para 116; Koen Lenaerts and Piet Van Nuffel (2017) p 65-112; *Commission v Council (ERTA)* [1971] paras 19-22

In sum: spatial scope of application of general principles of EU law

The foregoing has allowed me to distill another common denominator of loyal cooperation and fundamental rights: It is not to be excluded that the application of general principles of EU law may be extended to external European law (i.e. when European law extends beyond Europe) when EU law is applicable.[302] The studied case law and literature on loyal cooperation and fundamental rights have exposed that both general principles are in principle able to extend beyond Europe. At the same time, the question of their enforceability depends on other factors that are not studied here. They would steer too far from the general research question on the extension of the principle of mutual trust to the field of external European asylum law. The finding of the potential external extension of general principles of EU law will be used as a starting point in *Chapter 4* on the potential external extension of mutual trust and, more specifically, in *Chapter 6* on the potential extension of mutual trust to external European asylum law.

2.6 Conclusion

In order to answer the sub-questions on the defining characteristics of general principles of EU law and their spatial scope of application, this chapter first gave a general overview of the *status quo* in CJEU case law and legal scholarship on general principles of EU law. This exposed a struggle in the identification of general principles of EU law, and a strong focus on their functions.

Aiming to add to legal scholarship on the identification of general principles of EU law, I focused firstly on what makes a norm qualify as a general principle of EU law. This led me to distilling the common denominators of two examples in order to identify their defining characteristics. The two selected examples are the general principles of loyal cooperation and of fundamental rights. Based on the studied case law and literature on these general principles, I argued in this chapter that general principles of EU law have four defining characteristics. More specifically, I defined a general principle of EU law as a norm, that exists independently of written EU law and is applicable throughout multiple fields of EU law, which has a certain weight attached to it and which derives its legitimacy from its specification in a norm under EU law or its reflection in a norm outside of EU law.

[302] Art. 21 Treaty on the European Union [2016] OJ C 202/1

In this chapter, I have coined the term 'specification': the various ways in which general principles can form the basis for rules and principles *within* EU primary and secondary law, and the term 'reflection': the counterparts, so to speak, of principles in legal systems *outside* of the EU, i.e. in the national laws of the Member States and in international law.

One of the results of the qualification of a norm as a general principle of EU law is that it may apply externally – reaching beyond the combined territories of the EU Member States. This was confirmed by case law and literature on the general principles of loyal cooperation and of fundamental rights. The potential external extension of general principles of EU law is the answer to the sub-question on the spatial scope of application of general principles of EU law.

The previous findings on the defining characteristics and the spatial scope of application of general principles of EU law will serve as a framework for *Chapter 4.* There, I will investigate whether mutual trust should be considered as a general principle of EU law. Doing so requires bringing together the study on general principles of EU law of this chapter and the study on the principle of mutual trust. The latter study on mutual trust will take place in the following chapter in the context of internal EU asylum and criminal law.

Chapter 3 Mutual trust

3.1 Introduction

Mutual trust is a presumption of trust regarding the application of EU law that is supposed to exist between the Member States. Throughout this study, I use mutual trust as a lens through which I study intra-European interstate interaction. The goal of this chapter is to create a better understanding of the principle of mutual trust that will enable us to interpret the cooperation dynamics between the Member States. As such, in this chapter, I aim to answer the sub-questions of what legal function the principle of mutual trust fulfills within the EU and what the legal trigger factors[303] of mutual trust are.

The findings on mutual trust of this chapter will be applied to the framework of general principles of EU law, developed in *Chapter 2* (General Principles of EU Law), in order to evaluate in *Chapter 4* (Mutual Trust – a General Principle of EU Law) whether mutual trust should be regarded as a general principle of EU law and how it should relate to other general principles of EU law. In turn, *Chapter 4* will serve as the basis for *Chapter 6* (Consequences of externalization) in which I will study several legal consequences of the externalization of European asylum law in light of mutual trust and its relation to other general principles of EU law.

Since the existence of (predecessors of) the EU, mutual trust between the Member States has been mentioned quite often in political discourse. For example, in the 1999 Tampere conclusions, mutual trust was considered the 'cornerstone' of cooperation in civil and criminal matters.[304] However, mutual trust is not mentioned in the Treaties and its application relies almost completely on CJEU case law.[305] Before trying to grasp any current and future constitutional role mutual trust might play (in *Chapter 4*), it is important to understand where this principle is coming from and how it is currently applied in the EU legal system.

[303] A trigger factor is considered here as the activating circumstance or provision, meaning that which makes the principle of mutual trust applicable in the studied context.
[304] Recital 33-37 of the Presidency Conclusions, Tampere European Council, 15 and 16 October 1999 [1999]
[305] Luc Leboeuf (2016) p 23-34

The development of mutual trust in CJEU case law begins in the 1970s in the area of the internal market and continues in the Area of Freedom, Security, and Justice.[306] Today, mutual trust plays an important role mainly in the AFSJ – which is where its relation to fundamental rights is clearest, as will be discussed later – although it also reaches beyond this area of EU law.[307]

I start the research in this chapter by examining the legal function of mutual trust within the EU legal order (*Section 3.2*).[308] Next, I discuss the trigger factors of mutual trust in *Section 3.3* and *3.4*: What causes mutual trust to apply in certain legal contexts? These trigger factors will firstly be studied in the context of internal EU asylum law, more specifically the Dublin system concerning the determination of the Member State responsible for the assessment of an application for international protection made in Europe (*Section 3.3*).[309] Secondly, the trigger factors of mutual trust are studied in internal EU criminal law, more specifically the European Arrest Warrant system of arresting and transferring criminal suspects and sentenced persons between the Member States (*Section 3.4*).[310] As mentioned in *Chapter 1, Section 1.6.2*, I selected the Dublin and EAW system as context to study mutual trust in because they are characterized by a contentious interplay between the principle of mutual trust and fundamental rights. This will be further discussed in *Section 3.3* and *3.4* of this chapter. The limitations to mutual trust in the form of fundamental rights are discussed in the same sections. This chapter ends by conceptualizing the principle of mutual trust (*Section 3.5*). This conceptualization of mutual trust adds to legal scholarship, inter alia by building upon the studies of developments in internal EU asylum and criminal law.

Before moving onto the study of the principle of mutual trust, and to avoid misconceptions on the implications of this principle on Member State cooperation dynamics, it is important to note here that the principle of mutual trust is based on the presumption of *equivalent* compliance with EU

[306] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) ; Luc Leboeuf (2016) p 14; Ermioni Xanthopoulou (2019) p 29-36
[307] Sacha Prechal [2017] p 76-79
[308] I do so based on the understanding of mutual trust as a legal principle, not a socio-legal one. For an overview of various disciplinary approaches to (mutual) trust, see Birgit Aasa, *The Principle of Mutual Trust in EU Law. What is in a name?* (PhD thesis, European University Institute 2021) p 63-101
[309] Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31
[310] 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1

law in the Member States, rather than *equal* compliance and fundamental rights protection.[311] For example, if Member State A trusts Member State B in complying with EU law, including its fundamental rights obligations, Member State B may choose how to guarantee the fundamental rights of individuals such as applicants for international protection. The manner in which this is done is not required to be exactly the same as the protection offered in Member State A, as long as the outcome – upholding the fundamental rights of asylum seekers in line with EU law – is equivalent in Member State A and B. It is only required that B complies with EU law and therefore offers equivalent protection.[312]

3.2 Legal function of mutual trust

This section assesses the legal function of the principle of mutual trust within the EU. It does so based on a selection of CJEU case law and legal scholarship. In addition to the conceptualization of mutual trust later in this chapter (*Section 3.5)*, the study of mutual trust's legal function in this section will enable me to answer the question of the constitutional status of mutual trust under EU law in *Chapter 4*. It relates specifically to the weight characteristic of general principles of EU law, which I identified in *Section 2.5.1.4* of *Chapter 2*.

Opinion 2/13

Seminal to our understanding of mutual trust in the EU legal system is the 2013 Opinion of the CJEU on the Draft Accession Agreement of the EU to the ECHR. In Opinion 2/13, the CJEU found that accession to the ECHR would be incompatible with the T(F)EU.[313] The relevance of Opinion 2/13 to this study lies in the fact that the CJEU not only stresses the 'fundamental importance in EU law' of the principle of mutual trust 'given that it allows an area without internal borders to be created and maintained'.[314] The Court even considers mutual trust to underlie the legal structure of the EU. When mentioning the legal structure of the EU, the CJEU understands it

[311] Evelien Brouwer, 'Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts' [2016] European Papers 893, p 904; Court of Justice of the European Union Case C-491/10 PPU *Aguirre Zarraga* [2010] para 48
[312] Christina Eckes, 'Protecting Fundamental Rights in the EU's Compound Legal Order. Mutual Trust against Better Judgment?' in Azoulai and others (eds), *Collected Courses of the Academy of European Law* (Oxford University Press 2017), p 17
[313] See Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection - On *Opinion 2/13* on EU Accession to the ECHR' [2015] Human Rights Law Review 485
[314] *Opinion 2/13* [2014] para 191

to include the constitutional structure of the EU, its specific characteristics arising from the very nature of EU law (such as effectiveness and direct effect) and the principles, rules and legal relations resulting therefrom.[315]

In my opinion, the CJEU attributes two traits to the principle of mutual trust in Opinion 2/13: a pragmatic and a fundamental one. Firstly, the pragmatic trait of the principle of mutual trust relates to the internal market. The CJEU views mutual trust as an aid to the abolishment of internal borders in Europe.[316] Mutual trust does so by providing a tool to ensure the conformity of Member State action with EU law; the higher the level of conformity between the standards in the different Member States, the more easily the internal market can be realized.[317] Secondly, the fundamental trait of mutual trust relates to the role it plays in the EU legal order. According to the CJEU, mutual trust underlies the legal structure of the EU.[318] As will be discussed below, the conception of mutual trust by the CJEU has evolved over time.[319]

'Neutral governance principle'

Based on CJEU case law, Caeiro and others detect two different understandings of mutual trust.[320] The first understanding of mutual trust was more dominant in older CJEU case law. Therein, mutual trust was regarded as a command that aims to 'convey the punitive claims of the Member States throughout the EU, pursuing the transnational enforcement of domestic decisions.' In that sense, mutual trust 'works as an *amplifier*, a driver for the pan-European reach of the […] policy of every single Member State'.

The second perception identified by Caeiro and others – which is the prevailing current understanding of the CJEU – views mutual trust as a 'neutral governance principle'. This principle is aimed at European governance because it 'binds Member States to recognize each other's interests within a common framework of values'. Its denotation as 'neutral' must be understood as unaligned and unrelated to the policy and law of a single Member State. Indeed, the principle of

[315] *Opinion 2/13* [2014] paras 164-167
[316] *Opinion 2/13* [2014] para 191
[317] Damian Chalmers and others, *European Union Law* (4th edition, Cambridge University Press 2019) p 97-117
[318] *Opinion 2/13* [2014] paras 164-167
[319] See also Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Invidivual' [2012] Yearbook of European Law 319, p 319-372
[320] Pedro Caeiro and others, 'The evolving notion of mutual recognition in the CJEU's case law on detention' [2018] Maastricht Journal of European and Comparative Law 689

mutual trust is applicable 'regardless of whether or not this leads to the actual "execution" of the issuing state's decision'.[321] According to this second, current perception of mutual trust, the cooperation between Member State A and B depends on the compliance of Member State B with common rules and policies, which is monitored and ensured by EU law. Thus, the trust between A and B is a result of B's compliance with the common framework rather than a blind execution of B's decision.[322]

While their study of CJEU case law was limited to, firstly, mutual recognition[323] and, secondly, case law on the EAW system and detention in particular, I believe their conclusions are relevant to a better understanding of mutual trust in the broader EU legal context. Indeed, in asylum law, a similar evolution from the first to the second perception of mutual trust can be observed. In the Dublin system, the CJEU also evolved from viewing mutual trust as an automatic command to understanding mutual trust as a 'neutral governance principle'. The main difference between the case law on criminal law and on asylum law was that the tendency towards regarding mutual trust as a neutral governance principle in internal EU asylum law was heavily influenced by ECtHR case law, as will be observed in *Section 3.3.2.*

'Acting apart together'

As to the understanding of the legal function of mutual trust in legal scholarship, Gerard, for one, has focused on the 'significance of trust for the management of the Union as a polity'.[324] On the one hand, he found that mutual trust is responsible for the effectiveness 'of a legal system based on the coordination of a diversity of domestic solutions (as opposed to the unification of rules […]).'[325] On the other hand, in the *NS* judgment, the CJEU has framed mutual trust as the basis and '*raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System'.[326] Based thereon, Gerard

[321] Pedro Caeiro and others [2018] p 702-703
[322] See also Valsamis Mitsilegas [2012] p 344
[323] As mentioned before and discussed later, mutual recognition is derived from the principle of mutual trust. See *Section 3.4.1*.
[324] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 70
[325] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 73
[326] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] paras 79 and 83; Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 70

argues that mutual trust functions both as a guarantee of effectiveness and as the 'normative underpinning of cooperation' that underlies instruments of secondary law.[327]

Rizcallah considers mutual trust as a governance principle which is essential for the functioning of the EU legal system: 'this results from the convergence of three givens at the heart of European construction: *i.* the ambition to constitute an area without internal borders – unity –, *ii.* the predominantly indirect nature of the administration of Union law – diversity – and, *iii.* the principle of equality between Member States – equality'.[328]

Similarly, Widdershoven regards mutual trust as a means of cooperation that avoids the EU institutions taking over the administrative duties from the Member States. Widdershoven frames this as 'acting apart together'.[329] Guild and Marin describe mutual trust as 'a tool to compensate for powers' that the Member States had ceded to the EU regarding border controls.[330]

In addition, Gerard views cooperation in the AFSJ as an 'integration strategy' which requires, first and foremost, 'the pre-existence of a core of shared values'. A system that relies on cooperation, as opposed to a full alignment of rulesets,[331] entails a wide variety of 'domestic solutions'. In order for such a system to be viable without the existence of any enforcement mechanisms in the hands of the EU institutions, mutual trust is required.[332]

However, Janssens notes that, while '[encouraging] a general climate of mutual trust may oblige Member States to do away with a certain amount of prejudice towards or ignorance of other Member States' systems, [… mutual trust] should not be seen as a static or invariable concept but

[327] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 73
[328] Cecilia Rizcallah (2020) p 462-478. Original text in French: 'celui-ci résulte de la convergence de trois données au coeur de la construction européenne: *i.* l'ambition de constituer un espace sans frontières intérieures – l'unité –, *ii.* le caractère principalement indirect de l'administration du droit de l'Union – la diversité – et, *iii.* le principe d'égalité entre les États membres – l'égalité.'
[329] Rob Widdershoven [2015]
[330] Elspeth Guild and Luisa Marin, 'Still Not Resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges Ahead after the Lessons Learned from the Past' in Guild and Marin (eds), *Still Not Resolved? Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2009) 1-10, p 7
[331] While a commentary on the use of the term 'harmonization' goes beyond the scope of this study, I note here that I will use the more neutral concept of 'aligning rulesets' that I developed elsewhere: Jasper Bongers and others, 'Aligning rulesets: understanding cooperation in the European Union' [2021] Political Research Exchange 1
[332] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 74-75

rather as a soft and flexible concept, subject to permanent reconsideration under changing circumstances, and some room must be left for individual considerations.'[333]

'Tool of governance'

Leboeuf adds that mutual trust is 'a new method of harmonization' in the sense that it does not require actually adopting common rules but focuses on coexistence by respecting the diverging legal traditions of the Member States. Mutual trust is thus not limited to ensuring respect for secondary law but instead is aimed at reaching a certain result without the actual unification of substantive rules.[334] This is what Marguery and Van Den Brink consider as 'a "third way" between full legislative freedom for Member States and harmonisation'.[335] Rizcallah agrees up to the point that mutual trust 'constitutes an important tool of governance for removing borders between domestic legal systems in several fields'.[336] However, Rizcallah argues, 'trust-based governance raises some important challenges encountered in the EU legal order'.[337] Even if these points of critique are not directly pertinent to the research question of this study, they clarify that the legal function of mutual trust, if regarded as a tool for cooperation, is not uncontested. Therefore, it is important to keep in mind that, while mutual trust entails several benefits in the search for the balance between effective cooperation between the Member States, on the one hand, and the sovereignty of the Member states, on the other, it also entails risks, as identified by Rizcallah.

In sum

Based on the authors discussed in this section, I consider mutual trust as a tool for horizontal cooperation without the for some too far-fetching consequences of a full alignment of rulesets. In this respect, mutual trust is the result of a balancing act. On the one side of the scale lies the wish to cooperate and align rulesets, and on the other side, respect for the national solutions.

---

[333] Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) p 28-29

[334] Luc Leboeuf (2016) p 25-34. Original text in French: 'La Commission européenne a immédiatement saisi les vertus harmonisatrices de la reconnaissance mutuelle. Elle s'est fondée sur celle-ci pour développer la "nouvelle méthode d'harmonisation".' See also Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985) [1985] COM(85) 310 final

[335] Tony Marguery and Ton Van Den Brink, 'Mutual Recognition and Mutual Trust: Reinforcing EU Integration? Introduction' [2016] European Papers 861, p 861

[336] Cecilia Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' [2019] European Law Journal 1, p 2-3

[337] Cecilia Rizcallah [2019] p 12-18. Rizcallah identifies issues regarding 'Member States' sovereignty and democratic legitimacy, the question of States' liability, the protection of individual freedoms and the existence of competitive federalism.'

Effectiveness of EU law is understood here as its *effet utile*: 'justiciability, practical effect and/or enforceability of clear, precise and unconditional European rights for European citizens who may invoke those rights before the courts'.[338]

Respect for the myriad national solutions in a system of multilayer governance, presented by the different administrative systems of the Member States, can also be linked to a fear of a decrease of autonomy and the wish to maintain diversity among the Member States' legal systems. Interestingly – because it might seem paradoxical – mutual trust is a legal principle that seems to result from the Member States wishing to avoid the full alignment of their rulesets (which may be understood as a sign of distrust) but it results in a trust-centered form of governance.[339]

Based on the foregoing, I construe from the literature and the case law of the CJEU that the legal function of mutual trust is finding a balance between the effectiveness of EU law and the sovereignty of the Member States. Finding that balance ensures the effectiveness of EU law in the horizontal relationship between the Member States. Mutual trust aims to do so in the *sui generis* entity with federal elements that constitutes the EU, without disrespecting the administrative sovereignty of the Member States.

Building upon my understanding of the legal function of the principle of mutual trust, I will position mutual trust in the context of asylum law (*Section 3.3*) and criminal law (*Section 3.4*) in the following sections, before conceptualizing mutual trust under EU law (*Section 3.5*).

[338] Elvira Mendez-Pinedo, 'The principle of effectiveness of EU law: a difficult concept in legal scholarship' [2021] Juridical Tribune 5, p 10

[339] Kathrin Hamenstädt, 'Mutual (Dis-)trust in the Area of Freedom, Security and Justice?' [2021] Review of European Administrative Law 5, p 5. Similarly, see Henrik Wenander, 'Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-Determination, and Individual Rights' [2011] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law 755, p 784-785: '[T]he legal function of rules and principles on recognition is to balance the interests of international cooperation and national self-determination in administrative matters. The degrees of transfer of public power through the different recognition regimes make it possible for legislators and legal decision-makers to find an appropriate level of cooperation. Recognition of foreign administrative decisions would seem to be most important where there is a certain degree of mutual trust between the states, but at the same time no political interest in centralised decision-making. This applies in many fields of EU law and is associated to the partly federal character of the EU.'

3.3 Mutual trust in asylum law

3.3.1 Introduction

The principle of mutual trust plays a vital role in internal EU asylum law, i.e. the Common European Asylum System, more specifically in the Dublin system concerning the determination of the Member State responsible for the assessment of an application for international protection made in Europe.[340] This section zooms in on the application of mutual trust in internal EU asylum law by focusing on its relationship with fundamental rights as a limitation, and the legal trigger factors of mutual trust: the factors that cause mutual trust to apply in the Dublin system.

The Dublin system is based on Regulation 604/2013 (Dublin Regulation),[341] which has been called the cornerstone of the Common European Asylum System.[342] The Dublin system aims to avoid that asylum applicants submit multiple applications throughout Europe[343] or that they seek out a particular Member State in which they wish to apply for international protection ('asylum shopping').[344] Moreover, the Dublin Regulation intends to ensure that every application for international protection is assessed in order to avoid 'refugees in orbit'.[345] The Dublin Regulation was not created with the goal of protecting fundamental rights but rather to facilitate external borders controls and the abolition of internal border controls, as will be exemplified by CJEU case law in *Section 3.3.2*.[346]

[340] Sacha Prechal [2017] p 76-79
[341] Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31
[342] The Stockholm Programme. An open and secure Europe serving and protecting citizens [2010] OJ C 115/1; see also Madeline Garlick, *Solidarity Under Strain. Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union* (PhD thesis, Radboud University 2016) p 93-96
[343] In this study, I will refer to the application of the Dublin Regulation in 'Europe' for the sake of readability. In the context of the Dublin Regulation, 'Europe' is understood as the 'Dublin area' consisting of the EU Member States and the four European Free Trade Area States.
[344] See Sílvia Morgades-Gil, 'The "Internal" Dimension of the Safe Country Concept: the Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts' [2020] European Journal of Migration and Law 82; Minos Mouzourakis, '"We Need to Talk about Dublin": Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union' [2014] Working Paper Series Refugees Studies Centre University of Oxford 1, p 20-23
[345] See Karen Birchard, 'Dublin Convention on handling of EU asylum seekers becomes law' [1997] The Lancet 722
[346] Luc Leboeuf (2016) p 106-107 and 129-131

The Regulation includes a hierarchy of criteria that determine the Member State responsible for the assessment of an application for international protection.[347] Whenever an application for international protection is made in Europe,[348] we turn to the Dublin Regulation to find out which Member State is responsible for assessing the application. The most influential criterion in practice is laid down in Article 13:

> '[when] an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection.'

As a result, the Dublin system generally assumes that any third-country national who applies for international protection in another Member State than the one they irregularly entered, will be transferred to the latter.[349] Although this system might seem cut and dried, the Dublin system is not uncontested in the sense that many doubt its fairness and applicability in practice.[350] This will be further explained in *Chapter 6, Section 6.2.1* when discussing the interplay of the Dublin system and the EU-Turkey Deal in light of the principle of mutual trust.

The text of the Dublin Regulation does not specifically refer to the principle of mutual trust.[351] However, because of its focus on the facilitation of the determination of the Member State responsible, mutual trust has been positioned as a vital element of the Dublin system.[352] In the *N.S.* judgment (discussed in *Section 3.3.2*), the CJEU ruled that it is apparent from the instruments of the CEAS that the principle of mutual trust lies at the basis of the Dublin system.[353] This implies

[347] Art. 7 Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31; For a detailed discussion on the hierarchy of the criteria of the Dublin Regulation, see Luc Leboeuf (2016) p 108-120
[348] As noted before, in the Dublin context, 'Europe' is understood as the combined territories of the four European Free Trade Area States and the EU Member States.
[349] Evelien Brouwer [2016] p 906
[350] E.g. Susan Fratzke (2015) ; Marie-Sophie Vachet [2018] p 1-17
[351] Only the Preamble of the Dublin refers to the principle of mutual trust. This will be further discussed in *Chapter 4, Section 4.3.2.*
[352] Sacha Prechal [2017] p 77
[353] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 79: 'It is precisely because of that principle of mutual confidence that the European Union legislature adopted [the Dublin Regulation] in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it

its application even without a statutory basis in the secondary law underlying the Dublin system. Despite its importance, the presumption that the other Member States comply with EU standards cannot be regarded as absolute, as the Member States have to comply in practice with their fundamental rights obligations under EU law and under international law.[354] In certain cases, the vast difference between the assumption that other Member State complies with its fundamental rights obligations, in theory, and the violations of fundamental rights, in reality, has led to a decrease in mutual trust.[355]

3.3.2 Case law

That the application of the principle of mutual trust needed to be reconciled with fundamental rights, became clear in 2011 when the ECtHR and the CJEU each issued a seminal judgment concerning the application in practice of the principle of mutual trust and the 'tense symbiosis'[356] between the fundamental rights obligations of the Member States and the fundamental rights protection in practice.[357]

Indirect refoulement

The asylum seeker M.S.S., who had irregularly entered Greece before applying for international protection in Belgium, was transferred to Greece based on the Dublin Regulation. Before the ECtHR, they argued *inter alia* that, because of the deficiencies in the Greek asylum procedure and reception conditions, Belgium had transferred him in violation of article 3 ECHR. The prohibition of torture and inhuman and degrading treatment also entails a prohibition of indirect *refoulement*[358] and is, moreover, an absolute prohibition. In light of that prohibition, the Court ruled in the *M.S.S.*

being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.'

[354] Hemme Battjes, 'Kroniek Dublinverordening' [2018] Asiel&Migrantenrecht 75; Luc Leboeuf (2016) p 35-48; Oskar Losy, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law' [2018] Adam Mickiewicz University Law Review 185, p 192-193

[355] Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 59-68

[356] See Takis Tridimas [2020] p 13

[357] Evelien Brouwer [2013] p 135-136

[358] 'Glossary on Migration' (IOM 2019): Indirect *refoulement* is the risk of a violation of the principle of *non-refoulement* when that risk 'would not subsist in the State to which the person is returned in the first place, but in any other country to which the person would risk being subsequently returned by this State'.
The principle of *non-refoulement* is '[t]he prohibition for States to extradite, deport, expel or otherwise return a person to a country where his or her life or freedom would be threatened, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel, inhuman and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm').

case that the presumption of mutual trust could be rebutted if that would have otherwise entailed that Belgium could not have complied with their obligations under the ECHR;[359]

> 'When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.'[360]

The ECtHR found that Belgium 'knew or ought to have known that he had no guarantee that his application for international protection would be seriously examined by the Greek authorities' and that it had therefore violated the principle of indirect *non-refoulement*.[361] This shift in ECtHR case law would turn out to be highly challenging for a system which was previously based on irrebuttable trust.

Systemic deficiencies

Indeed, the CJEU issued a similar judgment in the *N.S.* case in which it decided that

> 'to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.'[362]

Article 4 of the Charter contains a prohibition of inhuman or degrading treatment, which is based on article 3 ECHR and also entails the principle of *non-refoulement.* As a result of the CJEU judgment *N.S.* and the ECtHR judgment *M.S.S.*, Dublin transfers to Greece were suspended.[363]

---

[359] *M.S.S. v Belgium and Greece* [2011] para 340; Evelien Brouwer [2016] p 906-911
[360] *M.S.S. v Belgium and Greece* [2011] para 342
[361] *M.S.S. v Belgium and Greece* [2011] para 358
[362] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 94
[363] Mattias Wendel, 'Mutual Trust, Essence and Federalism - Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' [2019] European Constitutional Law Review 17

Systemic interests

Although the *N.S.* judgment may give the impression of the CJEU leaning more towards interpreting the Dublin Regulation as a system firstly protecting fundamental rights, the 2013 *Abdullahi* judgment reveals otherwise.[364] In that case, the Court not only confirmed the principle of mutual trust, it also reiterated the objective of the Dublin system:

> 'the establishment of a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.'[365]

This implies that the systemic interests of a functioning Dublin system (which do not necessarily but may coincide with the interests of the Member States) sometimes surpass the fundamental rights protection of individuals.[366] In line therewith, exceptions to the principle were limited to 'systemic deficiencies […] which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[367] As a result, the CJEU essentially found that the only way in which the applicant may lodge an appeal in Member State A against a Dublin transfer to B, is when the applicant has shown that there is a real risk of a violation of Article 4 of the Charter because of systemic deficiencies in B.[368]

The rather stringent view of the CJEU in *Abdullahi* was nuanced, firstly, by the ECtHR.[369] The Strasbourg Court ruled in *Tarakhel* that the Dublin transfer of an applicant for international protection may be subject to judicial review in Member State A, even when there are no systemic deficiencies in Member State B, for as long as there are substantial grounds for believing that the asylum seeker, who is returned to B, faces a real risk of being subjected to inhuman and degrading treatment.[370] In other words, even if there are no systemic deficiencies in B, A must in some cases still assess the individual situation of the asylum seekers upon return to B in order to verify that

[364] Court of Justice of the European Union Case C-394/12 *Shamso Abdullahi* [2013]
[365] *Shamso Abdullahi* [2013] para 59
[366] Luc Leboeuf (2016) p 128-129
[367] *Shamso Abdullahi* [2013] para 60
[368] *Shamso Abdullahi* [2013] para 62
[369] Luc Leboeuf (2016) p 128-129
[370] European Court of Human Rights (Grand Chamber) Case 29217/12 *Tarakhel v Switzerland* [2014] paras 100-105

they do not run a risk of being subjected to inhuman or degrading treatment. This may be done by obtaining individual guarantees from B regarding the treatment of the applicant.[371]

Secondly, the CJEU further nuanced its own reasoning in *Abdullahi* in the 2016 *Ghezelbash* case.[372] Therein, it concluded that 'an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility' as laid down in the Dublin Regulation.[373] While this made the judicial review of Dublin cases more centered on individual rights, it does not fully devaluate the Court's finding in *Abdullahi*.[374] In my opinion, the focus in *Ghezelbash* on the correct application of the Dublin criteria confirms that judicial review in the Dublin system is still heavily focused on concerns of a systemic nature. Therefore, I consider the Dublin system as a system focused on effectiveness, first, and fundamental rights, second. However, as I will argue in *Chapter 4* (*Section 4.4.1*) and *Chapter 6*, the effectiveness of a system based on the principle of mutual trust should not be viewed as detached from the protection of fundamental rights in practice.

Individual circumstances

In 2017, the CJEU filed a judgment which is relevant to the further understanding of what is qualified in *Section 3.5.1* as 'the subject of trust' in the Dublin system. In *C.K.*,[375] the CJEU seemed to let go of the requirement of assessing the (legal) system as a whole of Member State B for the rebuttal of mutual trust. A violation of Article 4 of the Charter no longer needs to stem from systemic deficiencies in the asylum procedure and/or the reception conditions of Member State B. It could also be caused by the individual circumstances and the decision in an individual case by B's decision-making authorities. In the case of C.K., the decision to transfer the applicants, of which one had a mental illness, was the subject of mutual trust. Even though

> 'in accordance with the mutual confidence between Member States, there is a strong presumption that the medical treatments offered to asylum seekers in the Member States will be adequate, […] it cannot be ruled out that the transfer of an asylum seeker whose state of health is particularly serious may, in itself, result, for the person concerned, in a

[371] *Tarakhel v Switzerland* [2014] para 122
[372] Court of Justice of the European Union Case C-63/15 *Mehrdad Ghezelbash* [2016]
[373] *Mehrdad Ghezelbash* [2016] para 61
[374] *Shamso Abdullahi* [2013] para 59
[375] Court of Justice of the European Union Case C-578/16 PPU *C.K. and others v Slovenija* [2017]

real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, irrespective of the quality of the reception and the care available in the Member State responsible for examining his application.'[376]

Consequently, Member State A has to assess whether a risk for a violation of Article 4 of the Charter exists in that particular case, regardless of the general situation in B's system. The Court stresses it does so in full respect of the principle of mutual trust.[377]

In general, I observe that the relevant case law on mutual trust in the Dublin system is characterized by an interplay of ECtHR and CJEU case law, with the former often increasing the fundamental rights protection in the latter.

3.3.3 Dublin transfers to Greece

An example of such influence of ECtHR case law on CJEU case law on mutual trust was discussed in the context of Dublin transfers to Greece. This example is studied further in this section because it showcases that mutual trust may not only be rebutted but that it also bears the potential of being restored.

Asylum seekers

Because of the suspension of Dublin transfers to Greece in 2011, the Member State where an asylum seeker submits an application, after previously having applied for international protection in Greece, has been deemed responsible for that application instead of Greece. For example, if an asylum applicant arrives in Greece and submits an application for international protection there, next travels to Germany and submits another application there, Germany is deemed responsible for the application, despite Article 13 of the Dublin Regulation.[378]

[376] *C.K. and others v Slovenija* [2017] paras 70 and 73
[377] *C.K. and others v Slovenija* [2017] paras 77 and 95
[378] Art. 13 Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31: 'Where it is established, on the basis of proof or circumstantial evidence […] that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. […]'

In order to reverse the general suspension of Dublin transfers to Greece, the European Commission recommended the Member States in 2016 to consider resuming such transfers.[379] Based on Recommendation 2016/2256, I observe here that the Commission ushered the Member States towards an increased application of mutual trust. It has been argued that such an increase in mutual trust is unwarranted for because there are 'multiple serious indications that some of the systemic issues engaging the Greek state's responsibility in the *M.S.S.* judgment had not been completely resolved'.[380]

The available statistics show that, although the Member States have tried restarting Dublin transfers to Greece, only a few asylum seekers were actually transferred. 2018 was the first year after 2011 in which Dublin transfers to Greece took place again. In that year, 18 transfers to Greece took place from all of the Member States combined, out of a total of 9 142 requests.[381] It can be presumed that out of these 9 142 requests from the other Member States, quite a few were rejected by Greece. From the cases in which Greece did accept the transfer, some were brought before the national courts of the requesting Member State concerned, as was the case in Belgium and the Netherlands.

In the Netherlands, the decision-making authorities first started trying to transfer asylum seekers to Greece in 2018. In 2019, the Netherlands submitted 74 requests for Dublin transfers to Greece. That year, however, none proceeded.[382] In line with the Commission Recommendation, these transfers only concerned asylum applicants who were not deemed vulnerable. In 2019, a case of a Dublin transfer to Greece was brought before the Dutch Council of State, which decided that the Dutch authorities sufficiently investigated the living conditions and reception conditions in Greece and also received adequate individual guarantees from the Greek authorities.[383] However, the Council decided that the investigation into the functioning of the general asylum procedure in

[379] Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013 of the European Parliament and of the Council [2016] OJ L 340/60

[380] Boryana Gotsova, 'Rules Over Rights? Legal Aspects of the European Commission Recommendation for Resumption of Dublin Transfers of Asylum Seekers to Greece' [2019] German Law Journal 637, p 651

[381] 'Country Report: Greece 2018 Update' (AIDA Asylum Information Database March 2019) <https://asylumineurope.org/reports/country/greece/> accessed 23 November 2021

[382] 'Country Report: Greece 2019 Update' (AIDA Asylum Information Database June 2020) <https://asylumineurope.org/reports/country/greece/> accessed 23 November 2021

[383] Dutch Council of State Case ECLI:NL:RVS:2019:3537 *201904035/1/V3* [2019] para 6.4; For a discussion on the judgment, see: Frédérique Jurgens and Ashley Terlouw, 'Uitspraak Uitgelicht – Niet terug naar Griekenland als rechtsbijstand ontbreekt' [2020] Asiel&Migrantenrecht 25

Greece did not fulfill the requirements of Article 4 of the Charter, particularly regarding the access to an effective remedy and legal assistance.[384] As a result, the transfer of this asylum seeker to Greece was not allowed. At the same time, the Council of State seemed to keep open the option of future Dublin transfers to Greece, as far as the decision-making authorities thoroughly investigate the system of legal assistance in Greece and acquire individual guarantees from the Greek authorities.[385] This seems to have led to a slight increase of Dublin transfers of asylum seekers from the Netherlands to Greece. The data for 2020 show that 11 Dublin transfers took place from the Netherlands to Greece.[386]

In the same year as the judgment of the Dutch Council of State, the Belgian Council for Alien Law Litigation (CALL) seemed less prudent; it allowed the Belgian decision-making authorities to restart Dublin transfers of asylum applicants to Greece. It found that, even if some deficiencies in the asylum procedure and reception conditions still exist, these can no longer be qualified as systematic deficiencies.[387] Therefore, the general suspension of Dublin transfers to Greece was no longer deemed necessary. The CALL has, however, formulated several restraints. Firstly, the question of a possible transfer to Greece needs to be assessed on a case-by-case basis.[388] Secondly, asylum applicants who are especially vulnerable, such as unaccompanied minors, should not be transferred to Greece.[389] Thirdly, the Greek authorities must have provided the Belgian authorities with individual guarantees regarding the applicant's access to the Greek asylum procedure and their reception conditions,[390] as this entails that any of the concerns that may rise from the available country information no longer apply to the situation of the asylum seeker in question.[391] This line of case law was later confirmed.[392] It can be assumed that Dublin transfers from Belgium to Greece

[384] *201904035/1/V3* [2019] para 7.6
[385] As argued elsewhere: Lynn Hillary, '*ABRvS 20190435/1/V3* Voorlopig nog geen Dublinoverdrachten van asielzoekers aan Griekenland (case note)' [2020] AB Rechtspraak Bestuursrecht 275
[386] In 2020, the Netherlands submitted a total of 66 requests for Dublin transfers to Greece, of which the majority was thus rejected by Greece or halted by the Dutch courts. See 'Country Report: Greece 2020 Update' (AIDA Asylum Information Database June 2021) <https://asylumineurope.org/reports/country/greece/> accessed 23 November 2021 p 75
[387] Belgian Council for Alien Law Litigation Case 205 104 *X* [2018] para 4.3.5.4
[388] *X* [2018] para 4.3.5.4
[389] *X* [2018] para 4.3.6.2
[390] *X* [2018] para 4.3.5.4
[391] *X* [2018] paras 4.3.9-4.3.10
[392] Belgian Council for Alien Law Litigation Case 208 991 *223 867 / IX* [2018]

have recommenced, albeit slowly.[393] In 2020, Belgium transferred 11 asylum seekers to Greece out of a total of 412 submitted requests.[394]

Refugees with a Greek residence permit

In a development parallel to the restarting Dublin transfers to Greece, the CJEU looked into the question of sending refugees with a Greek residence permit back to Greece. Previously to the 2019 *Jawo* and *Ibrahim* judgments,[395] this was done routinely without a previous assessment of their situation upon returning to Greece. This was standing practice because, as the decision-making authorities reasoned, refugees did not fall under the scope of the Dublin Regulation.[396] The situation of refugees with Greek residence permits thus stood in sharp contrast with the situation of asylum seekers who had previously applied for asylum in Greece.

This changed after 2019 when the CJEU ruled that, if the person concerned has a residence permit in Member State B (the Member State which would normally be deemed responsible for their asylum application based on the Dublin criteria), Member State A must also take into account their situation in B *after* the granting of such a residence permit. The CJEU concluded that,

> 'in the event of such protection being granted in that Member State, the applicant would be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter, on account of the living conditions that he could be expected to encounter as a beneficiary of international protection in that Member State [because of] a situation of extreme material poverty that does not allow him to meet his most basic needs',

this would prohibit sending the refugee concerned back to Greece. Such extreme material poverty would be in violation of Article 4 of the Charter.[397]

---

[393] In 2018 and in 2019, 4 transfers took place each year from Belgium to Greece. See 'Country Report: Greece 2018 Update' (AIDA Asylum Information Database March 2019); 'Country Report: Greece 2019 Update' (AIDA Asylum Information Database June 2020)
[394] 'Country Report: Greece 2020 Update' (AIDA Asylum Information Database June 2021) p 75
[395] Court of Justice of the European Union Case C-163/17 *Abubacarr Jawo v Germany* [2019] ; Court of Justice of the European Union Case C-297/17 *Bashar Ibrahim and others v Germany* [2019]
[396] *Abubacarr Jawo v Germany* [2019] para 39
[397] *Abubacarr Jawo v Germany* [2019] paras 92 and 98

Like in other Member States,[398] this reasoning was applied in the Netherlands by the Dutch Council of State to two cases of Syrian nationals with a Greek residence permit in 2021.[399] Due to a change in the Greek provisions on the facilities for refugees with a Greek residence permit, which decreased their access to reception conditions and facilities,[400] The Council of State found that the Greek authorities are not able to prevent that they are exposed to a situation that does not allow them to meet their most basic needs, such as a place to live, food and personal hygiene. As a result, the refugee with a Greek residence permit concerned should not be sent back to Greece without proper substantiation on their living conditions in Greece.[401] Thus, the mutual trust concerning their compliance with their fundamental rights obligations under EU law towards individuals with a Greek residence permit was partly rebutted.[402]

In sum

While the developments in the context of Dublin transfers of *refugees with a Greek residence permit* seem to benefit the fundamental rights protection of the individual, the contrary is true for the developments in the context of Dublin transfers of *asylum seekers* to Greece. The assessment of possible fundamental rights violations has increased in the cases of permit holders being transferred to Greece, whereas the previous rebuttal of mutual trust no longer applies automatically in the cases of asylum seekers being transferred to Greece. Perhaps the assessment of asylum seekers cases and cases of residence permit holders will eventually grow closer.

At the moment, however, it can still be observed that the 'reinstatement of the Dublin system would be premature'[403] in the context of Dublin transfers to Greece. A lack of material trust in the

[398] See Anna Chatelion Counet and Nadine Imminga, 'Uitspraak Uitgelicht – Statushouders niet zonder betere motivering terugsturen naar Griekenland' [2021] Asiel&Migrantenrecht 552, p 553-554
[399] Dutch Council of State Case ECLI:NL:RVS:2021:1626 *202005934/1/V3* [2021] ; Dutch Council of State Case ECLI:NL:RVS:2021:1627 *202006295/1/V3* [2021]
[400] *202005934/1/V3* [2021] paras 7.1-7.3
[401] *202005934/1/V3* [2021] para 8
[402] This judgment reverses the previous line of case law of the Dutch Council of State in which it found that the situation for refugees with a residence permit in Greece is not as difficult that it amounts to extreme material poverty. See Dutch Council of State Case ECLI:NL:RVS:2020:1382 *202002276/1/V3* [2020] ; Dutch Council of State Case ECLI:NL:RVS:2019:2384 *201901667/1/V3* [2019] ; Dutch Council of State Case ECLI:NL:RVS:2019:2385 *201902302/1/V3* [2019] ; Dutch Council of State Case ECLI:NL:RVS:2018:1795 *201706354/1/V3* [2018]
[403] Boryana Gotsova [2019] p 647-651 and the sources referenced there

asylum system and reception conditions in Greece still exists.[404] Nevertheless, it seems that some of the Member States are indeed slowly leaning into the direction of restoring mutual trust, which will be part of the conceptualization of mutual trust in *Section 3.5.3*.

In sum: Mutual trust in asylum law

While the Dublin Regulation does not explicitly refer to the principle of mutual trust, it undoubtedly plays an important role for the functioning in theory and in practice of the Dublin system. The CJEU even positioned the principle as the *raison d'être* of the Dublin system: 'It is precisely because of that principle of mutual confidence that the European Union legislature adopted [the Dublin Regulation].'[405] Therefore, such case law should be regarded as the legal trigger factor of mutual trust in the Dublin system.

Despite the central role of mutual trust in the Dublin system, the assumption of trust is rebutted in quite a few cases. The discussed case law of the CJEU and the ECtHR in the previous sections supports this finding. However, recent developments regarding Dublin transfers to Greece show that a restoring of mutual trust towards Greece is not to be excluded. These findings will be the starting point for the conceptualization of mutual trust in *Section 3.5*, together with the study of mutual trust in the context of the EAW system in the following section.

3.4 Mutual trust in criminal law

3.4.1 Introduction

Similar to the Dublin system, the principle of mutual trust is vital to internal EU criminal law in general and, in particular, the European Arrest Warrant system of arresting and transferring criminal suspects and sentenced persons between the Member States.[406] As in *Section 3.3*, this section will map the legal trigger factors of mutual trust and the relationship between mutual trust and its limitations in the context of the EAW system.

---

[404] E.g. EPA, 'Noodkreet Vluchtelingenwerk over retourtickets migranten' *NOS* (24 May 2018) <https://nos.nl/artikel/2233324-noodkreet-vluchtelingenwerk-over-retourtickets-migranten> accessed 23 November 2021; Dutch Parliament: Aanhangsel van de Handelingen II [2018] 2017/18 no. 2499

[405] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 79

[406] Evelien Brouwer [2016] p 911-916

The assumption of mutual trust is generally applicable in the European Arrest Warrant system[407] but, like in the Dublin Regulation, this assumption is not irrebuttable. This entails that a European Arrest Warrant issued by Member State B may (or, in some cases, should) be the subject of judiciary review in Member State A.[408] Contrary to the Dublin system, the rebuttal of mutual trust finds its explicit basis in secondary law. Articles 3 and 4 of the Framework Decision 2002/584/JHA (EAW Framework Decision)[409] lay down the exceptions in which mutual recognition of decisions made in other Member States is not obliged (Article 4) or even not permitted (Article 3). Moreover, Article 1(3) stresses that '[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

As noted before, the term 'mutual recognition', used in the EAW Framework Decision, differs from the underlying principle of mutual trust. Mutual recognition is described by Brouwer as the trust of Member State A in the *products* (i.e. the individual decisions) of Member State B, whereas mutual trust concerns the trust of A in the legality and quality of the *legal system* of B.[410] As noted by Xanthopoulou, '[m]utual trust constitutes the basis for several mutual recognition instruments of the AFSJ'.[411] In addition, mutual trust is considered to be the more fundamental principle of the two.[412] Thus, as mutual trust lies at the basis of mutual recognition, and mutual recognition is relied upon by the EAW system, it can be concluded that the principle of mutual trust underlies the EAW system. This has also been acknowledged by the CJEU.[413]

3.4.2 Case law

Even though mutual recognition, which is derived from mutual trust, has an explicit written legal basis in the EAW system, the CJEU has been largely influential in the development of mutual trust in the EAW system, specifically in relation to its limitations.

---

[407] Art. 1(2) 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
[408] Pieter Verrest, 'Zorgen om de rechtsstaat in Polen bij uitvoering van een Europees aanhoudingsbevel' [2021] Nederlands Tijdschrift voor Europees Recht 81, p 82-83
[409] 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
[410] Evelien Brouwer [2013] p 136
[411] Ermioni Xanthopoulou (2019) p 26
[412] This is also the case in other fields of EU law, such as the internal market: Nathan Cambien [2017] p 98-102
[413] Court of Justice of the European Union Case C-168/13 PPU *Jeremy F* [2013] para 50

For example, in the 2013 *Jeremy* judgment, the CJEU decided on the role of fundamental rights in the EAW system. The CJEU first reiterated that the Framework Decision in itself complies with fundamental rights and that the Member States still have to comply with fundamental rights in criminal proceedings which fall outside the scope of the Framework Decision.[414] The fundamental rights obligations of the Member States reinforce 'the high level of confidence between Member States and the principle of mutual recognition on which the mechanism of the European arrest warrant is based'.[415] Most importantly, the CJEU concluded that

> '[t]he principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights'.[416]

The Court went on to conclude that the margin of discretion of the courts of the warrant executing Member State must be limited.[417] This reasoning was in line with its case law at the time.[418] As a result, the courts of Member State A were not allowed to refuse the recognition of an arrest warrant issued by Member State B when the Framework Decision did not explicitly provide for such an exception.[419] Thus, at that time, the CJEU had quite a stringent, formalistic understanding of the principle of mutual trust.[420]

In 2016, the CJEU changed its stance in the groundbreaking *Aranyosi* judgment.[421] In the *Aranyosi* case, the Hungarian authorities issued two European arrest warrants for the purposes of prosecution. When the suspect was arrested in Germany, they claimed that the detention conditions in Hungary did not satisfy minimum European standards. The German court then referred preliminary questions to the CJEU in order to find out whether the Framework Decision requires judicial authorities in the Member State to refuse to execute a European arrest warrant when there is 'solid evidence that detention conditions in the issuing Member State are incompatible with

[414] *Jeremy F* [2013] paras 47-48
[415] *Jeremy F* [2013] para 49
[416] *Jeremy F* [2013] para 50
[417] *Jeremy F* [2013] para 56
[418] Oskar Losy [2018] p 193-195
[419] Court of Justice of the European Union Case C-396/11 *Ciprian Vasile Radu* [2013] para 43; Court of Justice of the European Union Case C-399/11 *Stefano Melloni* [2013] para 64
[420] Evelien Brouwer [2016] p 913-916
[421] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016]

fundamental rights, in particular with Article 4 of the Charter',[422] or whether such evidence requires national judges to obtain information regarding the compatibility of detention conditions with fundamental rights from the Member State that issued the European arrest warrant. Despite affirming that mutual trust and mutual recognition are 'the "cornerstone" of judicial cooperation in criminal matters',[423] the CJEU established Article 4 of the Charter as a safety valve to mutual trust in the EAW system, too. This fundamental right fulfills such a function in the EAW system because 'the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter',[424] although mutual trust should only be rebutted 'in exceptional circumstances'.[425] As a result, the fundamental rights obligations of the Member States (more specifically, their obligations under Article 4 of the Charter) must not be dematerialized simply because of the assumption of mutual trust in the EAW system.

In light thereof, Article 4 of the Charter – the absolute prohibition of inhuman or degrading treatment or punishment – requires the Member States to assess the risk of violation of that prohibition when it is in possession of evidence of such a risk in the issuing Member State. The executing judicial authorities must therefore

> 'rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.'[426]

[422] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] para 74
[423] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] para 79
[424] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] para 83
[425] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] para 82; *Opinion 2/13* [2014] para 191; see Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?' [2016] European Papers 943, p 945-949
[426] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] paras 84-90

This assessment of information on the situation in Member State B is the first step of the *Aranyosi* test.[427] The second step requires an individualization of the risk: if a real risk of inhuman or degrading treatment exists in the detention system in the issuing Member State, the judicial authorities must make a further individual assessment answering the question of exposure *of the applicant* to that risk.[428] Doing so requires, according to the CJEU, requesting information on the detention conditions from the issuing Member State.[429] In the *Aranyosi* case, this led to the German court ending the European arrest warrant procedure and, as a result, the applicant was not transferred to Hungary for their prosecution.

In sum, in the EAW system, the CJEU has based limitations of the principle of mutual trust mostly upon Article 4 of the Charter, i.e. the absolute prohibition of inhuman or degrading treatment or punishment.

3.4.3 Rule of law concerns

In 2018, however, the CJEU introduced another limitation to the principle of mutual trust. This new strand of limitations to mutual trust is so far related to the principle of the rule of law and the independence of the judicial authorities in the other Member State.

The case law on the rule of law as a limitation to mutual trust in the European Arrest Warrant system, which will be discussed in this section, was initiated by concerns on the rule of law in Poland.[430] These concerns gave rise to a series of judgments on the rule of law in Poland and the independence of Polish judges, both by the ECtHR and the CJEU.[431] While the judgments on

[427] Pedro Caeiro and others [2018] p 694-695; Jannemieke Ouwerkerk, 'Grenzen aan wederzijds erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM' [2021] SEW Tijdschrift voor Europees en economisch recht 615, p 615-627

[428] Jannemieke Ouwerkerk [2021] p 615-627

[429] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] paras 91-95

[430] Valsamis Mitsilegas, 'Judicial dialogue, legal pluralism and mutual trust in Europe's area of criminal justice' [2021] European Law Review 579, p 597

[431] See Laurent Pech and others, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' [2021] Hague Journal on the Rule of Law 1; Rick Lawson, 'Hard Gras – Xero Flor en de Rechtsstaat in Polen' (Nederland Rechtsstaat 25 May 2021) <www.nederlandrechtsstaat.nl/forum/id377/27-05-2021/hard-gras-%E2%80%93xero-flor-en-de-rechtsstaat-in-polen.html> accessed 23 November 2021 ; Rick Lawson, 'Verschroeide Aarde – Xero Flor en de Rechtsstaat in Polen II' (Nederland Rechtsstaat 17 June 2021) <www.nederlandrechtsstaat.nl/forum/id382/17-06-2021/verschroeide-aarde-%E2%80%93-xero-flor-en-de-rechtsstaat-in-polen-ii.html> accessed 23 November 2021 ; Rick Lawson, 'Over Naar de VAR? De Rechtsstaat in Polen III' (Nederland Rechtsstaat 23 July 2021) <www.nederlandrechtsstaat.nl/forum/id398/23-07-2021/over-naar-de-var?-de-rechtsstaat-in-polen-iii.html> accessed 23 November 2021

mutual trust towards Poland in the EAW system should be understood against the background of general rule of law concerns, this section is limited to a discussion on the developments in the EAW system and in light of the principle of mutual trust. This delimitation is due to the selection of the EAW system as an exemplary case for studying the application of mutual trust in internal EU law, with a goal to further our understanding of the role of the principle of mutual trust in the EU legal system. With this delimitation in mind, the following discussion on rule of law-based limitations to mutual trust in Polish EAW cases have a broader relevance. This is true both in terms of the Member State concerned – the mutual trust towards another Member State may also be rebutted on a similar basis – and in terms of the field of law – rule of law concerns may also lead to the rebuttal of mutual trust in other fields of law, such as internal EU asylum law.[432]

Effective judicial protection

In the 2018 *LM* case,[433] three European arrest warrants were issued by the Polish courts against the criminal suspect concerned, LM, *inter alia* for trafficking in narcotic drugs. As a result, they were arrested in Ireland. LM argued that Poland violates the principle of the rule of law by not guaranteeing the independence of Polish judges. Ireland can thus, LM claimed, not rely on the principle of mutual trust. The CJEU first reiterated that

> 'the high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States […] meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts'. [434]

Nevertheless, the Court agreed with LM.[435] The CJEU concluded that, if the independence of the judge in the other Member State is insufficient to safeguard the rule of law, the Member State cannot execute the arrest warrant.[436]

Essence of a fundamental right

[432] See also Lilian Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' [2021] European Constitutional Law Review 471
[433] Court of Justice of the European Union Case C-216/18 PPU *LM* [2018]
[434] *LM* [2018] para 58
[435] *LM* [2018] para 58
[436] *LM* [2018] paras 14-25 and 58-61

Interestingly, *LM* is the first case in which the CJEU accepted that the principle of mutual trust might be rebutted based on another norm than Article 4 of the Charter. The Court first looks at the 'essence' of the fundamental right to effective judicial protection, 'which is of cardinal importance as a guarantee […] that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[437] As noted by Wendel,[438] this implies that, in order to pinpoint the 'essence' of a fundamental right, one must look at its link with the rule of law or another value laid down in Article 2 TEU.[439]

It seems that the CJEU's reasoning in *LM* concerning the essence of a fundamental right expands the safety net of the principle of mutual trust. Indeed, the first step of the *Aranyosi* test is now broader in the sense that systemic deficiencies can be identified based on a risk of a violation of the essence of *any* fundamental right, no longer limited to Article 4 of the Charter.[440] The second step of the *Aranyosi* test still applies in the same vein: Member State A must next 'assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right' in Member State B.[441]

Member State case law

The application of *LM* has led to a diverging body of national case law in the Member States.[442]

In the Netherlands, for example, the District Court of Amsterdam responded to the CJEU's call in several similar cases concerning EAW transfers to Poland. In one of the first Dutch cases after the *LM* judgment, the District Court of Amsterdam found that there was sufficient reason to believe that a real risk of a breach of the fundamental right to a fair trial exists in Poland. As a result, it engaged in a dialogue with the Polish judicial authorities concerning the state of their

[437] *LM* [2018] para 48
[438] Mattias Wendel [2019] p 25-29
[439] Art. 2 Treaty on the European Union [2016] OJ C 202/1: '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.'
[440] Mattias Wendel [2019] p 27-28
[441] *LM* [2018] para 60
[442] For an overview of the commonalities and differences in such case law, see Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe' [2020] eucrim the European Criminal Law Associations' Forum 321, p 323-327

independence.[443] Based on that dialogue, it seemed that the District Court of Amsterdam had at that time ascertained for the most part[444] that there are 'structural deficiencies regarding the Polish judiciary, threatening the independence of the Polish judiciary'.[445]

Around the same time, in February 2020, the Karlsruhe Higher Regional Court in Germany (*Oberlandesgericht*) went even a step further.[446] The Karlsruhe Higher Regional Court initiated the judicial dialogue with the Polish judges but did not await the answer and released the person concerned.[447] As reported by Steinbeis, the court did so 'because extradition to Poland is out of question now after the so-called "muzzle law" against the independent judiciary in Poland has been enacted'.[448] The Karlsruhe court was the first domestic court of any Member State to do so.[449]

On the contrary, the District Court of Amsterdam concluded in several judgments that the person concerned did not run a risk of treatment in violation of the right to a fair trial. In other words, the second step of the Aranyosi test was not fulfilled. As a result, the criminal suspects or convicts in such a case were transferred to Poland.[450]

Second step of the Aranyosi test

---

[443] Amsterdam District Court Case ECLI:NL:RBAMS:2018:7032 *13/751441-18 RK 18/3804* [2018] paras 4.4.1-4.4.2

[444] For the most part because the District Court of Amsterdam was also engaging in dialogue with the Polish judges in some cases. E.g. Amsterdam District Court Case ECLI:NL:RBAMS:2020:103 *13/752099-18 (EAB I)* [2020] para 5.4

[445] Amsterdam District Court Case ECLI:NL:RBAMS:2019:6583 *13/751551-19* [2019] para 5.1; Amsterdam District Court Case ECLI:NL:RBAMS:2019:8020 *13/751671-19* [2019] para 6; Amsterdam District Court Case ECLI:NL:RBAMS:2019:9098 *13/751306-19* [2019] para 8.1; Amsterdam District Court Case ECLI:NL:RBAMS:2019:9983 *13/737516-13* [2019] para 6.1; Amsterdam District Court Case ECLI:NL:RBAMS:2020:184 *13.752.083-19* [2020] para 5.3.1; Amsterdam District Court Case ECLI:NL:RBAMS:2020:181 *13/751948-19* [2020] para 5.3.1; Amsterdam District Court Case ECLI:NL:RBAMS:2020:1105 *13/751348-18* [2020] para 5.1.1; Amsterdam District Court Case ECLI:NL:RBAMS:2020:1850 *13/751003-20* [2020] para 5

[446] Thomas Wahl, 'Fair Trial Concerns: German Court Suspends Execution of Polish EAW' (eurcrim.eu spotlight 2 April 2020) <https://eucrim.eu/news/fair-trial-concerns-german-court-suspends-execution-polish-eaw/> accessed 23 November 2021

[447] Maximilian Steinbeis, 'Editorial: So this is what the European Way of Life looks like, huh?' (Verfassungsblog 6 March 2020) <https://verfassungsblog.de/so-this-is-what-the-european-way-of-life-looks-like-huh/> accessed 23 November 2021 ; Anna Wójcik, 'Muzzle Law leads German court to refuse extradition of a Pole to Poland under the European Arrest Warrant' (Rule of law 6 March 2020) <https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/> accessed 23 November 2021

[448] Maximilian Steinbeis, 'Editorial: So this is what the European Way of Life looks like, huh?' (Verfassungsblog 6 March 2020)

[449] Karlsruhe Higher Regional Court Case Ausl 301 AR 95/18 [2020] (unpublished)

[450] *13/751551-19* [2019] para 5.4.2; *13/751671-19* [2019] para 6; *13/751306-19* [2019] para 8.4.2; *13/737516-13* [2019] para 6.4; *13.752.083-19* [2020] para 5.3.2; *13/751948-19* [2020] para 5.3.2; *13/751348-18* [2020] para 5.1.2; *13/751003-20* [2020] para 5

Certainly, while the conclusion on the structural deficiencies of the Polish judiciary and its adversarial consequences on the rule of law in Poland is relevant to the first step of the Aranyosi test, it does not dissolve the domestic courts of the Member State to undertake the second step, i.e. the assessment of the individual risk. The assessment of the viability of mutual trust in the EAW system thus still needs to be carried out on a case-by-case basis. By late 2020, the CJEU confirmed this in response to preliminary questions referred to it by the District Court of Amsterdam.

In *L & P*, the CJEU found that, if the domestic court of Member State A

> 'has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in [Member State B] at the time of issue of that warrant or which arose after that issue, that [court of Member State A …] cannot presume that there are substantial grounds for believing that that person will […] run a real risk of breach of his or her fundamental right to a fair trial […] without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.'[451]

As a result of *L & P,* the two step *Aranyosi* test was thus continued as the general rule for assessing a limitation of mutual trust in the EAW system, also for limitations grounded in rule of law concerns.[452]

Based on the Amsterdam case law at the time of writing, I observe that the District Court of Amsterdam has come to the conclusion that there are sufficient concerns regarding the rule of law and independence of the judiciary in Poland to automatically accept that the first step of the Aranyosi test is fulfilled in Polish EAW cases. However, the second step (the assessment of the individual risk) still needs to be carried out in each case.[453]

In other words, the assessment of EAW transfers (to Poland, but also other Member States) in the case law after *L & P* still depends on a case-by-case assessment. For example, in a judgment of March 2021, the District Court of Amsterdam concluded that the second step of the Aranyosi test

[451] Court of Justice of the European Union Case C-354/20 PPU and C-412/20 PPU *L & P* [2020] para 69
[452] Pieter Verrest [2021] p 85-86; Valsamis Mitsilegas [2021] p 598-603
[453] Amsterdam District Court Case ECLI:NL:RBAMS:2021:179 *RK 20/3065 and 13/751520-20* [2021] paras 5.1.1 and 5.4.1

was not fulfilled, meaning that there was no individualized risk for the person concerned.[454] On the contrary, the District Court found in another judgment of February 2021 that the independence of the Polish judge *in that case* was insufficient to safeguard the rule of law and, consequently, prohibited the EAW transfer to Poland.[455] In this case, the criminal suspect was released in the Netherlands.[456]

In sum: Mutual trust in criminal law

The EAW Framework Decision explicitly requires the Member States to 'execute any European arrest warrant on the basis of the principle of mutual recognition'[457] – which is derived from mutual trust.[458] Thus, I observe that mutual trust plays an important role in the EAW system and that its legal trigger factor is the mentioning of mutual recognition in the Framework Decision. However, the prominence of mutual trust does not imply that its presumption cannot be rebutted. Firstly, the Framework Decision itself lays down exceptions to mutual recognition[459] and, consequently, it is clear that the underlying principle of mutual trust is rebuttable. Secondly, it is now generally accepted that the assumption of mutual trust may be rebutted when doing otherwise would violate Article 4 of the Charter, which prohibits inhuman or degrading treatment or punishment.[460] In addition to Article 4 of the Charter, the developments since 2018 in the case law of the CJEU and the national courts have broadened the rebuttal of mutual trust to other fundamental rights. Based thereon, I expect the 'essence' – requiring a link with the values of the EU, such as the rule of law – of *all* fundamental rights to increasingly provide support for the rebuttal of mutual trust in the context of the European Arrest Warrant system. Possibly, the rebuttal of mutual trust based on the 'essence' of all fundamental rights could also play a role in the Dublin system.[461]

---

[454] Amsterdam District Court Case ECLI:NL:RBAMS:2021:855 *13.752.149-20 RK 20/6239* [2021] para 6.2.2
[455] Amsterdam District Court Case ECLI:NL:RBAMS:2021:420 *RK 20/771 13/751021-20* [2021] paras 5.3.5-5.3.12
[456] *RK 20/771 13/751021-20* [2021] para 6.2
[457] Art. 1(2) 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
[458] *Jeremy F* [2013] para 50; Ermioni Xanthopoulou (2019) p 26
[459] Art. 3-4 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
[460] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] para 104
[461] As I have argued elsewhere: Lynn Hillary, 'Uitzonderingen op het interstatelijk vertrouwensbeginsel in het Dublinsysteem in navolging van strafrechtelijke jurisprudentie' [2020] Asiel&Migrantenrecht 500

3.5 Conceptualizing mutual trust

Based on the study of mutual trust in the context of internal EU asylum and criminal law, this section conceptualizes the principle of mutual trust. It does so based on CJEU case law, the previously developed frameworks of mutual trust by other authors and the discussed developments in the Dublin and the EAW system. My understanding of the concept of mutual trust – which I submit includes the rebuttal and restoring of mutual trust – aims at a deepened understanding of Member States cooperation dynamics. In turn, this will allow for a better evaluation of the qualification of mutual trust as a general principle of EU law in *Chapter 4* and the Member State cooperation dynamics in the context of the externalization of European asylum law in *Chapter 6.*

3.5.1 Mutual trust

Briefly and simplified, the CJEU case law on mutual trust can be viewed as resulting in a presumption that Member State A is, in principle, supposed to trust Member State B to comply with its obligations under EU law.[462]

More elaborately, and based on a framework developed by Schwarz[463] and complemented with concepts developed by Brouwer,[464] I understand the principle of mutual trust as follows:

Mutual trust implies the cooperation between Member State A (the first actor) and Member State B (the second actor) in which A relies on (i.e. trusts) B to comply with its fundamental rights obligations towards individuals falling under its jurisdiction – and *vice versa*. The legal fiction of reliance of A is based on B's competence to comply with its obligations under EU law (including its fundamental rights obligations under EU law), as well as B's responsiveness to A's reliance, whenever the Member States cooperate or align rulesets. The object of mutual trust is thus the fundamental rights obligations of the Member States. The subject of mutual trust may contain the functioning of a whole system (system trust) and/or the decision concerned (case trust).[465] Lastly,

[462] *W.J.G. Bauhaus v The Netherlands State* [1977] para 22; *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] para 19; *Esther Renée Bouchara, née Wurmser* [1989] para 18; *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 79

[463] Michael Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' [2018] European Law Journal 124

[464] Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016)

[465] For a description of system trust and case trust, see Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 61

the third actor of mutual trust is the collective of individuals whose fundamental rights are protected under EU law because of their link with Member State A, which makes the decision of transferring them to B, and because of the potential infringements of their potential fundamental rights in practice by B, which may be assessed by the domestic courts of Member State A.[466]

Mutual trust in the Dublin and EAW system

The discussion on the case law and literature on mutual trust in the Dublin system and the EAW system allows us to contextualize this concept of mutual trust.

Mutual trust in the Dublin system, respectively the EAW system, can be understood as the reliance of Member State A (actor one) on Member State B (actor two) to comply with its fundamental rights obligations towards applicants for international protection, respectively criminal suspects and sentenced persons, under its jurisdiction when these individuals fall under the Dublin Regulation or the Framework Decision (actor three).

Subject of mutual trust in the Dublin and EAW system

The subject of trust is part of B's response to A's reliance on B to comply with its obligations under EU law in the context of Dublin or EAW transfers of individuals to B.

Based on the CJEU case law, I argue that the subject of trust in the Dublin system is two-fold. On the one hand, it concerns the (legal) system of the other Member State as a whole.[467] On the other hand, the European courts increasingly require an individualized assessment of the situation of the asylum seeker in the other Member State.[468]

Based on the EAW case law, the subject of trust in that system is always a combination of system trust and of case trust.[469] Step 1 of the *Aranyosi* test requires an assessment of the (legal) system

[466] This is an application of the frameworks developed by Schwarz (Michael Schwarz [2018]) and by Brouwer (Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016))
[467] *M.S.S. v Belgium and Greece* [2011] para 352; *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] paras 88-89
[468] *Tarakhel v Switzerland* [2014] para 105; Court of Justice of the European Union Case C-578/16 *C.K., H.F., A.S. v Republika Slovenija* [2017] p 73-76; *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] paras 91-94
[469] Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 61

as a whole, whereas step 2 concerns the decision of the case concerned.[470] Both steps are to be completed in each case[471] and thus the subject of trust in the EAW system cannot be considered as either system trust or case trust, but rather a combination of both.

Object of mutual trust in the Dublin and EAW system

The object of trust is the protection of fundamental rights in general and of Article 4 of the Charter in particular.

In the Dublin system, Article 4 of the Charter has, to the best of my knowledge, so far been the only fundamental right that the system and/or the individual decision of B have been tested against.

Like in the Dublin system, the fundamental right which the transfer and the situation in B have been tested against most in the EAW system, is Article 4 of the Charter. However, the developments in CJEU case law on the EAW system showcase a willingness to broaden that scope by also including the 'essence' of other fundamental rights, when that essence has a connection with the rule of law or another value laid down in Article 2 TEU.[472]

Individuals in the Dublin and EAW system

The third actor in the Dublin system, the individuals, are the asylum seekers who find themselves in another Member State than the Member State which is deemed responsible for their application for international protection. In the EAW system, the individuals are the criminal suspects or sentenced persons who find themselves in another Member State than the Member State that issued the European Arrest Warrant.

3.5.2 Rebutting mutual trust

In addition to the concept of mutual trust, the rebuttal of the presumption of mutual trust can be understood as the result of a decrease in reliance of A on B. The decrease of reliance of A on B results from the lack of responsiveness from B, materialized in the subject of trust: B no longer complies with its obligations under EU law. Often, the rebuttal of mutual trust is a reaction to a lack of responsiveness from B to A's reliance, for example because B no longer complies with its

[470] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] paras 84-95
[471] See *L & P* [2020]
[472] *LM* [2018] para 48; see also Lynn Hillary, 'Uitzonderingen op het interstatelijk vertrouwensbeginsel in het Dublinsysteem in navolging van strafrechtelijke jurisprudentie' [2020] Asiel&Migrantenrecht 500

obligations under EU law, including its fundamental rights obligations. The lack of compliance can be true for the whole of B's (legal) system, but it could also be limited to an individual decision.

Individuals

A (temporary) suspension of mutual trust is often a result of individuals claiming protection of their fundamental rights from Member State A, instead of being able to claim protection from B (who would be deemed responsible to protect their fundamental rights, if not for the rebuttal of the principle of mutual trust). If individuals do so successfully before the courts of Member State A, the presumption of mutual trust in B is rebutted.

If mutual trust is rebutted, A arguably accepts responsibility for some of the fundamental rights obligations of B towards individuals. As Wendel puts it, '[a]cknowledging exceptions to mutual trust in the field of fundamental rights, means preventively extending the responsibility to protect EU fundamental rights from the trouble-making Member State to its peers.'[473] Such an extension of fundamental rights obligations from B to A is often instigated by individuals who claim their rights before the courts of Member State A. Therefore, I consider individuals as catalysts for Member State cooperation and interaction dynamics.

Subject of mutual trust

Unresponsiveness in the context of the EAW system entails both a lack of compliance in the general system and in the individual case.[474] The rebuttal of trust in the context of the Dublin Regulation may apply for the whole of B's (legal) system, such as in the *N.S.* case[475] and the *M.S.S.* case[476] where the subject of trust was the whole of Greece's (legal) system, referring to its asylum procedure and its reception facilities. However, the (unresponsive) subject of trust could also be an individual decision, for example the individual transfer decision in the *C.K.* case.[477]

Fundamental rights as a safety valve to mutual trust

[473] Mattias Wendel [2019] p 19
[474] *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] paras 84-95
[475] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011]
[476] *M.S.S. v Belgium and Greece* [2011]
[477] *C.K., H.F., A.S. v Republika Slovenija* [2017]

If the judge in a specific case agrees that the lack of material trust is justified, based on the available information, the presumption of mutual trust is rebutted in favor of fundamental rights.[478] Each material fundamental right, which has to be observed by the Member States, is thus considered a safety valve[479] to the presumption of mutual trust in the context of the Dublin system and the EAW system. Considering specific fundamental rights as a safety valve for mutual trust entails a balancing act for courts dealing with the tension between the fundamental rights obligations of the Member States and the fundamental rights protection in practice.[480] The domestic courts should take into account the effectiveness of EU law, in the form of the principle of mutual trust, on the one hand, and the obligations of the Member States to protect the fundamental rights of the asylum seeker, respectively the criminal suspect or sentenced person, on the other hand.[481]

As I have argued under *Section 3.5.1,* the object of mutual trust in the Dublin and EAW system is the protection of fundamental rights in general. Although it is clear that a fundamental rights violation may lead to the rebuttal of mutual trust, the question of which fundamental rights and in how far is less of a settled matter. The violation of the absolute right protected by Article 4 is not contested and leads to a rebuttal of mutual trust. However, a rebuttal could also occurs in case of the violation of a non-absolute right. In such a case, the 'essence' of that right has to be violated – which requires a connection with the rule of law or another value under Article 2 TEU – before mutual trust can be rebutted.[482]

3.5.3 Restoring mutual trust

As the last component of the conceptualization of mutual trust developed in this study, I argue that mutual trust can also be restored after a (general or individual) rebuttal of the presumption of mutual trust. (Re)establishing the reliance of A on B, as well as B's responsiveness to A, arguably begins with the subject of mutual trust; restoring the system as a whole and/or individual decisions requires their compliance with EU law, including their fundamental rights obligations under EU law.

[478] Hemme Battjes and others (2011) ; Sacha Prechal [2017] p 75-92; Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) ; Luc Leboeuf (2016) p 35-48
[479] Sacha Prechal [2017] p 85-90
[480] Evelien Brouwer [2016] p 894-895
[481] E.g. Lyon Administrative Court of Appeal Case 17LY02181 - 17LY02184 [2018]
[482] Lynn Hillary [2020] p 502-504

Individuals

While individuals may well be considered catalysts for the rebuttal of mutual trust, they fulfill a similar function in the restoring of mutual trust. When individuals claim their fundamental rights before domestic courts in Member State A and do so unsuccessfully, this may lead to an increase in material trust of A towards B. In other words, the collective of individuals may actually instigate case law showing that B is (again) responding to A's previous reliance by respecting fundamental rights of individuals. This may lead to a new perception of the subject of trust: A may again perceive B as complying with EU law. However, the evolution towards restoring mutual trust may also be instigated top-down, as was the case in the Dublin system when the European Commission recommended the Member States in 2016 to restart transfers of asylum seekers to Greece.[483]

Interrelated conditions

To help understanding the restoring of mutual trust, Halberstam's federalist perspective of mutual trust is useful.[484] He argues that 'the deep problem of stability […] is a serious mismatch between obligations of mutual trust and social reality.' In order to remedy this mismatch, Halberstam suggests three interrelated conditions that should be fulfilled in order to restore trust. Firstly, throughout the EU, a common set of values and a similar level of fundamental rights must exist. The second condition concerns the ability to effectively remedy fundamental rights violations. Thirdly, EU (primary or secondary) law must include a safety valve for Member State A 'to invoke overriding policy justifications'. Not (fully) fulfilling one or more conditions does not automatically prevent restoring mutual trust, but there seems to exist 'a hydraulic connection' between the three conditions; 'where one or more of these elements is weak, the remaining element(s) must be correspondingly strong.'[485] Halberstam's three hydraulic conditions correspond to the restoring of mutual trust discussed in this section. After a rebuttal of mutual trust – the safety valve based on fundamental rights – mutual trust may be restored when Member State B has (again) reached a similar level of fundamental rights protection as the other Member States.

[483] See *Section 3.3.3*.
[484] Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' [2015] Michigan Law Public Law and Legal Theory Research Paper Series 1
[485] Daniel Halberstam [2015] p 27-28

As is apparent from the developments regarding the restarting of Dublin transfers of asylum seekers to Greece, restoring mutual trust has been an endeavor of the Commission.[486] Most likely, this is due to the important function mutual trust fulfills with respect to the effectiveness of the Dublin system and the CEAS. As discussed in *Section 3.3.2* and *3.3.3,* the individual asylum seekers bringing their cases before the domestic courts and before the CJEU and the ECtHR will determine the future perception of the subject of system trust. *If* the (domestic courts of the) other Member States would again trust Greece in complying with its fundamental rights obligation regarding its asylum procedure and the reception conditions, this would restore the mutual trust in the Dublin system in the context of transfers to Greece. It still remains to be seen whether this could also be the case for the EAW transfers to Poland in the aftermath of the *LM* judgment.

In sum

In the foregoing, I have conceptualized the principle of mutual trust as implying the cooperation between Member State A and B in which Member State A trusts Member State B to comply with its fundamental rights obligations. Such a conceptualization – consisting of mutual trust, its potential rebuttal *and* restoring – positions the principle of mutual trust in the EU legal system. I aim for it to provide a lens through which we can study Member State cooperation dynamics. It is therefore relevant to the Member State cooperation dynamics in the context of external European asylum law, which I will study in *Chapter 6.*

3.6 Conclusion

In the third chapter of this study, I have studied the legal function of mutual trust and have identified its legal trigger factors in the context of the Dublin system (internal EU asylum law) and the European Arrest Warrant system (internal EU criminal law).

As to the sub-question on the legal function of mutual trust within the EU, I have construed from the literature and the case law of the CJEU that the legal function of mutual trust is finding a balance between the effectiveness of EU law and the sovereignty of the Member States. Finding that balance ensures the effectiveness of EU law in the relationships between the Member States.

[486] Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013 of the European Parliament and of the Council [2016] OJ L 340/60

Mutual trust aims to do so in the *sui generis* entity with federal elements that constitutes the EU, without disrespecting the administrative sovereignty of the Member States.

Having studied mutual trust in this chapter has allowed for the further development of the concept of mutual trust in *Section 3.5*:

Mutual trust implies the cooperation between Member State A and B in which Member State A (the first actor) relies on (i.e. trusts) Member State B (the second actor) to comply with its fundamental rights obligations (i.e. the object of mutual trust). This is materialized in B's system and/or an individual decision (i.e. the subject of mutual trust), towards individuals (the third actor). The third actor is composed of the individuals falling under the jurisdiction of A and, contextualized, falling under the scope of the Dublin Regulation, respectively the EAW Framework Decision. If individuals are able to rely on Member State B to protect their fundamental rights, the mutual trust is intact. However, if this is not the case and individuals address Member State A to uphold their fundamental rights, they can act as catalysts for the rebuttal of mutual trust. Mutual trust will be rebutted if (the courts of) Member State A find(s) that the fundamental rights of the individual are not protected in practice in Member State B. Lastly, I have argued in this chapter that restoring mutual trust is possible in as far as the subject of trust (the system as a whole and/or individual decisions of B) once again complies with EU law and is again in conformity with B's fundamental rights obligations.

Understanding mutual trust in this way allows me to study Member State cooperation dynamics as a cycle of rebutting and restoring mutual trust. Therein, individuals may act as catalysts. Such an understanding of mutual trust will serve as a basis to study Member State cooperation dynamics in the context of external European asylum law in *Chapter 6.*

In this chapter, I have also studied mutual trust in the contexts of the Dublin and the EAW system with the aim of answering the sub-question on the legal trigger factors of mutual trust.

The Dublin system is deemed to be 'governed' by mutual trust, in spite of the text of the Dublin Regulation not mentioning the principle of mutual trust as its governing principle. As discussed in *Section 3.3*, I argue that the legal trigger factor of mutual trust in the context of the Dublin system is, in any case, not the explicit mention thereof in secondary law. Instead, I view the CJEU case law – which, based on the Dublin Regulation, identifies the unwritten assumption that Member

States have to trust one another in complying with their fundamental rights obligations in order for the Dublin system to function – as the legal trigger factor of mutual trust in the Dublin system.

The inquiry on the legal trigger factors of mutual trust is slightly different for the EAW system, as the EAW Framework Decision describes 'mutual recognition' as lying at the basis of the EAW system. Mutual trust – on which mutual recognition is founded, as confirmed by the CJEU – is thus triggered at least whenever the Framework Decision is applicable, as observed in *Section 3.4*.

It has been widely observed in literature as well as in the case law of the CJEU, the ECtHR and the domestic courts of the Member States that a tension exists between the fundamental rights obligations of the Member States and the protection of fundamental rights in practice. Especially in the Dublin system and the EAW system, fundamental rights every so often give rise to a (temporary) suspension of mutual trust.[487] While it may be true that the limitation of mutual trust by a certain fundamental right, mostly Article 4 of the Charter, often leads to a decrease in mutual trust between the Member States, it is more accurate to describe each individual, substantive fundamental right as a potential safety valve to mutual trust.[488] In that sense, a fundamental right is a requirement for avoiding that mutual trust remains black-letter law. Perhaps it could even be said that the principle of mutual trust cannot exist without such a safety valve. This will further be expanded upon in the next chapter on the qualification of mutual trust as a general principle of EU law and the relationship between mutual trust and other general principles of EU law. *Chapter 4* will thus bring the lines of *Chapter 2* and *Chapter 3* of *Part I* together, in order to explore mutual trust as a general principle of EU law.

[487] See *Section 3.3* and *3.4* for an overview of the legal scholarship and the case law of the CJEU on the relation between mutual trust and fundamental rights in the context of the Dublin system, respectively the EAW system. Where relevant, the case law of the ECtHR and of the domestic courts of the Member States is also discussed in these sections.
[488] Sacha Prechal [2017] p 85

Chapter 4 Mutual trust – a general principle of EU law

4.1 Introduction

The fourth chapter of this study brings together the previous two chapters of *Part I* on general principles of EU law and mutual trust. By bringing the conclusions of the first two chapters together, I qualify mutual trust as a general principle of EU law and aim to clarify its relation to other general principles of EU law. The conclusions of this chapter will further serve as a basis to study several consequences of the externalization of European asylum law in *Chapter 6*, after having studied several sources of external European asylum law in *Chapter 5*.

As discussed in *Chapter 3*, mutual trust implies the cooperation between Member State A and Member State B in which A trusts B to comply with its fundamental rights obligations, materialized in B's system and/or an individual decision, towards individuals. In *Chapter 2*, I argued that general principles of EU law are norms that exist independently of written EU law and are applicable throughout multiple fields of EU law, that have a certain weight attached to it and that derive their legitimacy from their specification in a norm under EU law or their reflection in a norm outside of EU law.

In *Section 4.2*, this chapter begins by giving a brief overview of the discussion in legal scholarship on the status of mutual trust as a general principle of EU law. In *Section 4.3*, I will assess mutual trust in light of the four defining characteristics of general principles of EU law, which I identified in *Chapter 2.* This assessment will take place based on the study of mutual trust of *Chapter 3*. As a conclusion, I will argue that the principle of mutual trust should be considered as a general principle of EU law.

Next, the relationship between mutual trust and other general principles of EU law will be studied in *Section 4.4*. This section will focus on the relationship between mutual trust and the two selected general principles of EU law in *Chapter 2*, i.e. fundamental rights and loyal cooperation.[489] The conclusions of this section will form the starting point for *Chapter 6*, in which several consequences of the externalization of European asylum law will be examined against the

[489] See *Chapter 1, Section 1.6.1* on the selection criteria for these two examples of general principles of EU law.

backdrop of the relation between fundamental rights obligations and the principle of mutual trust and the legal functions of mutual trust and of loyal cooperation.

Such an assessment of the consequences of externalization in *Chapter 6* requires answering the question of the external extension of mutual trust. This will be done in *Section 4.5* based on the study of the spatial scope of application of general principles of EU law in *Section 2.5.2* of *Chapter 2.*

To conclude, this chapter will answer the following sub-question: Should mutual trust qualify as a general principle of EU law and how should it relate to (other) general principles of EU law? An answer to this question is required before being able to study the possible extension of mutual trust to external European asylum law and, as a result, the possibility of the extrapolation of the relation between mutual trust and other general principles in that field of law. With that goal in mind, I will position mutual trust within the EU legal order before trying to grasp its extension to external European asylum law.

4.2 Discussion

Why does a study of the qualification of mutual trust as a general principle of EU law matter? After all, the CJEU has framed mutual trust as a principle of constitutional value. The Court did so in Opinion 2/13 on the incompatibility of an EU accession to the ECHR with the Treaties.[490] Tridimas notes that, in Opinion 2/13, the principle of mutual trust 'has been elevated from a merely justificatory principle to a source of obligations, thereby acquiring the credentials of a constitutional principle.'[491] One might think that Opinion 2/13 would have thus solved the discussion. However, despite the CJEU's Opinion, legal scholarship studying the status of mutual trust in the EU legal order is diverging.[492]

[490] *Opinion 2/13* [2014] para 168. See *Chapter 3, Section 3.2.*
[491] Takis Tridimas [2020] p 12
[492] For authors problematizing the categorization of mutual trust as a general principle, see Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 59 - 68; Luc Leboeuf (2016) p 49-59
For authors who have a more positive attitude towards regarding mutual trust as a 'structural' or general principle of EU law, see Sacha Prechal [2017] ; Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 69-79; Xavier Groussot and others (2017) p 122

For example, Leboeuf disagrees with the Court's reasoning in Opinion 2/13. Leboeuf views the CJEU's approach to the principle of mutual trust as 'a surprise' because the Treaties do not mention mutual trust, nor do the EU secondary law instruments refer to mutual trust.[493] He concurs with Advocate General Wathelet in *Gazprom* that mutual trust may not be compared with general principles such as fundamental rights, the 'breach of which would shake the very foundations on which the EU legal order rest'.[494] Leboeuf claims that mutual trust is nothing more than an aid for interpretation.[495] I will challenge this by arguing that the principle of mutual trust does represent a certain weight in the EU legal order (*Section 4.3.4)* and should be considered a general principle of EU law, which is foundational to the EU legal system (*Section 4.3 in fino*).

Further, Leboeuf considers mutual trust to be 'the consequence of respect for the constitutional principles: it is because the Member States participate in the common values and because they respect EU law that a mutual trust between them exists'.[496] Leboeuf also argues that mutual trust cannot be an alone-standing constitutional principle because that would suggest that mutual trust would be able to oppose to fundamental rights, a general principle which it was derived from.[497] While I agree that mutual trust is strongly intertwined with and sometimes derived from other general principles of EU law, such as loyal cooperation, I fail to understand why, as Leboeuf argues, this would prevent us from considering mutual trust as a general principle of EU law itself. This will be expanded upon in *Section 4.4.1* in which I discuss the relationship between the general principle of fundamental rights and mutual trust.

Another author who is skeptical of mutual trust as a general principle of EU law is Brouwer. She argues that mutual trust should not be considered a general principle of EU law 'as long as for each instrument of European cooperation one has to assess between which countries this trust has to be assumed'.[498] In other words, Brouwer opposes the qualification of mutual trust as a general principle of EU law because it is applied to different relationships depending on the context. This

[493] Luc Leboeuf (2016) p 50. Original text in French: 'Cela n'a pas manqué de susciter, à juste titre, la surprise.'
[494] Court of Justice of the European Union Case C-536/13 *Gazprom* [2015] Opinion AG Wathelet para 181
[495] Luc Leboeuf (2016) p 50-51
[496] Luc Leboeuf (2016) p 51. Original text in French: 'La confiance mutuelle est la conséquence du respect de ces principes constitutionnels: c'est parce que les États membres partagent des valeurs communes et qu'ils respectent le droit de l'Union européenne qu'ils s'accordent une confiance mutuelle.'
[497] Luc Leboeuf (2016) p 51
[498] Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 65

is what they identify as its 'variable geometry of membership' – meaning that 'the "body" of mutual trust consists of a "patchwork" of groups of States, and within each group, different States cooperate for different purposes'.[499] In my opinion, this variable geometry of membership does not prevent mutual trust to qualify as a general principle of EU law. For example, the same holds true for the principle of loyal cooperation (discussed in *Chapter 2*); loyalty may exist between the Netherlands and the European Commission,[500] but it also applies in a different vein in the relationship between the European Parliament and the Commission.[501]

As I have argued in *Chapter 2*, *Section 2.5.1,* the qualification of a norm as a general principle of EU law should rely on the framework of defining characteristics, based on the common denominators I identified for the general principles of loyal cooperation and fundamental rights. I will conduct such a qualification assessment for the principle of mutual trust in *Section 4.3* of this chapter.

While other authors, such as Prechal and Gerard, have a more positive attitude towards recognizing the importance of mutual trust for the EU legal order,[502] the qualification of mutual trust as a general principle of EU law is not generally accepted. Such divergence may cause issues in the application and interpretation of mutual trust in practice. For instance, mutual trust may be viewed in one Member State as a general principle of EU law – which is part of EU primary law and fulfills certain functions in the EU legal system (see *Section 2.2.3* of *Chapter 2)* – while in another Member State it may be viewed exclusively as an aid to interpretation. In this chapter, I hope to contribute to that discussion by approaching the qualification of mutual trust as a general principle, in the next section, based on the previously developed framework on the defining characteristics of general principles of EU law.

[499] Evelien Brouwer (Mapping mutual trust: understanding and framing the role of mutual trust in EU law 2016) p 64
[500] See *Zwartveld* [1990]
[501] Art. 13(2) Treaty on the European Union [2016] OJ C 202/1: '[…]The institutions shall practice mutual sincere cooperation.'
[502] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 79; Sacha Prechal [2017] p 76-79

4.3 Defining characteristics

In *Chapter 2,* I have identified four defining characteristics of general principles of EU law. Firstly, I argued that general principles exist independently of any written EU law. Secondly, they derive their legitimacy from their 'specification' within EU law and/or 'reflection' outside of EU law. Thirdly, they are applicable throughout the broad spectrum of EU law. Lastly, there must be a certain weight attached to the principle.[503]

In order to determine whether the principle of mutual trust should qualify as a general principle of EU, I will consider whether mutual trust fulfills the requirements for those four defining characteristics. I will do so based on the discussion of the principle of mutual trust in *Chapter 3* in the context of the Dublin system concerning the determination of the Member State responsible for the assessment of an application for international protection made in Europe[504] and the European Arrest Warrant system of arresting and transferring criminal suspects and sentenced persons between the Member States.[505]

4.3.1 Independent of written EU law

As developed in *Chapter 2 (Section 2.5.1.1),* the first defining characteristic of general principles of EU law is that they underpin written EU law. Any written EU law, be it EU primary or secondary law, is merely an expression of the general principle, not the source of it.[506] General principles of EU law are able to exist without an explicit provision in written EU law and, if such a provision does exist, the general principle does not depend on it for its existence.

---

[503] See *Chapter 2, Section 2.5.1.*

[504] The Dublin system concerns the determination of the Member State responsible for an application for international protection: Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31

[505] The EAW system concerns the arresting and transferring of criminal suspects and sentenced persons between the Member States: 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
See *Chapter 3, Section 3.2* on the legal function of mutual trust, *Section 3.3* on mutual trust in the Dublin system, *Section 3.4* on mutual trust in the EAW system, and *Section 3.5* on the conceptualization of mutual trust.
See *Chapter 1, Section 1.6.2* for the delimitation of the study of mutual trust to the contexts of the Dublin and EAW system.

[506] Koen Lenaerts and José Antonio Gutiérrez-Fons (2011) p 179

To find out whether the requirements for this characteristic are fulfilled, I turn to the legal trigger factors of mutual trust in different fields of law, as studied in *Chapter 3* in the context of the Dublin and the EAW system.

Dublin system

In the Dublin system, the trigger factors of mutual trust are not laid down in EU secondary law. The Dublin Regulation nor any other instrument of the Common European Asylum System mentions if, when and how mutual trust should apply.[507] However, despite the lack of an explicit statutory basis in internal EU asylum law, mutual trust is applicable in the Dublin system.[508] Mutual trust lies at the basis of the Dublin system, as explained by the CJEU in the *N.S.* judgment.[509] As a result, mutual trust has been applied in the Dublin system and the CEAS without an explicit statutory basis in the Dublin Regulation or another instrument of the CEAS. Therefore, the principle of mutual trust exists independently of written EU law in the Dublin system.

EAW system

In contrast therewith, the EAW system relies on a written transcription of mutual trust, albeit only partly. The trigger factors of mutual trust in the EAW system are laid down in EU primary law (in the Treaties) and in EU secondary law (in the EAW Framework Decision) in the form of 'mutual recognition'.[510] However, mutual recognition is a derivative of mutual trust.[511] Such a transcription of mutual trust in the EAW Framework Decision is based on the principle of mutual trust. Therefore, I argue here that the principle of mutual trust and its application do not rely on the

[507] Sacha Prechal [2017] p 77
[508] See *Section 3.3.*
[509] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 79: 'It is precisely because of that principle of mutual confidence that the European Union legislature adopted [the Dublin Regulation] in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.'
[510] Art. 67(3) and 82(1) Treaty on the European Union [2016] OJ C 202/1; Art. 1(2) 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
[511] Evelien Brouwer [2013] p 136 Court of Justice of the European Union Case C-168/13 PPU *Jeremy F* [2013] para 5

written law. The principle of mutual trust underpins the mentioning of mutual recognition in the EAW Framework Decision, not the other way around.

In sum

Based on the legal trigger factors of mutual trust in internal EU asylum and criminal law, I conclude here that mutual trust exists independently of written law.

4.3.2 Legitimacy based on specification and/or reflection

The second defining characteristic of general principles of EU law concerns their legitimacy. As argued in *Chapter 2, Section 2.5.1.2*, the focus should be on their specification[512] and reflection[513] rather than on their process of creation.[514] This means that general principles of EU law are inspired and influenced by national and international law, as well as other written sources within EU law, while still being specific to the EU. It is this specification and/or reflection that provides the general principles of EU law with legitimacy. The process of creation – which may involve CJEU case law or the EU legislative process – is thus not defining for the qualification of a norm as a general principle of EU law. The requirement for this second characteristic is that the principle in question must rely on specification and/or reflection to be developed and applied legitimately.

Dublin system: specification

The Preamble of the Dublin Regulation explicitly refers to mutual trust in the context of an early warning process, which 'should be established in order to ensure robust cooperation within the framework of this Regulation and to develop mutual trust among Member States with respect to asylum policy'.[515] As mentioned before in *Section 3.3*, there is no other specification of mutual trust in the Dublin Regulation, nor in any other CEAS instrument.

Mutual trust was only included in the Preamble of the Dublin Regulation in 2013 (Dublin III). This, however, was the result of the CJEU's finding in the *N.S.* judgment that 'the texts which

[512] I use the term 'specification' to refer to the various ways in which general principles can form the basis for rules and principles *within* EU primary and secondary law. See *Chapter 2, Section 2.5.1.2.*
[513] The term 'reflection' concerns the counterparts, so to speak, of principles in legal systems *outside* of the EU, i.e. in the national laws of the Member States and in international law. See *Chapter 2, Section 2.5.1.2.*
[514] The term 'process of creation' is understood as the practice or procedure followed to create a norm. See *Chapter 2, Section 2.5.1.2.*
[515] Recital 22 of the Preamble of Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31

constitute the Common European Asylum System' make it possible to assume that the Member States comply with fundamental rights and other general principles of EU law 'and that the Member States can have confidence in each other in that regard'.[516] Moreover, the CJEU continues, '[i]t is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003'.[517] In other words, the CEAS relies on mutual trust even if it does not explicitly mention mutual trust. Not only does mutual trust underlie the CEAS, the EU secondary law instruments of the CEAS also contain specific provisions which are expressions of mutual trust in the context of the instrument concerned. By expressions I mean that these provisions would cease to exist if it were not for mutual trust; mutual trust is implied in their application. For instance, Article 34 of the Dublin Regulation on 'information sharing' implies the Member States trusting one another in correctly registering and sharing information concerning asylum seekers and their procedures.[518] Without an implication of mutual trust, this provision would remain black-letter law.[519] Thus, the texts of the CEAS are a specification of the principle of mutual trust in EU asylum law in the sense that they consist of several rules that are based on mutual trust.

As the Dublin Regulation is an instrument of the CEAS, mutual trust also lies at the basis of the Dublin Regulation. Consequently, the principle of mutual trust lies at the basis of the Dublin system. Therefore, I conclude that mutual trust finds it legitimacy in its specification in the Dublin Regulation and other instruments of the CEAS.

EAW system: specification

Also in EU criminal law, the principle of mutual trust relies on specification for its legitimacy. Mutual trust forms the basis for EU secondary law in the EAW system. More specifically, Article 1(2) of the Framework Decision mentions 'mutual recognition', which is a derivative of the

[516] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 78
[517] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 79
[518] Art. 34(1) Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31
[519] Similarly, Article 21(1) of the Dublin Regulation requires the Member States to trust one another to correctly register information in Eurodac.

principle of mutual trust.[520] Moreover, the Framework Decision[521] refers to the 1999 Tampere conclusions in which the mutual recognition of judicial decisions was claimed to be the 'cornerstone' of cooperation in civil and criminal matters.[522] Laying down specifications of mutual trust in the EAW Framework Decision and the Tampere conclusions provides mutual trust with legitimacy in the context of EU criminal law.

EU legal system: reflection

On the more general level of the EU legal system, Wendel argues that the concept of intra-European mutual trust refers to 'describing the federal problem of attributing and distributing the responsibility for the protection of fundamental rights within a multi-levelled polity'.[523] They compare the EU principle of mutual trust to the obligation of the authorities of German *Länder* to cooperate 'since both are bound by the fundamental rights of the German Basic Law and both presume that their peers generally respect these rights or, in the exceptional case they do not, will be sanctioned accordingly'.[524] In that sense, the EU principle of mutual trust is reflected in the German principles of attribution and distribution of fundamental rights responsibilities between the *Länder* within their federal context. The similarity between EU mutual trust and German *Vertrauen* has been noted in legal scholarship before.[525]

In sum

Based on the foregoing, I argue that the principle of mutual trust forms the basis of several rules within EU secondary law in the fields of asylum and criminal law. Moreover, a counterpart of mutual trust exists outside of EU law in the context of German federal law. As a result, the principle of mutual trust is legitimized based on 'specification' within EU law, and 'reflection' in the national law of a Member State. These sources of legitimacy lead to my conclusion that mutual trust fulfills the requirements of the second defining characteristic of general principles of EU law.

---

[520] Evelien Brouwer [2013] p 136; Court of Justice of the European Union Case C-168/13 PPU *Jeremy F* [2013] para 5

[521] Recital 1-2 of the Preamble of the 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1

[522] Recital 33-37 of the Presidency Conclusions, Tampere European Council, 15 and 16 October 1999 [1999] ; see also Garlick 2016 p 93-96

[523] Mattias Wendel [2019] p 37

[524] Mattias Wendel [2019] p 37

[525] Thomas Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' [2016] German Law Journal 339, p 344

4.3.3 Broad application

The third defining characteristic of general principles of EU law identified in *Chapter 2* is the broad application of these principles throughout EU law. I have concluded in *Section 2.5.1.3* that it is not required that a principle is applied in every field of EU law, as long as its application is not restricted to one or two fields of law.

Dublin and EAW system

Based on the case law on asylum and criminal law, discussed in *Chapter 3*, I observe that mutual trust finds application throughout the whole Dublin system (see *Section 3.3*) and the European Arrest Warrant system (see *Section 3.4*).

AFSJ

In addition to EU asylum and criminal law, mutual trust also has an important role to play in other fields of the Area of Freedom, Security and Justice, such as civil law. For example, the Brussels IIa Regulation (concerning the recognition and enforcement of judgments of other Member States in matrimonial matters and matters of parental responsibility) articulates that '[t]he recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust […]'.[526] In child abduction cases, which fall under the Brussels IIa Regulation, the CJEU has on multiple occasions confirmed this.[527]

Internal market

In addition to the AFSJ, the principle of mutual trust is applicable in the internal market. In that context, it was originally developed by the CJEU in the 1970s.[528] Snell notes that mutual trust was originally perceived in the *Cassis de Dijon* case[529] as a 'qualified mutual trust' in the sense that

[526] Recital 21 of the Preamble of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338
[527] See the case law discussed in Evelien Brouwer [2016] p 900-906; Similarly, for mutual trust in the context of the enforcement of civil judgments, see Xandra Kramer [2013]
[528] Jukka Snell, 'The Single Market: Does Mutual Trust Suffice?' (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law, Florence, 2016) p 11; Luc Leboeuf (2016) p 14
[529] Court of Justice of the European Union Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979]

the recognition, flowing from the trust between the Member States, was far from automatic.[530] As noted by Leboeuf, the CJEU has approached the 'high degree of confidence as a fundamental premise' which has allowed it to interpret diverse fields of EU law, such as the free movement of goods.[531] Mutual trust was further elaborated upon in legislation concerning the internal market.[532] More recently, as Cambien points out, 'the principle of mutual trust played a central role in the discussions leading up to the adoption of the […] Services Directive'.[533] This Directive promotes administrative cooperation based on mutual trust.[534] Similarly, other EU legislative initiatives within the internal market rely heavily on the principle of mutual trust. For example, the Regulation on the requirements for accreditation and market surveillance relating to the marketing of products reiterates the importance of strengthening the mutual trust between the Member States.[535]

Social security

Furthermore, the principle of mutual trust has come to the fore in the field of social security. For example, Regulation 883/2004 on the coordination of social security systems relies on mutual trust for the cooperation between the Member States.[536] A specific issue that has arisen in the field of social security concerns the question of which Member State's social security system is applicable to the worker concerned. For example, worker X may be employed in Member State A but social security contributions for X may have been paid to Member State B. Based on Regulation 987/2009,[537] a certificate may then be issued by Member State B to confirm that X remains subject

[530] Jukka Snell (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 11-12
[531] Luc Leboeuf (2016) p 14. Original text in French: 'Dans sa jurisprudence, la Cour de justice use de ce haut degré de confiance comme d'une prémisse fondamentale, qui lui permet d'interpréter un ensemble de dispositions du droit de l'Union européenne dans des domaines aussi divers que la libre circulation des marchandises et la reconnaissance mutuelle des décisions de justice.'
[532] Nathan Cambien [2017] p 108.
[533] Nathan Cambien [2017] p 108
[534] Recital 3 and 7 of the Preamble of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376
[535] Recital 13 of the Preamble of Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L 218; Nathan Cambien [2017] p 108-109
[536] Henrik Wenander, 'A Network of Social Security Bodies – European Administrative Cooperation under Regulation (EC) No 883/2004' [2013] Review of European Administrative Law 39; Art. 76 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) [2004] OJ L 166
[537] Art. 13 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284

to B's social security system despite X being employed in Member State A. The principle of mutual trust (derived from the principle of loyalty, as discussed in *Chapter 2*) generally requires the Member State in which the worker actually works (A) to trust the certificates issued by the Member State (B) under whose social security system the worker falls.[538]

In sum

Mutual trust is applied throughout EU criminal law, asylum law, civil law, the internal market, and social security law. The applicability of mutual trust in these myriad fields of EU law fulfills the requirement for the defining characteristic of broad application.

4.3.4 Weight

The fourth and last requirement for a norm to qualify as a general principle of EU law, is the weight characteristic. This involves reflecting a 'core value'[539] of and having added weight in multiple fields of EU law (see *Section 2.5.1.4*).

Dublin system

In the context of EU asylum law, it has been argued many times by other authors that mutual trust is central to the Dublin system.[540] In addition, the CJEU in the *N.S.* judgment has held that mutual trust is the '*raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System'.[541] Thus, I observe that the CJEU not only considers mutual trust to be a core value to the Dublin system, but also to general EU asylum law and, even broader, the AFSJ.

EAW system

Another element of the AFSJ is the EAW system, in the context of which the CJEU reasoned in a similar vein. In the *Jeremy* judgment, it found that

[538] E.g. Court of Justice of the European Union Case C-17/19 *Bouygues travaux publics* [2020] paras 40-41
[539] Takis Tridimas (2006) p 1
[540] E.g. Sacha Prechal [2017] p 76-79
[541] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] paras 79 and 83; Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 70

> '[t]he principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights'.[542]

This mutual confidence, more commonly known as mutual trust, has also been positioned in the literature as vital to the EAW system.[543]

EU legal system

Even more generally, the CJEU has held in its Opinion 2/13 that the principle of mutual trust underlies the legal system of the EU, including the constitutional structure of the EU, its specific characteristics arising from the very nature of EU law (such as effectiveness and direct effect) and the principles, rules and legal relations resulting therefrom.[544] The general weight of the principle of mutual trust can be deducted from the following paragraph of Opinion 2/13:

> 'This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'[545]

As mentioned in *Section 3.2* of *Chapter 3*, the CJEU regards mutual trust as having a fundamental characteristic: It is considered to underlie the legal structure of the EU.

In sum

Based on the discussed case law, it is clear that the CJEU considers the principle of mutual trust to have added weight in EU asylum law, EU criminal law and even generally speaking in the whole

[542] *Jeremy F* [2013] para 50
[543] E.g. Evelien Brouwer [2016] p 911-916
[544] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] paras 191 and 164-167
[545] *Opinion 2/13* [2014] para 168

of the legal system of the EU. Therefore, the requirements of the fourth and last defining characteristic of general principles of EU law are fulfilled.

In sum: Mutual trust as a general principle of EU law

Based on the study of mutual trust in the context of EU asylum law and EU criminal law in *Chapter 3*, I have firstly found that mutual trust exists independently of any written EU law. Secondly, mutual trust derives its legitimacy from its 'specification' within EU law and 'reflection' outside of EU law. Thirdly, mutual trust is applied broadly throughout various fields of EU law. Fourthly, it has been shown that mutual trust represents a certain weight for the whole of the EU legal order. Thus, mutual trust fulfills the requirements for all four of the defining characteristics of general principles of EU law, as identified in *Chapter 2*. Based on the foregoing, I submit here that the principle of mutual trust should be qualified as a general principle of EU law.[546]

In addition to the qualification of mutual trust as a general principle of EU law, the next section will study the relationship between mutual trust and other general principles of EU law.

4.4 Relation to other general principles of EU law

In this section, I will study the relationship between the principle of mutual trust and other general principles of EU law. The goal of this section is to study the interaction between mutual trust and the two selected general principles discussed in *Chapter 2*: fundamental rights and loyal cooperation. Mapping the relation between mutual trust and fundamental rights and between mutual trust and loyal cooperation in the *internal* context of EU law will allow for a starting point of the relationship between mutual trust and these general principles of EU law in the context of *external* European asylum law (*Chapter 6* on the consequences of externalization).

4.4.1 Fundamental rights

As I argued in *Chapter 3*, a certain relation exists between the principle of mutual trust and each substantive fundamental right (most pertinently, Article 4 of the Charter) which has been described more accurately as a safety valve to mutual trust.[547] In this section, I will zoom out and focus on

[546] This finding stands contrary to other authors who did not consider mutual trust as a general principle of EU law. See *Section 4.2.*
[547] See Sacha Prechal [2017] p 85

the relation between the principle of mutual trust and the principle that fundamental rights ought to be protected under EU law. This section thus concerns the general principle of fundamental rights, as opposed to the individual substantive rights derived from it.

In order to understand the relation between the principle of fundamental rights and the principle of mutual trust, I note here that the legal function of the principle of mutual trust differs from the legal function of the principle of fundamental rights protection. Mutual trust aims to ensure the effectiveness of EU law, while respecting the administrative sovereignty of the Member States.[548] The principle of fundamental rights aims to protect fundamental rights throughout EU law. The former regulates the relationship between the Member States – and is thus largely institutional and foundational in nature – while the latter directly influences the relationship of individuals with Member States, EU institutions, or other individuals. However, both can be deemed fundamental to the functioning of the EU legal order.

As noted by Groussot and others, 'mutual trust is obviously a non-absolute principle'. They consider the rebuttal of mutual trust based on fundamental rights to endanger the effectiveness function of mutual trust.[549] While this may seem true in the short-term, I argue here that the situation is different when looked at from a long-term perspective.

Despite their largely opposing legal functions, I view the principle of fundamental rights as an essential requirement to the principle of mutual trust. Without fundamental rights, mutual trust between the Member States would not be sustainable; without fundamental rights, mutual trust would not be able to exist and applied during a longer period of time, as opposed to being applied for a short period and then losing credibility. As also argued by Hamenstädt, the

> '[f]unctioning of the system refers to mechanisms that ensure that clashes between fundamental rights and mutual recognition are detected, and that safeguards are in place to prevent Member States from risking an infringement of their human rights obligations when complying with the system of mutual recognition.'[550]

[548] See *Section 3.2.*
[549] Xavier Groussot and others (2017) p 122
The legal function of mutual trust is discussed in *Section 3.2* of *Chapter 3*.
[550] Kathrin Hamenstädt [2021] p 15-16, see also p 12

If not for the incorporation of a safety valve to mutual trust, in the form of the individual, substantive fundamental rights, I argue that the principle of mutual trust would have already lost credibility. This risk of (temporary) loss of credibility has been exemplified by the case law in the Dublin and EAW system.[551] For instance, in the *N.S.* judgment, the CJEU stated that

> 'to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.'[552]

Without such a response from the CJEU, centered on Article 4 Charter, the Member States would not have been able to comply with their own fundamental rights obligations while upholding the principle of mutual trust. Ultimately, mutual trust would have been discarded as a functioning principle in its entirety if it were not for its safety valve of Article 4 Charter (and, potentially, the essence of other fundamental rights).[553] In other words, mutual trust between the Member States cannot exist without compliance with their fundamental rights obligations. Thus, compliance with fundamental rights obligations supports mutual trust by adding to its credibility and longevity.

Based on the foregoing, I consider fundamental rights an essential requirement for avoiding that mutual trust remains a norm without practical value. Without the reassurance that fundamental rights violations will not generally be tolerated because of the principle of mutual trust, the mutual trust between the Member States would not be sustained.

---

[551] *M.S.S. v Belgium and Greece* [2011] ; *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] ; *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016]

[552] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 94

[553] The violation of the absolute right in Article 4 or of the essence of a non-absolute right relates to what Sap considers the lower limit of cooperation with a Member State in which injustice takes place: '[…] injustice should not be an excuse to show superiority. […] The limit is where human dignity is completely ignored.' Jan Willem Sap, 'Double standards. The political character of international human rights' [2020] NTKR Tijdschrift voor Recht en Religie 197, p 201-202

As a result of viewing fundamental rights as an essential requirement for the principle of mutual trust, I argue here that the principle of mutual trust may even be solidified by the principle of fundamental rights. The fundamental rights obligations of the Member States increase the credibility of mutual trust between the Member States when fundamental rights are protected in practice. The more the Member States comply with their fundamental rights obligations under EU law, and the more this is guaranteed by fundamental rights checks, the more the mutual trust between the Member States increases. Indeed, containing mutual trust when necessary to protect fundamental rights does not devaluate the principle but, on the contrary, makes it a functional principle embedded in reality.

4.4.2 Loyal cooperation

Differently from the relation between mutual trust and fundamental rights, the relation between mutual trust and loyal cooperation is a more harmonious one. As discussed in Chapter 2, *Section 2.2.1*, the CJEU assessed the relationship between the principle of mutual trust and the principle of loyal cooperation in the 2018 *Altun* judgment.[554] In *Altun*, the CJEU stated that 'the principle of sincere cooperation also implies that of mutual trust'.[555] In other words, loyal cooperation (which concerns the relation between the EU and the Member States) lies at the basis of mutual trust (which concerns the relationship between the Member States).

Both the CJEU and Advocate General Saugmandsgaard Øe remain silent in the *Altun* case as to *why* loyal cooperation implies mutual trust. Arguably, loyal cooperation implies mutual trust because they have a similar legal function: Both principles strive to streamline the cooperation of the different entities within the EU legal order.[556]

As argued by Widdershoven, the legal function of loyal cooperation is 'the uniform and effective application of Union law' in the context of 'a system of shared […] governance'.[557] In order for

[554] *Altun* [2018] paras 37-43
[555] *Altun* [2018] para 40
[556] See *Chapter 2, Section 2.3* and *Chapter 3, Section 3.2* for the study on the legal function of loyal cooperation respectively mutual trust. See also Madeline Garlick (2016) p 99-100: 'Inherent in the requirement for sincere or loyal cooperation is a degree of mutual trust among Member States – comprising trust and mutual confidence that other Member States will honour their obligations and respect not only the strict letter of EU law, but also wider objectives of the Union.'
[557] Rob Widdershoven [2015] p 561. Original text in Dutch: 'Om deze doelen te bereiken heeft de Unie niet gekozen voor een systeem waarbij de EU-instellingen in de plaats treden van de lidstaten, maar voor een systeem van gedeeld of samengesteld bestuur. […] Om binnen dit systeem in heel Europa een uniforme en effectieve toepassing van het

this vertical dimension of loyalty to fulfill the objective of the effectiveness in the *sui generis* entity of the EU, the horizontal dimension of mutual trust is required, too: No trust between the Member States and the EU (resulting from loyal cooperation) can exist without the Member States trusting one another (resulting from mutual trust), the Court seemed to argue in *Altun*. As a result, the application of the principle of loyal cooperation may entail the application of the principle of mutual trust. This has been argued before by Temple Lang,[558] and Gerard:

> 'The hosting of mutual trust under the loyalty umbrella appears all the more appropriate when considering the amendment brought by the Treaty of Lisbon to the formulation of that principle, notably the emphasis put on 'mutual respect', and its insertion in a provision – Article 4 TEU – underscoring the deference due to Member States' constitutional identities and equality.'[559]

As argued in *Section ,* I consider mutual trust as a self-standing general principle of EU law.[560] Mutual trust and loyal cooperation have a similar legal function and represent different dimensions of the cooperation between different entities within the EU legal order.

4.4.3 In sum

The foregoing shows that mutual trust is closely connected with both the principle of fundamental rights and the principle of loyal cooperation, albeit in different ways.

As argued in *Chapter 3*, each substantive right functions as a safety valve to mutual trust. As argued in this chapter, the *principle* of fundamental rights even functions as an essential requirement for the longevity of the principle of mutual trust. Despite their different legal functions, the principle of fundamental rights may solidify the principle of mutual trust because

---

Unierecht te garanderen, is samenwerking essentieel. […] De algemene rechtsbasis voor deze samenwerking is het beginsel van wederzijdse loyale samenwerking van artikel 4 lid 3 VEU, een beginsel met federale trekken.'

[558] John Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' [1990] Common Market Law Review 645, p 671

[559] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 79

[560] Mutual trust's close connection to loyal cooperation, in my opinion, does not prevent it from being considered a self-standing general principle of EU law. Similarly, the principle of effectiveness is closely related to loyal cooperation, while still being a general principle in and of itself. See Lena Enqvist and Markus Naarttijärvi, 'Administrative Independence Under EU Law: Stuck Between a Rock and Constanzo?' [2021] European Public Law 707, p 707-708 and 720

fundamental rights protection in practice may increase its sustainability. When the Member States adhere to their fundamental rights obligations, this embeds mutual trust in reality.

The principle of loyal cooperation lies at the basis of the principle of mutual trust. They have a similar legal function, namely streamlining the cooperation of the different entities within the EU legal order, of which they represent different dimensions. Because of that similar legal function, the application of loyal cooperation is able to solidify the principle of mutual trust in the EU legal order.

4.5 Spatial scope of application

As argued in *Chapter 2 (Section 2.5.2*), it is not to be excluded that general principles of EU law apply externally: Their spatial scope of application may extend beyond Europe. Since I have argued in this chapter that mutual trust should be considered a general principle of EU law, its external extension is a possibility worth investigating in view of the general research question on the externalization of European asylum law.

This section will shortly sketch a general picture on the possibility of the external extension of mutual trust. A more specific and applied study of such an external extension of mutual trust will take place in the context of external European asylum law in *Chapter 6* when assessing several legal consequences of the externalization of European asylum law in light of the principle of mutual trust.

Perhaps most striking with regard to the scope of application of mutual trust is the connection between mutual trust and loyalty. As discussed in *Section 4.4.2*, mutual trust is derived from loyalty; mutual trust falls 'under the loyalty umbrella'.[561] This is interesting because the external application of loyalty is generally accepted, due to the case law of the CJEU as discussed in *Chapter 2 (Section 2.5.2*). Based on the *ERTA*[562] doctrine, the principle of loyalty is applicable when the Member States' external action might influence the EU's (external) policy[563] and, as discussed in *Chapter 2*, this also holds true when the Member States' external action might

[561] Damien Gerard (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law 2016) p 79
[562] *Commission v Council (ERTA)* [1971] paras 17-19 and 30-32
[563] Koen Lenaerts and Piet Van Nuffel (2017) p 65-112; Marcus Klamert (2014) p 73-75

influence internal EU law. [564] In line with the *ERTA* doctrine, I argue here that mutual trust, too, should apply to the cooperation of the Member States in the external sphere of EU law, whenever their cooperation might impact internal or external EU law.

One example of the external application of mutual trust can be found in the Visa Code.[565] The Visa Code provides the possibility of submitting a visa application to Member State A even if Member State A does not have a consulate in the third country or region where the application is submitted. In such a case, Member State B (with a consulate in that third country or region) may examine and issue the visa application on behalf of Member State A.[566] Among other issues, problems may arise if Member State B denies a visa to a third-country national because B considers them to be a threat to public policy – a ground for refusal based on Article 3(d) of the Visa Code – whereas Member State A does not consider the person concerned a threat to public policy and may even wish that person to visit Member state A. In such a situation, A may wish to challenge B's refusal. However, such a possibility does not exist under the Visa Code. This is due to the European visa system relying heavily on mutual trust between the EU Member States. This system extends beyond Europe and influences the cooperation dynamics between the EU Member States. As such, it is an example of the external extension of the principle of mutual trust. This finding will be the starting point for situating mutual trust in the context of external European asylum law. More specifically, in *Chapter 6,* other situations in which mutual trust extends beyond Europe will be discussed in the context of two case studies of external European asylum law.

4.6 Conclusion

In this chapter, I have brought together the study on mutual trust in the Dublin and EAW system (*Chapter 3*) with the study of fundamental rights and loyal cooperation as examples of general principles of EU law (*Chapter 2*).

Doing so has allowed, firstly, for a conclusion on the constitutional status of mutual trust in the EU legal system. I submit that mutual trust should be considered as a general principle of EU law,

[564] See also *Opinion 1/03* [2006] para 116; Koen Lenaerts and Piet Van Nuffel (2017) p 65-112; *Commission v Council (ERTA)* [1971] paras 19-22
[565] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243
[566] Art. 8(1), (5) and (6) Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243

because mutual trust fulfills the requirements of the defining characteristics of general principles of EU law. Indeed, mutual trust, firstly, exists independently of written EU law. Secondly, it derives its legitimacy from its 'specification' within EU law and 'reflection' outside of EU law. Thirdly, the principle of mutual trust is applied broadly throughout various fields of EU law. Lastly, mutual trust carries a certain weight in throughout the EU legal system. Thus, the principle of mutual trust should be considered as a general principle of EU law: one of those elusive, fundamental principles which shape EU law.

As discussed in *Chapter 2*, the qualification as a general principle of EU law has important consequences. One consequence is that mutual trust should be considered as part of EU primary law. Another consequence is that mutual trust fulfills the functions usually attributed to general principles of EU law: it serves as a ground for review, a rule of interpretation and has a gap-filling function.[567] In addition, mutual trust – as a general principle of EU law – is closely connected with other general principles of EU law.

The second finding of this chapter concerns that relation between mutual trust and other general principles of EU law. I have argued that the connection between mutual trust and other general principles of EU law may take different shapes, varying from being an essential requirement to its longevity, to having a similar legal function. What fundamental rights and loyal cooperation have in common in relation to mutual trust, is their ability to solidify the principle of mutual trust; they may increase the credibility and longevity of the principle of mutual trust.

As a result of the qualification of mutual trust as a general principle, this has also resulted in the possibility that mutual trust may apply externally, as do other general principles of EU law. As the third finding of this chapter, I therefore argue that mutual trust should apply to the cooperation of the Member States in the external sphere of European law whenever their cooperation might impact internal or external EU law. An applied study on the external extension of mutual trust will take place in *Chapter 6* by studying several legal consequences of the externalization of European asylum law in view of the principle of mutual trust.

In sum, I argue that mutual trust should be considered as a general principle of EU law because it fulfills the defining characteristics of general principles of EU law. The qualification of mutual

[567] See *Chapter 2, Section 2.2.3.*

trust as a general principle of EU law entails its possible extension to external European (asylum) law, and a close connection with other general principles of EU law, such as fundamental rights and loyal cooperation. These conclusions conclude the exploration of mutual trust as a general principle of EU law – as one of the grains of the stardust of the EU.

Conclusion of Part I: Exploring mutual trust as a general principle of EU law

In *Part I* of this study, I explored mutual trust as a general principle of EU law.

In order to do so, I first developed a framework on general principles of EU law in *Chapter 2* based on the common denominators of the general principles of loyal cooperation and fundamental rights. In that chapter, I identified the defining characteristics of general principles of EU law: They exist independently of written EU law; they derive their legitimacy from their 'specification' within EU law or 'reflection' outside of EU law; they are applicable throughout the broad spectrum of EU law; and they have a certain weight attached to them. Based on the studied case law, I argue that the qualification of a norm as a general principle of EU law should rely on this framework of defining characteristics. In *Chapter 2,* I also concluded that general principles of EU law may apply externally.

In *Chapter 3,* I studied mutual trust in the internal sphere of EU law, more specifically asylum law (the Dublin system of determining the Member State responsible for an application for international protection made in Europe) and criminal law (the European Arrest Warrant system of arresting and transferring criminal suspects and sentenced persons between the Member States). Based thereon, I argued that the legal function of mutual trust is finding a balance between the effectiveness of EU law and the sovereignty of the Member States.

In *Chapter 4* (as the last chapter of *Part I*), I brought together the study of mutual trust in internal EU asylum and criminal law (of *Chapter 3)* and the framework on the defining characteristics of general principles of EU law (of *Chapter 2*). Because the principle of mutual trust fulfills the four defining characteristics of general principles of EU law, I argued that it should be considered as a general principle of EU law.

In *Chapter 4*, I also discussed the relation of mutual trust with the general principles of EU law that were studied previously in *Chapter 2*. I argued that the connection between general principles of EU law may take different shapes, varying from fundamental rights being an essential requirement to mutual trust, to loyal cooperation having a similar legal function as mutual trust. What fundamental rights and loyal cooperation have in common in relation to mutual trust, is the

solidifying ability they show with regard to the principle of mutual trust in the sense that they may increase the credibility and longevity of mutual trust between the Member States.

Lastly, I argued in *Chapter 4* that mutual trust – as a general principle of EU law – should be extended to external European law whenever the cooperation of the Member States might impact internal or external EU law. This conclusion has laid the basis for positioning mutual trust in the context of external European asylum law, which will be done in *Part II*.

Part II: Mutual trust in the context of external European asylum law

Part II of this study concerns mutual trust and external European asylum law. To begin with, I will discuss two case studies of external European asylum law in *Chapter 5*; the EU-Turkey Deal and the Belgian humanitarian visa practice. This will allow me to study how the Member States can cooperate externally and what the rationale behind the externalization of European asylum law might be. To conclude *Part II*, *Chapter 6* assesses several legal consequences of such an externalization of European asylum law. It does so in the context of the two selected case studies of external European asylum law, and in light of the legal function of mutual trust and of its relation to other general principles of EU law.

Chapter 5 External European asylum law

5.1 Introduction

The application of European asylum law increasingly extends beyond Europe.[568] This is an addition to internal EU asylum law, applicable within the Member States, more commonly known as the Common European Asylum System.

After having studied mutual trust in the context of internal EU law in light of the general principles of EU law in *Part I,* I study this principle in *Part II* in the context of the externalization of European asylum law, i.e. the process of creating asylum law that is applicable beyond Europe. As defined in *Chapter 1, Section 1.2.2*, I understand 'External European asylum law' in this study as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe.

Plans to externalize European asylum law are not exactly new but rather a different emergence of the same objective, namely deterring migration to Europe as well as 'moving' asylum law outside of the EU and the Member States' territories.[569] As has been observed in scholarship, such externalization is often focused on border control and readmission, instead of offering international protection to those who qualify for it.[570] In response to criticism of this approach, the European Commission announced in 2020 that humanitarian admission will become a larger part of the external dimension of European asylum law.[571]

In this chapter, I observe the cooperation between the Member States in the context of external European asylum law in two case studies on the EU-Turkey Deal (*Section 5.3*) and the Belgian humanitarian visa practice (*Section 5.4*). As explained in *Chapter 1, Section 1.6.3*, these case

[568] Luc Leboeuf and Marie-Claire Foblets (2019) p 19; Maarten den Heijer, 'Frontex and the shifting approaches to boat migration in the European Union. A legal analysis' in Zaiotti (ed), *Externalizing Migration Management. Europe, North America and the spread of "remote control" practices* (Routledge 2016) 53-88, p 53-54; Sergio Carrera and others (2019) p 7-10; Thomas Spijkerboer [2017] p 216
[569] Tineke Strik [2018] ; Maarten den Heijer (2011) p 217-219
[570] Tineke Strik [2018] ; Paula García Andrade and Iván Martín, *EU cooperation with third countries in the field of migration* (European Parliament Policy Department C Citizen's rights and constitutional affairs 2015)
[571] Luc Leboeuf and Marie-Claire Foblets (2019) p 19-20; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final p 22-24

studies were selected because they are critical cases for the sources of agreements with third countries with an asylum component, respectively humanitarian visas. This means that the cases of the EU-Turkey Deal and the Belgian humanitarian visa practice have had a considerable impact on other cases within the source (or are foreseen to have such impact), or that they are prevalent within the source. The case studies will be studied from their spatial, relational, functional and instrumental dimension, as will be introduced in *Section 5.2.* After the case studies, this chapter concludes by comparing the case studies and answering the sub-questions on the ways Member States may cooperate in external European asylum law, and the reasoning behind the externalization of this field of law (*Section 5.5*).

In order to study the external dimension of external European asylum law, I have selected two sources. More specifically, this chapter includes one case study per source. Using case studies permits me to get a grasp on how the EU Member States cooperate externally in the field of asylum law and inquire on the reasoning behind the externalization of European asylum law. In the next section, I will explain the multidimensional model that will be used to approach the case studies.

5.2 Multidimensional approach

The case studies on the EU-Turkey Deal and the Belgian humanitarian visa practice are studied based on an approach developed by political science scholar Zaiotti. The model is based on four dimensions – the spatial, relational, functional and instrumental dimension[572] – and will further be referred to as the multidimensional approach or multidimensional model. While the methodology in this section remains legal doctrinal, the approach suggested by Zaiotti offers the benefit of making case studies of a largely scattered and diverse field comparable, as noted in *Chapter 1, Section 1.6.3.*

In this section, I will explain what is understood by each dimension of external European asylum law and how they relate to the sub-questions answered in this chapter and the general research question of this study.

[572] Ruben Zaiotti (2016) p 8-13

5.2.1 Spatial dimension

Firstly, Zaiotti describes the spatial dimension of external European asylum law as the

> 'geographical distance between the location of the object that needs to be protected (typically, the territory of a state receiving large numbers of migrants) and the location where a specific migration policy is implemented.'[573]

In the context of external European asylum law, such a spatial dimension can be qualified as near to or far from Europe. While not directly relevant to the general research question of this study, some attention to geopolitical factors is unavoidable here.

5.2.2 Relational dimension

The second dimension is relational, which concerns the relationships among various policy actors. The relational dimension can be multilateral, unilateral, or bilateral.

In the context of external European asylum law, such relationships may exist between the EU and/or one or more Member States, on the one hand, and third countries on the other hand. Such a third country can be the country of origin of people on the move, sometimes referred to as a 'sending' country, or a third country to the people on the move as well, also known as a 'transit' country. The types of policy actors can be national (governments of 'sending' and 'transit' third countries and governments of the Member States), international (international organizations), and official (authorities) or private (companies). The types of targeted flows can be regular or irregular.[574] Whenever the EU is involved, this adds a supranational actor to the relational dimension.

The relational dimension of external European asylum law is relevant to this study, as its central concept, mutual trust, concerns the relationships among and the cooperation between the EU Member States. Studying the relational dimension of the case studies of external European asylum law will allow for an analysis of the impact of external European asylum law on the relational dimension of *internal* EU asylum law and the interplay between these two dimensions of the same field of law. This will be done in *Chapter 6.*

[573] Ruben Zaiotti (2016) p 8-9
[574] Ruben Zaiotti (2016) p 9-10

5.2.3 Functional dimension

Thirdly, the functional dimension of the multidimensional model concerns the calculations of governments when they choose to externalize migration management. The functional dimension aims to find explanations for the reasoning behind externalization.

One of the interpretations of the rationales behind the externalization, according to Zaiotti, is rationalism. This explains externalization by viewing it as

> 'an efficient and cost-effective policy tool to manage this phenomenon. […] These calculations are not limited to the pecuniary aspect. Costs can also be estimated in political terms [as they allow] liberal governments to circumvent domestic legal and political constraints. "Ethical" calculations can also come into play.'[575]

Such 'circumvention of legal and political constraints', as an explanation for the reasoning behind externalization, may be understood from a legal perspective as the 'aim of migration control […] to prevent people on the move from triggering obligations'[576] of the Member States. More specifically, some forms of externalization may be explained by the rationale of preventing people on the move from reaching Europe and, consequently, preventing them from triggering the fundamental rights obligations of the Member States. The contrary is the case if 'ethical' calculations lie at the basis of externalization, that is, when the protection of fundamental rights in Europe of people on the move is the rationale behind an instrument of external European asylum law.

The relevance of the functional dimension of external European asylum law lies in its pertinence to one of the sub-questions of this chapter on the rationale behind the externalization of European asylum law. The answer to this sub-question will be built upon in *Chapter 6* when assessing several legal consequences of the externalization of European asylum law.

5.2.4 Instrumental dimension

The fourth and last dimension of external European asylum law as identified by Zaiotti is the instrumental dimension, concerning the 'policy "toolbox" that governments […] have developed over the years to manage incoming migration flows'. Most common are legal-administrative and

[575] Ruben Zaiotti (2016) p 9-11
[576] Annick Pijnenburg (2021) p 51 and the sources referenced there in footnote 77

law enforcement measures, although military or economic instruments have become less exceptional over time. The degree of formalization of the instruments used varies.[577]

The 'tools' for externalization discussed in the selected case studies will form the background for a discussion in *Chapter 6* on several legal consequences of the externalization of European asylum law. This will be done in light of the principle of mutual trust, which may be understood as a tool for cooperation *within* EU law.[578]

In the following sections, the case studies on the EU-Turkey Deal *(Section 5.3)* and the Belgian humanitarian visa practice *(Section 5.4)* will be approached from the spatial, relational, functional, and instrumental dimension of Zaiotti's approach in order to allow for an analysis of both case studies of external European asylum law and a comparison between them in *Section 5.5*.

5.3 EU-Turkey Deal[579]

This section approaches the EU-Turkey Deal, as a case study for agreements with third countries with an asylum component, from a multidimensional model. After giving an overview of how the EU-Turkey Deal came to see the light of day and what it consists of, I will argue why it could be considered problematic from the point of view of *non-refoulement* and judicial review (*Section 5.3.1* and *5.3.2*). Lastly, I will map the spatial, relational, functional, and instrumental dimension of the EU-Turkey Deal in *Section 5.3.3*.

5.3.1 Instruments and content

As a consequence of the Syrian conflict, the number of people on the move[580] arriving in Europe and applying for international protection quickly began to rise.[581] In response to this increase in arrivals, the EU Member States and Turkey started negotiations on how to manage migratory movements towards Europe.

'EU-Turkey Deal'

[577] Ruben Zaiotti (2016) p 12
[578] See *Chapter 3, Section 3.2.*
[579] Elements of this section originate from the previously published article: Lynn Hillary [2021]
[580] As noted in *Section 5.2,* I use the terms 'people on the move' or 'third-country nationals' whenever I refer to the broader category of non-European nationals, regardless of geographical location and regardless of their international protection needs.
[581] Elizabeth Ferris and Kemal Kirişci (2016) p 33-70

Before giving an overview of the negotiations leading up the EU-Turkey Deal, it is necessary to clarify what is understood here by the term 'EU-Turkey Deal' because there is no legal definition of what the 'deal' encompasses. Contrary to other literature,[582] I consider it to be a combination of several communications.[583] Therefore, the term 'Deal' is used here, not 'Statement'.[584] Focusing solely on Statement 144/16 and leaving out a study of other communications would disregard the political and legal reality in my opinion in the sense that it would ignore some of the substantive and facilitating elements of the Deal, which are identified hereafter.

Overview

The first result of the negotiations between Turkey, the EU and its Member States was a fact sheet of the European Commission, published on October 15, 2015. Therein, the goal and elements of the deal were broadly laid out.[585] This is the first publication showing the development of policy with regard to the EU-Turkey Deal on the EU level. A little over a month later, the 'Leaders of the European Union met […] with their Turkish counterpart' in order to further fill in the details of the deal. This resulted in a press release from the Council of the EU.[586] In response, the

[582] Other authors regard the EU-Turkey Deal as solely consisting of the EU-Turkey Statement 144/16. See Franceso Cherubini, 'The "EU-Turkey Statement" of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing' (British International Studies Association Annual Conference, Edinburgh, 2016) ; Maarten den Heijer and Thomas Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (EU Law Analysis 7 April 2016) <http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html> accessed 23 November 2021 ; Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)' (EJIL: Talk! 18 April 2016) <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/> accessed 23 November 2021 ; Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2)' (EJIL: Talk! 19 April 2016) <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/> accessed 23 November 2021 ; Nicole Koenig and Marie Walter-Franke, 'One year on: What lessons from the EU-Turkey "deal"?' (Jacques Delors Institut Berlin 17 March 2017) <https://www.delorscentre.eu/en/publications/detail/publication/one-year-on-what-lessons-from-the-eu-turkey-deal> accessed 23 November 2021 ; Henri Labayle and Philippe de Bruycker, 'The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?' (EU Immigration and Asylum Law and Policy 1 April 2016) <https://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/> accessed 23 November 2021 ; Orçun Ulusoy, 'Turkey as a Safe Third Country?' (University of Oxford Border Criminologies 29 March 2016) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third> accessed 23 November 2021 ; Paula García Andrade [2018]

[583] Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016) ; Council of the EU, 'EU-Turkey statement' 870/15 (29 November 2015) ; EU-Turkey joint action plan [2015] MEMO/15/5860; Council of the EU, 'EU-Turkey statement' 870/15 (29 November 2015) ; European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' IP/15/6330 (15 December 2015)

[584] For a similar approach, see Roman Lehner, 'The EU-Turkey-"deal": Legal Challenges and Pitfalls' [2019] International Migration 176

[585] EU-Turkey joint action plan [2015] MEMO/15/5860

[586] Council of the EU, 'EU-Turkey statement' 870/15 (29 November 2015)

Commission proposed a 'Voluntary Humanitarian Admission Scheme' to achieve the resettlement of refugees from Turkey to Europe.[587] The clearest result of the negotiations between Turkey and the EU, however, was the 'EU-Turkey Statement' of the Council of the EU on March 18, 2016.[588] In this communication 144/16, the content of the EU-Turkey Deal was made public.

1:1 scheme

Substantially speaking, the most prominent element of the deal is its reciprocating mechanism, according to which one Syrian refugee would be resettled from Turkey to one of the Member States, in exchange for each Syrian that was returned to Turkey from Greece.[589] This is referred to as the 1:1 scheme. The general idea behind this reciprocating system is that it would deter people on the move from travelling to Europe, and thus decrease the number of third-country nationals arriving in Europe and in Greece in particular – while still protecting Syrian refugees either through temporary protection in Turkey, or through admission to an EU Member State.[590]

Voluntary Humanitarian Admission Scheme

In order to attain the admission of Syrian refugees from Turkey to Europe, a Voluntary Humanitarian Admission Scheme was set up.[591] Given the focus on the reduction of migration to Europe and the voluntary nature of this alternative approach to resettlement, it should come as no surprise that the reaction of the Member States was reluctant.[592] Moreover, the number of refugees to be resettled through the Voluntary Humanitarian Admission Scheme was uncertain from the outset. Among other factors, it depended on the impact of the sustainable reduction of irregular

[587] European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' IP/15/6330 (15 December 2015)
[588] Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016)
[589] Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016)
[590] Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' [2019] Nordic Journal of International Law 315, p 350-351; Jan Willem Sap, *De opstanding van Europa* (Ars Aequi Libri 2016) p 57-64
[591] European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' IP/15/6330 (15 December 2015)
[592] European Commission, 'Relocation and Resettlement: EU Member States urgently need to deliver' IP/16/829 (16 March 2016) ; Andrea Ott, 'EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multi-layered Relationship?' [2017] CLEER Working Papers 2017/4 1; Court of Justice of the European Union Case C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the EU* [2017]

border crossings from Turkey into the EU on the overall number of displaced persons staying in Turkey.[593]

Visa liberalization

Another substantive element of the deal concerns visa liberalizations for Turkish citizens travelling to Europe. The visa liberalization by the EU was made conditional upon 72 requirements concerning 'document security, migration management, public order and security, fundamental rights and readmission of irregular migrants'.[594] Some of the migration management requirements, which are particularly relevant to the functioning in practice of the rest of the EU-Turkey Deal, are the establishment and strengthening of border guards, curbing access to Turkey for citizens of countries which represent 'a high migratory and security risk to the EU', and adopting and implementing legislation in line with the Refugee Convention and its Protocol without a geographical limitation.[595]

Capacity-building

As the negotiations continued, the European Commission provided capacity-building in Turkey. This was aimed partly at strengthening the Turkish coast guard, and partly at supporting Turkey in respecting Syrian refugees' rights *inter alia* to education.[596] This capacity-building was financed by the EU Regional Trust Fund in response to the Syrian crisis. In 2021, Turkey received 23% of this EU Trust Fund.[597]

Safe third country assumption

The EU-Turkey Deal and its 1:1 scheme are based on the assumption that Turkey is a safe third country. The concept of safe third countries requires refugees to seek international protection in the safe country they cross before entering the EU.[598] The application of the safe third country

[593] European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' IP/15/6330 (15 December 2015)
[594] European Commission, 'Turkey's progress on the visa liberalisation roadmap' (4 May 2016) p 1
[595] European Commission, 'Turkey's progress on the visa liberalisation roadmap' (4 May 2016) p 2-3
[596] European Commission, 'Facility for Refugees in Turkey: €47 million to strengthen migration management and to support education of Syrian refugees ' IP/16/1908 (26 May 2016)
[597] 'EU Regional Trust Fund in Response to the Syrian Crisis 8th Results Report Special edition with COVID-19 results' (External Monitoring and Evaluation for the European Union Regional Trust Fund in Response to the Syrian Crisis March 2021) <https://ec.europa.eu/trustfund-syria-region/system/files/2021-05/8th_RR%20EUTF%20Syria-FINAL.pdf> accessed 23 November 2021, p 5
[598] Roman Lehner [2019] p 180

concept to an application for international protection leads to the inadmissibility of such an application made in Europe.

As a result of the reliance of the EU-Turkey Deal on the safe third country assumption, applications for international protection made in the Greek island 'hotspots' were deemed inadmissible.[599] While several cases of returns from Greece to Turkey have been suspended, multiple other (Syrian) asylum seekers and people on the move have been returned from the Greek 'hotspots' to Turkey. It has been reported that the deportation of Syrian nationals to Turkey was the norm rather than the exception and that only people on the move falling under the Dublin Regulation (and thus falling under the responsibility of another Member State) or showing specific vulnerability (such as 'single refugee women' or Kurdish Syrians) would not be deported to Turkey.[600] In June 2021, the scope of the EU-Turkey Deal was expanded by designating Turkey as a safe third country for Afghan, Somalian, Pakistan and Bangladeshi nationals, too.[601] This designation took place in a Joint Ministerial decision, which has been challenged and brought before the Greek Council of State.[602]

Without discussing the 'safe third country' concept fully, I note here that the assumption that Turkey is a safe country for (Syrian) third-country nationals was heavily criticized because of the potential infringements of *non-refoulement,* i.e. the prohibition to return a person to a country where they run a risk of being subjected to treatment in violation of Article 4 of the Charter.[603]

---

[599] Art. 33(2)(c) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180; Mariana Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees' [2017] movements 213, p 214-216

[600] 'Country Report: Greece 2019 Update' (AIDA Asylum Information Database June 2020); see also Roman Lehner [2019] p 178-179

[601] 'Country Report: Greece 2021 Update' (AIDA Asylum Information Database May 2022) <https://asylumineurope.org/reports/country/greece/> accessed 12 September 2022 p 85 and the Joint Ministerial Decision referenced there

[602] 'Country Report: Greece 2021 Update' (AIDA Asylum Information Database May 2022) p 86

[603] Amnesty International, 'A blueprint for despair. Human rights impact of the EU-Turkey Deal' (Amnesty International 14 February 2017) <www.amnesty.org/en/documents/eur25/5664/2017/en/> accessed 23 November 2021 ; Franceso Cherubini (British International Studies Association Annual Conference 2016) p 42; Henri Labayle and Philippe de Bruycker, 'The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?' (EU Immigration and Asylum Law and Policy 1 April 2016) ; Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' (EU Law Analysis 5 February 2016) <http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html> accessed 23 November 2021 ; Orçun Ulusoy, 'Turkey as a Safe Third Country?' (University of Oxford Border Criminologies 29 March 2016); Maarten den Heijer and Thomas Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (EU Law Analysis 7 April 2016); Catherine Woollard, 'Weekly Editorial: EU-Turkey – Deconstructing the deal behind the statement' (European Council on Refugees and Exiles 16 March 2018) <https://ecre.org/weekly-editorial-

Not in the least because the real-world situation for non-Turkish third-country nationals, including those fleeing Syria, is often dire.[604] In addition, refugees are not necessarily entitled to protection in Turkey, notwithstanding their (theoretical) qualification as refugees.[605] Although Turkey is party to the Refugee Convention, it has made a reservation to the 1967 Protocol. This means that its scope of application in Turkey is limited to people on the move who have become refugees as a result of events occurring in Europe.[606] This geographical limitation leads to a legal vacuum for refugees, who are not granted refugee status as such. Due to this lack of legal status, people in need of international protection are often not able to access the legal protection, housing and employment they may be entitled to under the Refugee Convention.[607] Moreover, the workability in practice of the EU-Turkey Deal has been questioned, since a large number of people on the move who arrived in Europe have not been sent back to Turkey, especially after March 2020.[608] Instead, they have remained in the Greek islands 'hotspots' in critical circumstances.[609] Ultimately,

---

deconstructing-the-deal-behind-the-statement/> accessed 23 November 2021 ; Bill Frelick, 'Is Turkey Safe for Refugees?' (Human Rights Watch 14 June 2019) <www.hrw.org/news/2016/03/22/turkey-safe-refugees> accessed 23 November 2021 ; Farah Karimi, 'Opinie: Deal van EU met Turkije is grote morele dwaling' *Trouw* (12 april 2016) <www.trouw.nl/opinie/deal-van-eu-met-turkije-is-grote-morele-dwaling~b54acd6a/> accessed 23 November 2021; Question for written answer to the Commission: Compliance of EU-Turkey deal with the non-refoulement principle [2016] Parliamentary questions E-002892-16; Munich Administrative Court Case M 11 S 19.50722 and M 11 S 19.50759 [2019] ; see also Jan Willem Sap (2016) p 57-64

[604] Orçun Ulusoy and Hemme Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement* (Migration Law Series 2017) p 18-30

[605] Roman Lehner [2019] p 180-181

[606] United Nations General Assembly 2198 (XXI) of 16 December 1966: Protocol relating to the Status of Refugees [1967]

[607] Orçun Ulusoy and Hemme Battjes (2017) p 18-30; 'UNHCR on EU-Turkey deal: Asylum safeguards must prevail in implementation' (UNHCR 18 March 2016) <www.unhcr.org/56ec533e9.html> accessed 23 November 2021 ; see also Tineke Strik [2018] p 81-83; Orçun Ulusoy and Hemme Battjes, 'Returned and Lost: What Happens After Readmission to Turkey?' (University of Oxford Border Criminologies 19 October 2017) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/10/returned-and-lost> accessed 23 November 2021 ; Bill Frelick, 'Is Turkey Safe for Refugees?' (Human Rights Watch 14 June 2019); Roman Lehner [2019] p 180-181

[608] 'Country Report: Greece 2021 Update' (AIDA Asylum Information Database May 2022) p 85-86

[609] Nicole Koenig and Marie Walter-Franke, 'One year on: What lessons from the EU-Turkey "deal"?' (Jacques Delors Institut Berlin 17 March 2017); Jarl van der Ploeg, 'Lekkende tentjes, blubber en ziekten: zo leven vluchtelingen in de "openluchtgevangenis" op dit Griekse eiland' *de Volkskrant* (28 december 2017) <www.volkskrant.nl/nieuws-achtergrond/lekkende-tentjes-blubber-en-ziekten-zo-leven-vluchtelingen-in-de-openluchtgevangenis-op-dit-griekse-eiland~bd4f0ea6/> accessed 23 November 2021; 'UNHCR urges immediate safeguards to be in place before any returns begin under EU-Turkey deal' (UNHCR 1 April 2016) <https://www.unhcr.org/56fe31ca9.html> accessed 23 November 2021 ; Nikolaj Nielsen, 'Greek migrant hotspot now EU's "worst rights issue"' *euobserver* (7 November 2019) <https://euobserver.com/migration/146541> accessed 24 November 2021; Antoine Guérin, 'The European Approach to Hotspots in Greek Islands' (University of Oxford Border Criminologies 2 April 2021) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/04/european-approach> accessed 23 November 2021 ; 'Greece: Camp Conditions Endanger Women, Girls. Asylum Seekers Lack Safe Access to Food, Water, Health Care' (Human Rights Watch 4 December

the EU-Turkey Deal has the ability to lead to indirect *refoulement* (from the perspective of the EU Member States) in the sense that Syrian refugees have been reported being sent back from Turkey to Syria.[610] This is relevant to the study on the consequences of externalization in *Chapter 6.*

In sum

I consider the EU-Turkey Deal to consist of two decisions of the Council of the EU, i.e. 144/16 and 870/15, both named 'EU-Turkey Statement', and a joint action plan, i.e. MEMO 15 5860. These communications were accompanied by two Commission Recommendations on a voluntary humanitarian admission scheme and capacity-building in Turkey, in order to facilitate the other content of the EU-Turkey Deal. The main provisions of the deal concern a reciprocating mechanism (the 1:1 scheme), a voluntary humanitarian admission scheme, and visa liberalization for Turkish citizens. This is supported by the capacity-building in Turkey, funded by the EU Regional Trust Fund. Combined, these communications form the joint response of the EU and Turkey to the Syrian crisis, aimed at ending irregular migration through Turkey to Europe.

Due to the EU-Turkey Deal's reliance on the safe third country assumption, many scholars and NGOs have argued that the EU-Turkey Deal may lead to fundamental rights violations, both in Europe and in Turkey. Therefore, it is not surprising that the EU-Turkey Deal was tried before the EU courts.

5.3.2 Case law

This section discusses the only case on the EU level, *NF,* which resulted from the EU-Turkey Deal. On April 22, 2016, asylum seeker NF, residing on the Island of Lesbos, brought action against the European Council in order to annul the EU-Turkey statement.

The applicant considered the EU-Turkey Deal as an act attributable to the European Council, establishing an international agreement producing legal effects vis-à-vis third parties.[611] They argued that if it were to be considered an international agreement concluded by the Council, this

2019) <www.hrw.org/news/2019/12/04/greece-camp-conditions-endanger-women-girls> accessed 23 November 2023

[610] Melvin Ingleby, 'EU is indirect betrokken bij terugsturen Syrische vluchtelingen' *Trouw* (27 August 2019) <www.trouw.nl/buitenland/eu-is-indirect-betrokken-bij-terugsturen-syrische-vluchtelingen~b7f344ca/?utm_campaign=shared_earned&utm_medium=social&utm_source=whatsapp> accessed 23 November 2021

[611] General Court of the European Union Case T-192/16 *NF v European Council (General Court)* [2017] para 14

would lead to a breach of the legislative procedure prescribed by Article 218 TFEU[612] since the Council did not consult the European Parliament. In response, the European Council argued that the EU-Turkey Deal is not to be considered as an international agreement or treaty, but as a non-legally binding, political arrangement, and that it was not concluded by the Council.[613]

In *NF v European Council,* the General Court leaves open the possibility that a measure intended to produce legal effects vis-à-vis third parties can take the form of a press release or a statement and that such a statement can be judged by the CJEU.[614] Be that as it may, the conclusion of the Court is that the EU-Turkey Deal is a measure adopted by the representatives of the national authorities of several Member States, even though they physically gathered in the grounds of the EU institutions. Based on this Order, the EU-Turkey Deal is not subject to judicial review by the EU Courts.[615] Moreover, the appeal brought against the *NF v European Council* Order was declared inadmissible by the CJEU.[616] However, authors such as Brouwer[617] have criticized the outcome of the *NF* case and it cannot be ruled out that in another case the CJEU would decide on the merits of the case.[618]

5.3.3 Multidimensional approach to the EU-Turkey Deal

Based on the foregoing overview of the instruments and content of the EU-Turkey Deal and of the *NF* case it gave rise to, this section will map the spatial, relational, functional and instrumental dimension of the EU-Turkey Deal.

Spatial dimension

---

[612] Art. 218(6)(a) TFEU: 'The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.
Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
(a) after obtaining the consent of the European Parliament in the following cases:
[…] (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.'
[613] *NF v European Council (General Court)* [2017] paras 27 and 32
[614] *NF v European Council (General Court)* [2017] paras 42-44
[615] *NF v European Council (General Court)* [2017] paras 62, 68 and 71
[616] Court of Justice of the European Union Case C-208/17 to C-210/17 P *NF v European Council (Court of Justice)* [2018]
[617] Evelien Brouwer, 'Legality as a Challenge to EU Asylum and Migration Policies and vice versa' in Kilpatrick and Scott (eds), *Collected Courses of the Academy of European Law: Contemporary Challenges to EU Legality* (Oxford University Press 2021) 48-70, p 64-66
[618] Koen Lenaerts, 'The Court of Justice of the European Union and the Refugee Crisis' in Lenaerts and others (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019), p 10

The spatial dimension of the EU-Turkey Deal is both near to and far from Europe.

It is far because it concerns the geographical distance between Turkey – where as a result of the EU-Turkey Deal *inter alia* the border guard is being strengthened, access to Turkey is being curbed for some people on the move, and Turkish legislation is being altered to protect refugee rights – and Europe – the territory which the EU-Turkey Deal aims to deter people on the move from reaching. However, I also consider the spatial dimension as near, as the Greek hotspots, where Syrians are being transferred to Turkey from, are located within the EU.

Relational dimension

The policy actors involved in the EU-Turkey Deal are the EU and its institutions, the Member States, and Turkey. All actors are thus official and either national (the Member States and Turkey) or supranational (the EU). However, the EU Courts did not consider the Council to be involved in the EU-Turkey Deal. As discussed in *Section 5.3.2*, it remains unclear to what extent the EU should fully be considered a policy actor.

Depending on how that question is to be answered,[619] the relational dimension of the EU-Turkey Deal is (bi-)multilateral: it is either to be considered bi-multilateral because of the bilateral relationship between Turkey and the EU in combination with the multilateral relationship between the EU and its Member States, or it is to be considered multilateral between Turkey and the Member States (i.e. without EU involvement).

In *Chapter 6*, I will study the intra-European cooperation dynamics in the context of the EU-Turkey Deal. The relational dimension of the EU-Turkey Deal will be used as a starting point to compare the cooperation between the Member States in the context of the EU-Turkey Deal to the cooperation between the Member States in the context of the Dublin system concerning the determination of the Member State responsible for the assessment of an application for international protection made in Europe. The influence of the former on the latter and the interplay between the EU-Turkey Deal and the Dublin system will be discussed there in light of the principle of mutual trust.

Functional dimension

[619] I have elaborated on this elsewhere, see Lynn Hillary [2021]

The EU-Turkey Deal is arguably aimed at deterring people on the move from reaching Europe.[620] From a functional dimension, the EU-Turkey Deal is therefore firstly perceived as an efficient and cost-effective policy tool to manage migratory movements of people on the move going through Turkey towards Europe.

In addition, the rationale behind deterring people on the move from reaching Europe may be that doing so *prevents* the EU Member States to be held responsible for the fundamental rights protection of these people on the move and in particular refugees. Indeed, once people on the move are in Europe, they may claim fundamental rights protection under the CEAS (which is inspired by the Refugee Convention), the Charter, and the ECHR. These instruments arguably provide higher legal protection than the third-country national would enjoy in Turkey, where the ECHR applies in theory but the scope of application of the Refugee Convention is limited to persons who have become refugees as a result of events occurring in Europe, excluding most refugees.[621]

The functional dimension of the EU-Turkey Deal will be assessed in light of the legal function of mutual trust in *Chapter 6*.

Instrumental dimension

The policy toolbox developed in the context of the EU-Turkey Deal is diverse and scattered over various formal and informal instruments. Most of them are legal-administrative, such as the 1:1 scheme, the voluntary humanitarian admission scheme and the visa liberalization for Turkish citizens. However, a more economic instrumental dimension can also be distinguished in the form of capacity-building in Turkey, funded by the EU.

In sum

Firstly, the spatial dimension of the EU-Turkey Deal may be considered both near to and far from Europe. Secondly, its relational dimension is (bi-)multilateral: It is either to be considered bi-multilateral (because of the bilateral relationship between Turkey and the EU in combination with the multilateral relationship between the EU and its Member States) or it is to be considered multilateral between Turkey and the Member States (without EU involvement). The actors of the cooperation dynamics in the EU-Turkey Deal are official actors that are either national or

[620] Eleni Karageorgiou [2019] p 350-351
[621] Orçun Ulusoy and Hemme Battjes (2017) p 18-30

supranational. Thirdly, the functional dimension of the EU-Turkey Deal consists of efficiency and cost-effectiveness considerations in addition to political considerations of wishing to prevent people on the move from reaching Europe and thus triggering the fundamental rights obligations of the EU Member States. Lastly, the instrumental dimension consists of formal and informal legal-administrative instruments, supported by economic instruments.

5.4 Belgian humanitarian visa practice

In this section, I once more use Zaiotti's multidimensional approach to study the Belgian humanitarian visa practice. Before doing so, this section first discusses the procedure followed when an application is made for a humanitarian visa, including the criteria presumably used and the actors involved in that procedure (*Section 5.4.1*). Secondly, the European case law before the CJEU and the ECtHR to which the Belgian visa practice has led is discussed in *Section 5.4.2*. Lastly, as with the previous case study, I map the spatial, relational, functional, and instrumental dimension of the Belgian humanitarian visa practice (*Section 5.4.3*).

5.4.1 Practice

The Glossary on Migration of the International Organization on Migration defines a humanitarian visa as a

> 'visa granting access to and temporary stay in the issuing State to a person on humanitarian grounds for a variable duration as specified in the applicable national or regional law, often aimed at complying with relevant human rights and refugee law.'[622]

The Belgian humanitarian visa practice is studied here as a critical case study of humanitarian visas, as a source of external European asylum law.[623]

The Belgian humanitarian visa system is not laid down in a legal procedure but rather takes the shape of a practice, in which decisions are left largely to the discretion of the Belgian Minister responsible for migration matters. It has been noted that limited information is available on the exact procedure followed when refusing or granting a humanitarian visa.[624] The Belgian Aliens

[622] 'Glossary on Migration' (IOM 2019), p 97-98
[623] See *Chapter 1, Section 1.6.3.*
[624] Serge Bodart (2020) p 225-227; Astrid Declercq [2017] p 118

Act[625] does not include specific provisions on humanitarian visas and thus there are no legal criteria or procedures for obtaining a humanitarian visa. As a result, First President of the Council for Alien Law Litigation, Bodart, has argued that humanitarian visas fall under the general visa provisions.[626] However, the CJEU judgment in *X and X* partly counters that argument and has led to an alteration of the Belgian humanitarian visa practice, as will be explained in *Section 5.4.2.*

Criteria

Belgian humanitarian visas have been said to be granted mainly for reasons related to family life[627] and *non-refoulement*, requiring reasons related to international protection.[628] As only the *non-refoulement* related applications concern asylum law, the following discussion will be limited to the Belgian practice (and the case law to which it has led) in as far as it concerns asylum law, i.e. cases in which a third-country national applied or aimed to apply for international protection.[629]

Up until 2017,[630] Belgian practice entailed that a short-stay visa would be granted to a *prima facie* refugee. According to the UNHCR, a

> 'prima facie approach means the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylumseekers, their country of former habitual residence. A prima facie approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition.'[631]

In the humanitarian visa procedure, a first assessment of an application for international protection is made and it is declared that the individual is, at first appearance and in the absence of evidence to the contrary,[632] considered a refugee. Based on that first assessment, the humanitarian visa is

[625] Belgian Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers – Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen [1980] Moniteur belge – Belgisch Staatsblad 1980121550
[626] Serge Bodart (2020) p 226
[627] Astrid Declercq [2017] p 118-130
[628] Astrid Declercq [2017] p 136-145
[629] See *Section 5.2* on the understanding of external European asylum law in this study.
[630] Belgian practice was impacted by the CJEU and ECtHR case law discussed below and the legal basis for this practice was altered afterwards. See *Section 5.5.2*.
[631] UNHCR Guidelines on international protection no. 11: Prima Facie Recognition of Refugee Status [2015] p 2
[632] UNHCR Guidelines on international protection no. 11: Prima Facie Recognition of Refugee Status [2015] p 2; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees [2019] p 20

granted. Next, the *prima facie* refugee is allowed to enter the Belgian territory, allowing them to apply for international protection and formally enter the asylum procedure in Belgium. Their application is subsequently dealt with based on the same criteria as other applications for international protection, the only difference being that such an application is assessed under an accelerated procedure.[633]

Reported recipients of Belgian humanitarian visas based on protection needs can be further subcategorized into multiple groups, including but presumably not limited to resettled refugees,[634] Syrians who were beneficiaries of 'rescue operations',[635] and family members of refugees residing in Belgium.[636]

Actors

The selection process preceding the granting of a humanitarian visa by the embassy involves Belgian and third-country (faith-based) organizations.[637] Because no procedure is laid down and no data to that matter are made (publicly) available, it is unclear to what extent their involvement is decisive in the *prima facie* refugee status determination.

As noted by Bianchini in the Italian context, the involvement of private (faith-based) organizations may be problematic because of the flexible selection criteria, leaving room for setting aside the principles of legality and equality 'in favour of more practical and informal solutions'. Moreover, Bianchini argues that the lack of a formal procedure may also induce issues in terms of accountability and professionalism of the actors involved.[638]

In the context of the Belgian humanitarian visa practice, the Christian NGO Sant'Egidio has been known to be involved in the selection process through 'humanitarian corridors', which are a form of private sponsorship. As laid down in the 2017 letter of intent, Sant'Egidio selects third-country

[633] Serge Bodart (2020) p 228
[634] Even though resettlement is officially to be distinguished from humanitarian visas, as explained in *Chapter 1, Section 1.6.3.*
[635] See the discussion of the rescue operations of Christian Syrians in 2017 and 2018 in the next paragraph.
[636] 'Migratie in cijfers en in rechten 2020 | Katern uit het jaarverslag: Toegang tot het grondgebied' (Myria Federaal Migratiecentrum 2020) <www.myria.be/files/CHAP3-Toegang_tot_het_grondgebied-NL-AS.pdf> accessed 23 November 2021 ; 'Nota van Myria voor de Kamercommissie Binnenlandse Zaken, Algemene Zaken en Openbaar Ambt: Humanitaire visa: naar een omkaderd en transparant beleid' (Myria Federaal Migratiecentrum 29 January 2019) <www.myria.be/files/Myria-Nota-voor-de-Kamercommissie-290119.pdf> accessed 23 November 2021
[637] 'Nota van Myria voor de Kamercommissie Binnenlandse Zaken, Algemene Zaken en Openbaar Ambt: Humanitaire visa: naar een omkaderd en transparant beleid' (Myria Federaal Migratiecentrum 29 January 2019)
[638] Katia Bianchini (2020) p 181-183

nationals based on criteria of nationality (Syrian), vulnerability (families with children, the elderly, and disabled refugees) and, potentially, a connecting factor with Belgium.[639] They do so in close cooperation with partner NGOs and churches in Lebanon and Turkey.[640] The list of selected applicants is subsequently approved by the responsible Belgian Minister, after which a visa is issued by the Belgian embassy in Lebanon or Turkey.[641]

More problematic has been the private organization involvement in the 'rescue operations' in 2017 and 2018, which aimed to rescue Christian Syrians by granting humanitarian visas before allowing these pre-selected individuals and families to travel to Belgium and apply for international protection there. In that context, the Belgian politician Melvin Kucam was sentenced to prison over *inter alia* human trafficking.[642] Kucam – who is a member of the same political party as the state secretary responsible for migration at that time – received thousands of euros from applicants for being the intermediary in Belgian rescue operations for Christian Syrians, instead of the applicants solely paying the administrative costs that are normally due.[643] It remains unclear whether a (formal or informal) agreement existed between the Belgian government and Kucam's organization. In addition to humanitarian visa fraud, Kucam has also been sentenced for allowing 101 recipients of humanitarian visas to travel onwards to other EU Member States instead of applying for international protection in Belgium.[644]

The *Kucam* case not only showcases just how influential private organizations have been in the Belgian humanitarian visa practice, but also how susceptible to abuse humanitarian visa systems may be. This may very well be attributed to the obscurity of the procedure followed and the criteria

[639] 'Intentieverklaring betreffende het opzetten van een privaat gefinancierde "humanitaire corridor" voor 150 Syrische kwetsbare vluchtelingen uit Libanon en Turkije naar België tussen de Belgische Staatssecretaris voor Asiel en Migratie en De Gemeenschap van Sant'Egidio in partnerschap met de erkende erediensten van België' (Sant'Egidio Belgium 22 November 2017) <www.santegidio.be/wp-content/uploads/2019/01/Intentieverklaring-Humanitaire-Corridors.pdf> accessed 23 November 2021 p 2-3
[640] 'Nota Sant'Egidio over project 'Humanitaire corridor' (2017-2018) voor hoorzitting Kamercommissie Binnenlandse Zaken' (Sant'Egidio Belgium 5 February 2019) <www.santegidio.be/wp-content/uploads/2019/02/2019-Nota-voor-Hoorzitting-Kamercommissie-5-feb.pdf> accessed 23 November 2021
[641] 'Nota van Myria voor de Kamercommissie Binnenlandse Zaken, Algemene Zaken en Openbaar Ambt: Humanitaire visa: naar een omkaderd en transparant beleid' (Myria Federaal Migratiecentrum 29 January 2019); 'Intentieverklaring betreffende het opzetten van een privaat gefinancierde "humanitaire corridor" voor 150 Syrische kwetsbare vluchtelingen uit Libanon en Turkije naar België tussen de Belgische Staatssecretaris voor Asiel en Migratie en De Gemeenschap van Sant'Egidio in partnerschap met de erkende erediensten van België' (Sant'Egidio Belgium 22 November 2017)
[642] Antwerp Court of First Instance, Chamber AC10 Case 19A001065 *K.M.* [2021] para 3.2.1 A (p 35-44)
[643] *K.M.* [2021] para 3.2.1 A (p 35-44)
[644] *K.M.* [2021] para 3.2.1 A (p 43)

used. The consequences thereof will be further discussed in light of the legal function of mutual trust in *Chapter 6*.

5.4.2 Case law

Due to the observed obscurity of the procedure and criteria, it should come as no surprise that the Belgian humanitarian visa practice has led to strategic litigation in order to obtain 'better safeguards, less discretionary decisional processes and quicker decisions'.[645] The Belgian litigation has so far resulted in two judgements on the European level: the *X and X* judgment of the CJEU and the *M.N.* judgment of the ECtHR.[646]

X and X

In *X and X*, a Syrian family (a couple and their three minor children) submitted an application for a humanitarian visa at the Belgian embassy in Lebanon, after which they returned to Aleppo, Syria.[647] Their application was based on article 25(1)(a) of the Visa Code:

> '1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:
>
> (a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations,
>
> (i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;
>
> (ii) to issue a visa despite an objection by the Member State consulted in accordance with Article 22 to the issuing of a uniform visa; or
>
> (iii) to issue a visa for reasons of urgency, although the prior consultation in accordance with Article 22 has not been carried out'.[648]

[645] Tristan Wibault, 'Making the Case X&X for the Humanitarian Visa' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 271-282, p 275
[646] *X and X v Belgium* [2017] ; *M.N. v Belgium* [2020]
[647] *X and X v Belgium* [2017] para 19
[648] Art. 25(1)(a) Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243

They argued that a Schengen visa would allow them to apply for international protection in Belgium. However, the Belgian decision-making authorities denied the application because of the envisioned long-term stay, the lack of a positive obligation resulting from Article 3 ECHR, and the lack of possibility to apply for international protection at an embassy.[649]

When this case was brought before the Belgian CALL, it issued two preliminary questions to the CJEU, essentially understood as: Does the term 'international obligations' of Article 25(1)(a) of the Visa Code include the obligations under Article 4 and 18 of the Charter (prohibition of torture and the right to asylum), Article 3 of the ECHR (prohibition of torture) and Article 33 of the Refugee Convention (prohibition of refoulement)? If so, would this entail a positive obligation to grant such a humanitarian visa if a risk of violation of any of these provisions is established?

Based on Article 1 of the Visa Code,[650] the CJEU ruled that applications for long term stays do not fall under the scope of application of the Visa Code.[651] Thus, the application made in the *X and X* case was not considered to be governed by EU law and the Charter was not deemed applicable.[652] However, the reasoning of the Court could have easily gone the other way. In their Opinion to the *X and X* case, Advocate General Mengozzi not only found that humanitarian visa applications fall within the scope of EU law, but also that the Member States are obliged to issue a humanitarian visa

> 'if there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing that national to treatment prohibited by Article 4 of the Charter, by depriving that national of a legal route to exercise his right to seek international protection in that Member State.'[653]

As to the jurisdiction question, the Advocate General found that the applicants only intended to reside on the Belgian territory for a maximum of 90 days *based on their short-term visa.* After the expiration of their short-term visa, their right to remain on the territory would stem *from their*

[649] *X and X v Belgium* [2017] para 21
[650] Art. 1(1) of the Visa Code stipulates that the Visa Code 'establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period.'
[651] *X and X v Belgium* [2017] para 43
[652] *X and X v Belgium* [2017] para 45
[653] *X and X v Belgium* [2017] Opinion AG Mengozzi para 163

application for international protection (or, in case the application was processed earlier, *from their recognized status granting international protection*).[654] As the Advocate General states,

> '[t]he intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium *cannot alter the nature or purpose of their applications*. In particular, that intention cannot convert them into applications for long-stay visas or place those applications outside the scope of the Visa Code and of EU law'.[655]

However, the CJEU considered that allowing for humanitarian visas to fall under the scope of the Visa Code would undermine the Dublin system,[656] i.e. the system of internal EU asylum law determining the Member State responsible for an application for international protection.[657] This reasoning has been criticized by Brouwer for applying a narrow understanding of Article 25 of the Visa Code. According to Brouwer, the term 'international obligations' in this provision offers a legal basis because of the principle of non-refoulement, which is also protected under Article 4 of the Charter.[658] In *Chapter 6,* I will compare the *X and X* reasoning to the case law on the Dublin system in light of the mutual trust between the Member States.

In *X and X,* the Court found that the Visa Code does not intend to harmonize the laws of the Member States in the field of international protection – to that end, the Procedures Directive is only applicable to applications for international protection made 'in the territory' including at the borders, in territorial waters and in transit zones.[659] The *X and X* judgment concludes by deciding that humanitarian visas fall solely within the scope of national law[660] – thereby leaving open the possibility that a positive obligation could exist under Article 3 ECHR.

M.N.

This possibility led to strategic litigation in a different, albeit factually similar case before the ECtHR: *M.N.*. As in the CJEU *X and X* case, the Belgian authorities made the decision to deny

[654] *X and X v Belgium* [2017] Opinion AG Mengozzi para 52
[655] *X and X v Belgium* [2017] Opinion AG Mengozzi para 50
[656] *X and X v Belgium* [2017] para 48
[657] See *Chapter 3, Section 3.3.*
[658] Evelien Brouwer (2021) p 64-66
[659] *X and X v Belgium* [2017] para 49
[660] *X and X v Belgium* [2017] para 51

humanitarian visas, in response to applications submitted to the Belgian embassy in Beirut.[661] In *M.N.,* the main issue was the question of jurisdiction of the ECtHR.

Article 1 of the ECHR requires the applicant to fall under the jurisdiction of the State in order to fall under the scope of the ECHR.[662] Without going into detail on jurisdiction issues before the ECtHR, jurisdiction is most often established via territoriality, requiring the applicant to reside or to have resided on the territory of the State.[663] However, '[t]he Court has recognised that, as an exception to the principle of territoriality, acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention.'[664] In its case law, the ECtHR has recognized extraterritorial jurisdiction in case of 'effective control over an area outside [the State's] national territory',[665] which was established *inter alia* as a result of 'the actions or omissions of [the State's] diplomatic or consular officials when, in their official capacity, they exercise abroad their authority in respect of that State's nationals or their property.'[666] The ECtHR stresses that extraterritorial jurisdiction is exceptional, and is not established because of just any international element.[667]

Applied to the facts of the *M.N.* case, the Court reiterated that the applicants had never been in Belgium, and that there are no ties of family or private life to that State.[668] In addition, Belgium does not exercise control on Syrian or Lebanese territory.[669] Therefore, no 'exceptional circumstances existed which could lead to a conclusion that Belgium was exercising extraterritorial jurisdiction in respect of the applicants'.[670] Mere administrative control over embassies in third countries is insufficient, according to the ECtHR, to bring every person who enters the embassies' premises under the jurisdiction of that State.[671] In addition, bringing

[661] *M.N. v Belgium* [2020] para 110
[662] Art. 1 ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'
[663] *M.N. v Belgium* [2020] para 98
[664] *M.N. v Belgium* [2020] para 101
[665] *M.N. v Belgium* [2020] para 103
[666] *M.N. v Belgium* [2020] para 106
[667] *M.N. v Belgium* [2020] para 109
[668] *M.N. v Belgium* [2020] para 115
[669] *M.N. v Belgium* [2020] para 116
[670] *M.N. v Belgium* [2020] para 113
[671] *M.N. v Belgium* [2020] para 119

proceedings before the Belgian domestic courts was also considered insufficient by the ECtHR,[672] as finding otherwise

> 'would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction.'[673]

As the applicants did not find themselves within Belgium's jurisdiction, their application based on Article 3 of the ECHR was found inadmissible.[674] However, the ECtHR leaves open the possibility of 'endeavours made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations'.[675]

Alteration of the practice

Both European Courts leave humanitarian visas to the discretion of the Member States, and the CJEU has in fact prevented the Belgian visa practice from relying on the EU Visa Code.

As a result, the Belgian practice has been altered. Since the *X and X* judgment, the practice has shifted from a system based on short-term Schengen visas (relying on Article 5 of the Visa Code) to long-term national visas (relying on national law). In addition, it seems like the number of humanitarian visas granted for asylum reasons is decreasing and more applications for humanitarian visas are being rejected.[676] However, it has to be acknowledged here that any information on the Belgian humanitarian visa system may paint an incomplete picture; not only do we not know how many humanitarian visas are granted for asylum reasons (as opposed to *inter alia* family reunification reasons), the grounds for refusal remain unclear.

[672] *M.N. v Belgium* [2020] para 122
[673] *M.N. v Belgium* [2020] para 123
[674] *M.N. v Belgium* [2020] para 125
[675] *M.N. v Belgium* [2020] para 126
[676] 'Migratie in cijfers en in rechten 2020 | Katern uit het jaarverslag: Toegang tot het grondgebied' (Myria Federaal Migratiecentrum 2020) p 5

5.4.3 Multidimensional approach to the Belgian humanitarian visa practice

Based on the foregoing overview of the Belgian humanitarian visa practice and of the CJEU *X and X* judgment and the ECtHR *M.N.* judgement, I will hereafter map the spatial, relational, functional and instrumental dimension of the Belgian humanitarian visa practice.

Spatial dimension

Based on the study of the Belgian humanitarian visa practice, its spatial dimension is considered far from Europe. Applications for humanitarian visas to Belgium are received by an embassy or consulate in a third country, commissioned by the Belgian Minister. Travelling legally to Belgium or Europe is impossible without a pre-approved visa. Thus, the spatial dimension concerns the geographical distance between the location of the embassy or consulate in the third country and the Belgian territory to which the humanitarian visa grants access. The distance varies depending on the third country concerned, but is to be considered far in all humanitarian visa cases. Indeed, no practice or proposals, neither on the Belgian nor on the EU level, allow for the granting of visas (humanitarian or otherwise) upon arrival.

Relational dimension

The policy actors involved in the Belgian humanitarian visa system showcase the complex set of relationships and dynamics that the externalization of European asylum law may entail.

Firstly, national official actors are involved in the Belgian humanitarian visa practice. The Belgian Minister responsible for migration matters is involved because they have the discretionary power to grant humanitarian visas. The application for a humanitarian visa is received, however, by an embassy or consulate in the third country. Both the embassy or consulate and the Belgian Minister are national, official actors. The granting or denial of a humanitarian visa is a unilateral act of Belgium.

Secondly, and as with the regular visa system, private actors such as transport companies are involved in the document checks of people legally travelling to Belgium or Europe.[677] More importantly, private (faith-based) organizations have been involved in the selection process, which

[677] See Sophie Scholten and Paul Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands' [2008] European Journal of Migration and Law 123; Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' [2017] European Journal of Migration and Law 307

makes the Belgian humanitarian visa system susceptible to abuse, as was argued earlier in *Section 5.3.1* and will be expanded upon in *Chapter 6, Section 6.3.1*.

In sum, the relational dimension of the Belgian humanitarian visa system consists of unilateral actions of official national actors, accompanied by private actors in Belgium and in the third country.

As noted in *Chapter 1, Section 1.2.2* on the conceptualization of external European asylum law, external European asylum law in this study is not limited to EU action but also includes Member State action. The relational dimension of the Belgian humanitarian visa practice is an example of the potential of such Member State action. In addition, it showcases how the unilateral actions of one Member State may influence the dynamics of Member State interaction. An assessment of the relational dimension of humanitarian visas will be made in *Chapter 6* in light of the legal function of mutual trust.

Functional dimension

As defined in the IOM Glossary on Migration, humanitarian visas are 'often aimed at complying with relevant human rights and refugee law'.[678] If this presumption is correct, the aim of humanitarian visas could be considered ethical because the Member States have an *intrinsic* motivation to protect human rights. For example, an ethical consideration may be that the setting up of a humanitarian visa system could prevent the fundamental rights violations resulting from human smuggling.[679]

The aim of complying with human rights and refugee law may also be conceived in political terms, when viewing it as the *external* motivation of the EU Member States to comply with their obligations under human rights law – in the case of the EU and its Member State, primarily with their obligations under the ECHR and the Charter.

Moreover, from an efficiency and cost-effectiveness point of view, humanitarian visas may be viewed as decreasing costs for battling human smuggling as they may be perceived as alternatives for refugees to reach Europe. In addition, humanitarian visas may also be seen as decreasing costs

[678] 'Glossary on Migration' (IOM 2019), p 97-98

[679] See Wouter van Ballegooij and Cecilia Navarra, 'Humanitarian visas. European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (Rapporteur: Juan Fernando Ló pez Aguilar)' (European Parliamentary Research Service PE 621.823 22 November 2018)

for return procedures for those asylum seekers who are not recognized as refugees. Indeed, humanitarian visas are usually only granted after determining the *prima facie* refugee status of the person concerned, i.e. an assessment on the basis of objective criteria which justifies a presumption that this person meets the refugee definition.[680] Such an assessment prior to the asylum procedure arguably decreases the chance that the application for international protection will be denied and that the person will have to return to their country of origin or a safe third country. As a result, humanitarian visas may lead to decreasing the costs of return procedures.

Instrumental dimension

As explained above, the Belgian humanitarian visa system does not rely on a formal procedure, but rather on the discretion of the Minister or Secretary of State. In addition, sometimes informal agreements are concluded between the Minister responsible for migration and a private actor involved in the selection process for humanitarian visas. However, the outcome of such an informal procedure is a formal legal-administrative instrument, namely the humanitarian visa itself. The policy toolbox thus consists of informal and formal legal-administrative measures.

In sum

Firstly, the spatial dimension of the Belgian humanitarian visa practice is far from Europe. Secondly, its relational dimension consists of unilateral acts of Belgium through national, official actors, with private actor involvement. Thirdly, the functional dimension of the Belgian humanitarian visa system may be considered to consist of ethical, political, and efficiency and cost-effectiveness considerations. Lastly, the instrumental dimension of the Belgian humanitarian visa practice relies on informal and formal legal-administrative measures.

5.5 Conclusion

As conceptualized at the beginning of this chapter, external European asylum law is understood in this study as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe.

[680] 'UNHCR Global Report 2005: Glossary' (UNHCR 2005) <https://www.unhcr.org/449267670.pdf> accessed 23 November 2021

Starting from Zaiotti's multidimensional model, the case studies on the EU-Turkey Deal and the Belgian humanitarian visa practice were analyzed from their spatial, relational, functional and instrumental dimensions. This has allowed me to study and compare two largely different examples of the scattered and diverse field of external European asylum law. In addition, approaching the case studies from Zaiotti's multidimensional model has led me to draw cautious conclusions on the ways the Member States cooperate in external European asylum law and which considerations such externalization may be driven by.

Since the multidimensional model in this chapter is limited to the dimensions of two case studies, careful attention must be paid when attempting to draw conclusions covering all sources of external European asylum law. However, what the model does allow for, is a deepening of our understanding of what cooperation in the external dimension of European asylum law might look like.

Based on the study of a multidimensional approach to the EU-Turkey Deal and the Belgian humanitarian visa practice, I conclude that official actors still play the leading role, be it acting unilaterally or multilaterally, or even bi-multilaterally in case of involvement of EU institutions. However, private actor involvement is not excluded and may be influential in some cases. Instrumentally speaking, this results in a myriad of possibilities with legal-administrative instruments making up the main part and economic tools sometimes used as a supporting measure. Quite notable is the pooling of informal and formal instruments in external European asylum law.

As to the reasoning behind the externalization of European asylum law, efficiency and cost-effectiveness seem to be an important perceived advantage of proactively managing migration outside of Europe. In addition, I found that the rationale behind the externalization of external European asylum law may also be political. Interestingly, this political motivation may stem either from wishing to *prevent* people on the move from reaching Europe and consequently triggering the fundamental rights obligations of the Member States, or from wishing to *comply* with their fundamental rights obligations under EU law and the ECHR. Regarding the consideration to uphold fundamental rights, the motivation to protect fundamental rights may also be intrinsic and thus the reasoning behind externalization can also be perceived as ethical.

The foregoing results in the following multidimensional model of the EU-Turkey Deal and the Belgian humanitarian visa practice:

	EU-Turkey Deal	Belgian humanitarian visa practice
Spatial dimension	· Near · Far	· Far
Relational dimension	· (bi-)multilateral by official actors	· Unilateral by official actors · Private actor involvement
Functional dimension	· Efficiency and cost-effectiveness · Political: preventing to trigger fundamental rights obligations	· Efficiency and cost-effectiveness · Ethical: intrinsic motivation to protect fundamental rights · Political: external motivation to comply with fundamental rights obligations
Instrumental dimension	· Informal and formal · Legal-administrative · Economic	· Informal and formal · Legal-administrative

Table I: Multidimensional model of the EU-Turkey Deal and the Belgian humanitarian visa practice

In sum, the multidimensional approach to the case studies has shown that the Member States may cooperate in the field of external European asylum law in an official capacity, sometimes in collaboration with private actors. Examples have been found of unilateral and (bi-)multilateral actions resulting in formal and informal legal-administrative instruments, supported by economic instruments. The reasoning behind the externalization in the field of European asylum law may be explained by political and ethical rationales, and considerations of efficiency and cost-effectiveness.

Having answered the sub-questions regarding the ways Member States may cooperate in external European asylum law and the reasoning behind the externalization of this field of law, brings us a step closer to the inquiry on the general research question of how the externalization of European asylum law should influence the application of the principle of mutual trust and its relation to other

general principles of EU law, and, vice versa, how mutual trust and its relation to other general principles of EU law should influence external European asylum law.

Before being able to answer the general research question, however, the next chapter of *Part II* (*Chapter 6*) first studies several legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and of its relation to other general principles of EU law. The case studies of *Chapter 5,* and specifically the overview of the identified relational, functional and instrumental dimension will provide the starting point and context. They will allow for the identification and interpretation of the legal consequences of the case studies on the EU-Turkey Deal and the Belgian humanitarian visa practice in *Chapter 6*.

Chapter 6 Consequences of externalization

6.1 Introduction

Mutual trust is undeniably an element of the organization of the European Union and has received ample attention in the context of *internal* EU law.[681] However, it has, to the best of my knowledge, not been assessed in the context of *external* European law. In this chapter, I aim to add to legal scholarship on mutual trust by studying external European asylum law[682] through the lens of mutual trust.

In this final chapter of *Part II*, the previous chapters of this study are brought together. *Chapter 6* does so to answer the sub-question of what the legal consequences of the externalization of European asylum law are in view of the legal function of mutual trust and of its relation to other general principles of EU law. More specifically, I will build upon the study of mutual trust in internal EU law (*Chapter 3*) and the study of mutual trust as a general principle of EU law (*Chapter 4*), against the background of the case studies of external European asylum law (*Chapter 5*).[683] As such, *Chapter 6* brings the pieces of the puzzle together.

As noted as early as 2017 by Prechal: 'If the principle of mutual trust is to be considered a principle of EU constitutional law' – which I argued in *Chapter 4* it should be because it fulfills the defining characteristics of general principles of EU law – 'the question arises to what extent the principle may or will have a larger field of application than the AFSJ'.[684] While Prechal's comments on 'a larger field of application than the AFSJ' arguably concern a broader material scope of application, it could also be argued that the principle of mutual trust may have a larger spatial scope of application, i.e. extending to external European asylum law.

---

[681] See *Chapter 3* and the authors referenced there.
[682] External European asylum law is defined in this study as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe (see *Chapter 5, Section 5.2*). In line with Wessel (Ramses Wessel (2020) p 1), the internal dimension of external European asylum law is understood as 'the set of rules which govern the constitutional and institutional legal organization of [the EU] in pursuit of its interests in the world' to proactively manage migration at its source.
[683] The sub-question of *Chapter 6* on the consequences of externalization could not be answered any earlier. *Chapter 4* (on mutual trust as a general principle of EU law) was not a fitting place as I had not yet gathered information on external European asylum law. Neither was *Chapter 5* (on external European asylum law) as the sub-question answered in *Chapter 6* also concerns mutual trust and therefore exceeds the scope of *Chapter 5*.
[684] Sacha Prechal [2017] p 78-79

The possibility of such an external extension of mutual trust is supported by my finding in *Chapter 4* that mutual trust should apply to the cooperation of the Member States in the external sphere of European law whenever their cooperation might impact internal or external EU law. Based on this possibility, the following sections will delve into the extension of the principle of mutual trust to external European asylum law, more specifically in the context of the two selected case studies of external European asylum law, i.e. the EU-Turkey Deal (*Section 6.2*) and the Belgian humanitarian visa practice (*Section 6.3*). For each case study, several consequences will be discussed in view of the legal function of mutual trust (and loyal cooperation) in *Section 6.2.1* and *6.3.1*, and in view of the relation between mutual trust and fundamental rights in *Section 6.2.2* and *Section 6.3.2*.

The following identified consequences of the externalization of European asylum law do not intend to be all-encompassing. To begin with, they are limited to two case studies. Moreover, the consequences of the EU-Turkey Deal and the Belgian humanitarian visa practice are studied through the lens of mutual trust – from the perspective of Member State cooperation. It is not to be excluded that other consequences of these case studies could be identified if studied through a different lens or in the context of different case studies. However, the consequences of externalization identified hereafter do deepen our understanding of the status quo of external European asylum law in light of mutual trust.

6.2 Consequences of the EU-Turkey Deal

The EU-Turkey Deal was studied in *Chapter 5, Section 5.3* as a critical case for agreements with third countries with an asylum component because of its foreseeable impact on the cooperation between the EU (Member States) and third countries. Hereafter, several legal consequences of the EU-Turkey Deal will be analyzed in view of, firstly, the legal function of mutual trust and, secondly, of the relation between mutual trust and fundamental rights.

6.2.1 The legal function of mutual trust

Within the Dublin system, the Member States cooperate multilaterally under the umbrella of the European Union. The cooperation between the Member States is based on the principle of mutual trust which strives to balance the effectiveness of EU law and the sovereignty of the Member

States.[685] From the study of the EU-Turkey Deal in *Chapter 5*, the question emerges how the introduction of another actor – a third country – may influence the cooperation between the Member States in view of the mutual trust between them. This section studies if and how the (bi-)multilateral cooperation on the EU-Turkey Deal[686] (an instrument of external European asylum law) may influence the intra-European cooperation between the EU Member States on the Dublin Regulation (an instrument of internal EU asylum law), in light of the legal function of mutual trust.

Precedence

Notably, in *Chapter 5, Section 5.3*, I found that asylum seekers arriving on the Greek island hotspots would fall under the EU-Turkey Deal. As a result of the 1:1 mechanism therein, asylum seekers would be sent from Greece to Turkey as a safe third country. Let us assume for a moment that a third-country national managed to travel from Greece to another Member State A and applied for international protection in A. While Greece would in principle be held responsible under the Dublin Regulation,[687] the Dublin system would instead determine A as the Member State responsible for the assessment of the application for international protection, because the general rebuttal of mutual trust towards Greece.[688] On the contrary, based on the 1:1 mechanism of the EU-Turkey Deal, the third-country national would have to be sent back to Turkey based on the safe third country assumption. In practice, it has been observed that Syrians arriving on the so-called hotspots were not sent back to Turkey *inter alia* when, based on the Dublin system, another Member State was deemed responsible for the assessment of the application for international protection concerned.[689]

The precedence of the Dublin Regulation over the EU-Turkey Deal could be argued to be in line with Article 288 TFEU which stipulates the hierarchy of the legal acts of the Union. Because the EU-Turkey Deal is, formally, not a legal act of the Union but consists of several communications by the EU institutions, precedence would have to be given to the Dublin *Regulation*. However, it

[685] See *Chapter 3, Section 3.2* on the legal function of the principle of mutual trust.
[686] See the discussion on the relational dimension of the EU-Turkey Deal in *Chapter 5, Section 5.4.3*.
[687] Art. 13 Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31
[688] See *Chapter 3, Section 3.3*.
[689] 'Country Report: Greece 2019 Update' (AIDA Asylum Information Database June 2020)

could also be argued that the EU-Turkey Deal of 2015 should precede the Dublin Regulation of 2013 based on the principle of *lex posterior derogat legi anteriori/priori*. As a result, general rules of precedence do not provide us with one workable solution. CJEU case law also does not provide full clarity.[690]

No rules of precedence are laid down in the Dublin system nor the EU-Turkey Deal. Therefore, it remains impossible to state with certainty which provision of internal or external law would have to be applied in such cases.

Safe third country assumption

In addition, the reliance of the EU-Turkey Deal on the safe third country assumption may be problematic because there are national divergences between the EU Member States on which third countries are to be considered as a safe third country. With such divergences in mind, the EU and the Member States have to be mindful of how the interplay between the EU-Turkey Deal and the Dublin system pans out in practice. Indeed, if a Member State does not regard Turkey as a safe third country, it is unclear if that Member State would automatically be held responsible for any application for international protection made on its territory, or if the Dublin criteria for determining the EU Member State responsible would become applicable once again. Such divergence is not covered by the Procedures Directive,[691] although the 2020 New Pact on Migration and Asylum has announced greater harmonization in the use of safe (third) country concepts.[692]

Concerns on the interplay of the EU-Turkey Deal and the Dublin system may become increasingly relevant if the EU and its Member States continue to conclude similar agreements with asylum components with third countries that are not considered a safe third country by some of the

[690] For example, the ruling in the *Mirza* judgement does not offer a solution because it concerns a slightly different situation from the one outlined above. In *Mirza*, the CJEU ruled on a situation in which an applicant is transferred from Member State A to B – the one responsible based on the Dublin Regulation – and then sent from to a safe third country. Court of Justice of the European Union Case C-965 PPU *Mirza* [2016] paras 21-29, 37 and 53
[691] See Recital 46-48 of the Preamble Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180
[692] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final, p 5

Member States. Based on the Pact, it is to be expected that this will be the case.[693] This bears the potential of negatively reducing the application in practice of both the EU-Turkey Deal and the Dublin Regulation.

In sum

Based on the foregoing, I argue that the lack of clarity of which instrument of internal EU asylum law or external European asylum law is to be applicable, and the safe third country assumption that the EU-Turkey Deal is based on, may lead to ineffectiveness in the applicability of the EU-Turkey Deal and of the Dublin system. As noted under *Chapter 3, Section 3.2,* effectiveness of EU law is understood in this study as its *effet utile*: 'justiciability, practical effect and/or enforceability of clear, precise and unconditional European rights for European citizens who may invoke those rights before the courts'.[694] Because of the discussed concerns on issues of precedence and divergences on the safe third country concept, I argue here that the interplay between the EU-Turkey Deal and the Dublin system renders the rights, which may be derived from EU law, insufficiently clear, precise and unconditional to ensure that individuals may invoke such rights before the courts.[695] This may limit the practical effect of these instruments of internal EU asylum law and external European asylum law.

A striking illustration of the lack of justiciability of the EU-Turkey Deal is the *NF* Order of the EU General Court in which it was found that the EU-Turkey Deal was not subject to judicial review before the EU Courts, as discussed in *Chapter 5, Section 5.3.2*.[696] In my opinion, such lack of judicial review threatens the clarity required under the principle of effectiveness, because it adds to the previously mentioned uncertainty regarding rules of precedence. Indeed, it remains unclear for individuals to which courts they may turn in order to ensure the observance of their rights. While the individual perspective is not the focal point of this study, the observance of individual access to judicial review is interesting from a systemic point of view, too, because a lack of justiciability or judicial review is an element of the effectiveness of EU law – which is, in turn, an

[693] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final, p 2 and 5
[694] Elvira Mendez-Pinedo [2021] p 10
[695] This understanding of effectiveness as *effet utile* of EU law is adopted from Elvira Mendez-Pinedo [2021] p 10. See *Chapter 3, Section 3.2.*
[696] *NF v European Council (General Court)* [2017] paras 62, 68 and 71

element of the legal function of mutual trust, i.e. seeking a balance between ensuring the effectiveness of EU law and the sovereignty of the Member States.

Thus, the interplay between the EU-Turkey Deal and the Dublin system has arguably led to a decrease in *effet utile* of EU law. I submit that the balance between ensuring the effectiveness of EU law and the sovereignty of the Member States, sought for by the principle of mutual trust, may be disturbed due to the interplay between internal EU asylum law and external European asylum law. Such disturbance is undesirable in light of the legal function of mutual trust.

Arguably, this is not only a consequence of the externalization of European asylum law. It may also be said to be a consequence of the malfunctioning of the Dublin system in its current shape, as touched upon earlier in this section. Not only does the externalization of European asylum law impact internal EU asylum law, the reverse may also be the case. Here, the pre-existing issues in the Dublin system may negatively impact the application in practice of the EU-Turkey Deal.

In *Chapter 7*, I will recommend a better approach to the interplay between the EU-Turkey Deal and the Dublin system, aimed at finding a balance between the effectiveness of EU law and the sovereignty of the Member States – that is, a better approach because it would be more in line with the legal function of the principle of mutual trust.

While the foregoing answers the question of what the legal consequences are of the EU-Turkey Deal in light of the legal function of mutual trust, the following section discusses the legal consequences of the same instrument from a different point of view, namely the relation between mutual trust and another general principle of EU law.

6.2.2 Mutual trust and fundamental rights

In addition to the legal function of mutual trust, its relation to the general principle of fundamental rights also provides a framework against which to analyze the legal consequences of the EU-Turkey Deal.

Fundamental rights protection in Europe

Arguably, the level of fundamental rights protection *inside* Europe has decreased as a result of the EU-Turkey Deal. This is mainly due to the fundamental rights situation in the 'hotspots'.[697]

The European hotspot approach consists of registering and processing applications for international protection at the external European border. Hotspots have been created in Italy, *inter alia* on the island of Lampedusa, and in Greece, on five of the Aegean islands. The general idea behind the hotspot approach is to either grant international protection (or another residence permit) or to start a return procedure to a third country, in the case of the EU-Turkey Deal: to Turkey.[698] As observed by the EU Fundamental Rights Agency (FRA),

> 'serious fundamental rights gaps persist […]. While some of these can be addressed at the level of individual hotspots, others are directly linked to the overall mode of operation of the hotspots. Many of the protection challenges experienced in the Greek hotspots […] are the consequence of new arrivals' prolonged stay there. […] Other challenges with a similarly profound impact encountered in both Greece and Italy relate to unaccompanied children […]. The hotspot approach is deemed to fail in respecting the Charter rights if these systemic issues are not addressed through concerted legislative, policy and operational response at both the EU and national level.'[699]

While the hotspot approach in Greece is not formally linked to the EU-Turkey Deal, it has been accepted by the FRA that they are in practice.[700] Without an adaptation of the hotspot approach, the implementation of the 1:1 mechanism of the EU-Turkey Deal may have been hindered because the third-country nationals who had reached Europe would have been able to travel onwards instead of being returned to Turkey as a safe third country.[701] Most illustrative, the date after which

---

[697] Fundamental Rights Agency, 'FRA Opinion 3/2019: Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2019) p 8

[698] Fundamental Rights Agency, 'FRA Opinion 5/2016: Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2016) p 12; Nikos Kourachanis, 'Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015-2017)' [2018] International Migration & Integration 1153, p 1153-1154

[699] Fundamental Rights Agency, 'FRA Opinion 5/2016: Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2016) p 4

[700] Fundamental Rights Agency, 'FRA Opinion 3/2019: Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2019) p 8

[701] See Fundamental Rights Agency, 'FRA Opinion 5/2016: Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2016) p 16.
For more information on the assumption of Turkey being a safe third country, see *Chapter 5, Section 5.4.1* and the literature referenced there.

any Syrian refugee arriving at the hotspots would be transferred to Turkey is the same date as the implementation date of the EU-Turkey Statement. In combination with the reported poor quality of the reception infrastructure and procedural issues, the EU-Turkey Deal has arguably (indirectly) led to fundamental rights violations in the hotspots.[702] While the fundamental rights situation in Greece was insufficient before 2016,[703] the situation after the implementation of the EU-Turkey Deal not only persisted but even worsened, according to the FRA.

Based on the foregoing, I conclude that one consequence of the EU-Turkey Deal is that the fundamental rights of asylum seekers in the hotspots on the Greek Aegean islands have been negatively impacted. In other words, this instrument of external European asylum law has led to a decrease in the level of fundamental rights protection *in Europe*.

Spatial dimension

The impact of external European asylum law on the fundamental rights protection in Europe is linked to the spatial dimension identified in *Chapter 5*. It is quite perceivable that instruments of external European asylum law with a 'near' spatial dimension[704] – such as the EU-Turkey Deal (see *Chapter 5, Section 5.3.3)* – are more likely to influence the level of fundamental rights protection at the territory that the instrument concerned deters people on the move from reaching (which is Europe in this case). The conclusion that instruments of external European asylum law with a near spatial dimension may lead to a decrease in the level of fundamental rights protection in Europe is not only important in terms of the fundamental rights protection of individuals in Europe. In addition, it may also heavily impact the way the Member States interact with one another within the EU legal order. As argued in *Chapter 4, Section 4.4.1*, the fundamental rights obligations of the Member States are an essential requirement to the functioning of the principle of mutual trust. A decrease in the level of fundamental rights protection in Member State B may

[702] Fundamental Rights Agency, 'FRA Opinion 5/2016: Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2016); Fundamental Rights Agency, 'FRA Opinion 3/2019: Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2019)

[703] 'Greece: Chaos and squalid conditions face record number of refugees on Lesvos' (Amnesty International 24 August 2015) <www.amnesty.org/en/latest/news/2015/08/chaos-and-squalid-conditions-face-record-number-of-refugees-on-lesvos/> accessed 11 September 2022

[704] A 'near' spatial dimension implies that there is little 'geographical distance between the location of the object that needs to be protected (typically, the territory of a state receiving large numbers of migrants) and the location where a specific migration policy is implemented.' See Ruben Zaiotti (2016) p 8-9 and *Chapter 5, Section 5.3.1.*

give rise to the finding that B no longer (fully) fulfills its fundamental rights obligations, and, as a result, to a (further) decrease of mutual trust of Member State A in Member State B (or the obstruction of the restoring of trust in case the presumption of mutual trust had previously been rebutted).

In sum

Ultimately, the negative impact of the EU-Turkey Deal on the fundamental rights obligations of Greece may also impact the whole system of internal EU asylum law, because it may decrease the chances of mutual trust of the Member States towards Greece[705] (or another Member State) being restored. In *Chapter 7*, a better approach to the possible impact of external European asylum law on the level of fundamental rights protection in the EU Member States will be recommended in light of the essential requirement nature of fundamental rights for mutual trust.

6.2.3 Legal consequences of the EU-Turkey in light of the legal function of mutual trust and its relation to other general principles of EU law

Section 6.2 partly answers the sub-question of this chapter of what the legal consequences of the externalization of European asylum law are in view of the legal function of mutual trust and of its relation to other general principles of EU law. Specifically, in this section, I studied the legal consequences of the EU-Turkey Deal.

In view of the legal function of mutual trust, I have argued that the interplay between the Dublin system and the EU-Turkey Deal may threaten the effectiveness of EU law and thus the balance between effectiveness and the sovereignty of the Member States, which is the legal function of the principle of mutual trust.

As to the legal consequences of the EU-Turkey Deal in light of the relation between mutual trust and fundamental rights, I have concluded that the EU-Turkey Deal led to a decrease in fundamental rights protection in practice in Europe. This entails that (some of) the Member States are not fulfilling their fundamental rights obligations. As a result, mutual trust will likely be rebutted or, in case of a previous rebuttal, will likely not be restored. Ultimately, this may lead to the disruption

[705] The presumption of trust towards Greece has been rebutted in general since 2011. However, since 2016, a careful tendency towards restoring trust has been observed in *Chapter 3, Section 3.3.3*.

of the Common European Asylum System or possibly even other fields of internal EU law that also rely on the principle of mutual trust.

In the following section, I will study the legal consequences of the other case study of externalization, the Belgian humanitarian visa practice, in light of the legal function of mutual trust and its relation to other general principles of EU law.

6.3 Consequences of the Belgian humanitarian visa practice

The Belgian humanitarian visa practice was studied in *Chapter 5, Section 5.4* as a critical case of humanitarian visas, which is a source of external European asylum law that demonstrates interesting cooperation dynamics between different levels of administration in Europe. In this section, several legal consequences of the Belgian humanitarian visa practice will be analyzed in light of the legal function of mutual trust and of loyal cooperation, and the relation between mutual trust and fundamental rights.

6.3.1 The legal function of mutual trust and loyal cooperation

As discussed in *Chapter 5*, the relational dimension of the Belgian humanitarian visa practice is unilateral by official actors, with private actor involvement.[706]

Abuse of rights

In *Chapter 5, Section 5.4.1*, the situation of the *Kucam* case was outlined in which private actor involvement led to human smuggling and humanitarian visa fraud. I observed that several recipients of Belgian humanitarian visas had traveled onwards to other EU Member States instead of applying for international protection in Belgium.[707] While Article 12(2) of the Dublin Regulation foresees in the situation that an asylum seeker holds a valid visa – and appoints the Member State that granted the visa as the one responsible for assessing the asylum application – it does not fully address situations such as in the *Kucam* case because of the Member State involvement c.q. knowledge.

[706] See *Section 5.5.3.*
[707] *K.M.* [2021] para 3.2.1 A (p 43)

Arguably, the situation in the *Kucam* case was contrary to the principle of prohibition of fraud or abuse of rights.[708] Fraud is defined by the CJEU as 'individuals being able to rely on EU law for abusive or fraudulent ends' and findings of such fraud or abuse of rights 'are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor'.[709]

In my opinion, the *objective* factor is fulfilled in the *Kucam* case because the purpose of the Dublin Regulation of avoiding asylum shopping[710] was circumvented. Recipients of Belgian humanitarian visas were in fact allowed to seek out the Member State they wished to apply in, despite the Dublin Regulation determining Belgium as the responsible Member State. In addition, the recipients of the Belgian humanitarian visas who applied for international protection in another Member State arguably had the intention of obtaining the advantage of getting to choose their destination Member State and this was made possible by Kucam's private organization. This private actor was commissioned by the Belgian government. In this instance, the private actor involvement artificially created the conditions laid down for obtaining the humanitarian visas, which fulfills the *subjective* factor of abuse of rights.[711] As argued in *Chapter 5*, the creation of such an option for asylum seekers to 'asylum shop' may be considered a result of the obscurity of the procedure and criteria for a humanitarian visa, in combination with private actor involvement.

Contrary to other fields of (EU) law, a conclusion of abuse of rights by asylum seekers in the context of the Dublin system does not entail practical individual consequences for the right to international protection. Due to the absolute nature of the principle of *non-refoulement*,[712] a conclusion of abuse of rights should not take away their right to international protection. However, abuse of rights may be relevant to this study in as far as it involves the Member States (or a private actor, acting on the instructions of a Member State) because it deepens our understanding of Member State cooperation dynamics. This will be further expanded upon in *Chapter 7, Section 7.5.*

External extension of mutual trust

[708] See Lucia Cerioni, 'The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re-reading of the ECJ Case Law and the Quest for a Unitary Notion' [2010] European business law review 783, p 784-789
[709] *Altun* [2018] paras 48-52
[710] See *Chapter 3, Section 3.3.1.*
[711] See Court of Justice of the European Union Case C-110/99 *Emsland-Stärke* [2000] paras 52-53
[712] Clare Moran [2021] p 1039-1040

In order to study Member State cooperation dynamics in the context of the externalization of European asylum law through the lens of mutual trust, we have to first accept the possibility of an external extension of mutual trust. As argued in *Chapter 4*, the principle of mutual trust should extend beyond Europe whenever the cooperation between the Member States might impact EU law.

However, in the case study of the Belgian humanitarian visa practice, the CJEU has not accepted the applicability of an EU law instrument in the *X and X* judgment on humanitarian visas, and thus the applicability of EU law was rejected. Despite the Court's finding, the factual situation remains that the Dublin Regulation (and thus EU law) becomes applicable when the recipients of a humanitarian visa travel onwards to another Member State. In such a situation, the Dublin system assigns the responsibility of the application for international protection of a recipient of a long-term visa (also if this is a national visa) to the Member State that has granted the long-term visa.[713]

With regards to the principle of loyal cooperation, the CJEU has on multiple occasions accepted its external extension, even without the application of an EU instrument. In such cases, other reasons urged the court to accept the application of loyal cooperation to the actions of the Member States which extend beyond Europe.[714]

Similarly, I argue that in the case of the Belgian humanitarian visa practice, the principle of mutual trust becomes relevant as soon as the recipients of humanitarian visas travel onwards and apply for international protection in another Member State, as was the case in the *Kucam* case. Thus, national systems of humanitarian visas – which I consider as a source of external European asylum law in this study – should not be viewed as detached from internal EU asylum law.

Despite *X and X,* I argue here that this *national*, unilateral instrument of external European asylum law has the ability to impact on internal EU asylum law, more specifically the Dublin Regulation. Consequently, the principles of loyalty and mutual trust should extend to the Belgian humanitarian visa practice because the application of the latter may give rise to the application of the Dublin system, which is an instrument of EU law, more specifically of internal EU asylum law.

[713] Art. 12(2) Dublin Regulation: 'Where the applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection […].'
[714] *Commission v Council (ERTA)* [1971] ; *European Commission v Germany* [2019]

Legal function of mutual trust and of loyal cooperation

Based on the possible external extension of mutual trust and loyal cooperation, the previously established abuse of rights may be considered in light thereof. Given the lack of follow-up of the Belgian Ministry on the traveling of the recipients of Belgian humanitarian visas to other Member States,[715] the behavior of the Member State in relation to the abuse of rights in the *Kucam* case is arguably contrary to the legal function of the principle of mutual trust and the principle of loyal cooperation.

The legal function of mutual trust, identified in *Chapter 3 (Section 3.2)*, shows that the principle of mutual trust aims to find a balance between the effectiveness of EU law and the sovereignty of the Member States. Similarly, the legal function of the principle of loyal cooperation is 'the uniform and effective application of Union law' in the context of 'a system of shared […] governance.'[716]

In light of the sovereignty element of the legal function of mutual trust and of loyal cooperation, it makes sense that the Member States are allowed to set up their own system for humanitarian visas. As the Court of Justice ruled in *X and X*, humanitarian visas fall under national law, not EU law.[717] Taking that reasoning as a starting point,[718] I argue here that if a Member State chooses to make use of the option to create a national system for humanitarian visas, that choice triggers an obligation to do so in accordance with the legal function of mutual trust and loyal cooperation. In other words, *if* a humanitarian visa system is set up by a Member State, that Member State *must* ensure that such a system does not harm the objectives of the European Union or the balance between the effectiveness of EU law and the sovereignty of the Member States.

In sum

[715] *K.M.* [2021] para 3.1.1 (p 32)
[716] Rob Widdershoven [2015] p 561. Original text in Dutch: 'Om deze doelen te bereiken heeft de Unie niet gekozen voor een systeem waarbij de EU-instellingen in de plaats treden van de lidstaten, maar voor een systeem van gedeeld of samengesteld bestuur. […] Om binnen dit systeem in heel Europa een uniforme en effectieve toepassing van het Unierecht te garanderen, is samenwerking essentieel. […] De algemene rechtsbasis voor deze samenwerking is het beginsel van wederzijdse loyale samenwerking van artikel 4 lid 3 VEU, een beginsel met federale trekken.' See *Chapter 2, Section 2.3* on loyal cooperation and *Chapter 3, Section 3.2* on the legal function of mutual trust. See also *Chapter 4, Section 4.4.2* on the similar legal functions of mutual trust and loyalty.
[717] *X and X v Belgium* [2017] para 51
[718] See *Chapter 5, Section 5.5.2* for a discussion on the reasoning in the *X and X* judgment.

Based on the foregoing, I submit that a Member State that sets up a humanitarian visa system and grants humanitarian visas aimed at submitting an application for international protection in that Member State, and subsequently does not follow up on the procedure of the recipients, does not fulfil its obligations towards the Union and the other Member States under mutual trust and loyal cooperation. In *Chapter 7*, I will make recommendations to (further) bring such systems in line with the legal function of mutual trust and loyal cooperation.

6.3.2 Mutual trust and fundamental rights

In addition to the legal function of mutual trust and of loyal cooperation, the next part of this section will analyze several legal consequences of the Belgian humanitarian visa practice in light of the essential requirement nature of fundamental rights for mutual trust.

Most importantly, the judgments on the Dublin system and on the Belgian humanitarian visa practice, studied in *Chapter 3*[719] and in *Chapter 5*,[720] show a discrepancy in the CJEU's approach to the relation between fundamental rights and mutual trust in external European asylum law, as opposed to the CJEU's stance in internal EU asylum law.

Despite the CJEU in the *X and X* judgment not considering humanitarian visas to fall under EU law, and while the following analysis is based on one judgment on the Belgian humanitarian visa practice, this judgement does offer us an insight into the stance of the CJEU on the external cooperation between the Member States.[721] In the *X and X* judgment, the CJEU concluded that an external extension of the Visa Code to humanitarian visas would have been contrary to the Dublin system.[722]

I find the CJEU's reasoning in *X and X* largely unconvincing, especially when connecting *X and X* with the line of case law following the *MSS*[723] and *NS*[724] judgments, which were discussed in *Chapter 3*.[725] Notably, the ECtHR and the CJEU acknowledged in the case law following *MSS*

[719] See *Section 3.3.2* on the case law on the Dublin system – an element of internal EU asylum law.
[720] See *Section 5.5.2* on the case law on the Belgian humanitarian visa practice – an element of external European asylum law.
[721] See also *Chapter 5, Section 5.5.2.*
[722] *X and X v Belgium* [2017] para 48
[723] *M.S.S. v Belgium and Greece* [2011] para 342
[724] *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] para 94
[725] See *Section 3.3.2.*

and *NS*, which concerns *internal* EU asylum law, that the existence of the Dublin system is, simply put, not good enough a reason for the Member States not to comply with their (international) human rights obligations.[726] On the contrary, in *X and X*, which concerns external European asylum law, the CJEU reasoned that

> 'to conclude [that humanitarian visas would fall under the scope of the Visa Code], when the Visa Code is intended for the issuing of visas for stays on the territories of Member States not exceeding 90 days in any 180-day period, would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the [Dublin system].'[727]

In sum

The foregoing shows that the CJEU's approach to Member State cooperation in relation to their fundamental rights obligations in the *X and X* judgment on the Belgian humanitarian visa practice, differs compared to the approach taken by the CJEU in its case law on the Dublin system. In *Chapter 7*, I will offer a remedy to this inconsistency in the approach of the CJEU in internal EU asylum law compared to external European asylum law.

6.3.3 Legal consequences of the Belgian humanitarian visa practice in light of the legal function of mutual trust and its relation to other general principles of EU law

In addition to *Section 6.2*, this section partly answers the sub-question of this chapter of what the legal consequences of the externalization of European asylum law are in view of the legal function of mutual trust and of its relation to other general principles of EU law. More specifically, this section studies the consequences of the Belgian humanitarian visa practice.

In view of the legal function of mutual trust and of loyal cooperation, I have noted that while this system does not fall under the CEAS and, consequently, EU law, it does impact the Dublin system and is capable of negatively impacting the objectives of the European Union (and therefore at odds with the legal function of loyal cooperation) or the balance between the effectiveness of EU law

[726] Similarly, see Philip Hanke and others, 'The "spirit of the Schengen rules", the humanitarian visa, and contested asylum governance in Europe – The Swiss case' [2018] Journal of Ethnic and Migration Studies 1361, p 1371
[727] *X and X v Belgium* [2017] para 48

and the sovereignty of the Member States (and therefore at odds with the legal function of mutual trust).

In addition, in light of the relation between mutual trust and fundamental rights, I have identified a discrepancy in CJEU case law on internal EU asylum law compared to external European asylum law. This discrepancy relates to the approach to interstate cooperation and the relation between mutual trust and fundamental rights. While in internal EU asylum law, the existence of the Dublin system does not release the Member States from their fundamental rights obligations, this seems to be the case in external European asylum law.

6.4 Conclusion

The final sub-question of this study to be answered, before being able to answer the general research question, is: What are the legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and of its relation to other general principles of EU law? In this chapter, I therefore studied several legal consequences of the externalization of European asylum law. This was done in the context of the two case studies of *Chapter 5* on the EU-Turkey Deal (in *Section 6.2*) and the Belgian humanitarian visa practice (in *Section 6.3*). The framework consisted of the legal function of mutual trust and its relation to other general principles of EU law.[728]

The first conclusion of this chapter concerns the legal consequences of the externalization of European asylum law *in view of the legal function of mutual trust*. In the context of the EU-Turkey Deal, I argued that a certain interplay exists between the Dublin system and the EU-Turkey Deal. This interplay between these instruments of internal EU asylum law and external European asylum law may threaten the effectiveness of EU law and thus the balance between effectiveness and the sovereignty of the Member States, which is the legal function of the principle of mutual trust. Moreover, I submit that the negative impact of the EU-Turkey Deal and the Dublin Regulation on the effectiveness of EU law is a result of the interplay between these two instruments and of the pre-existing issues in the Dublin system, rather than a one-way influence of external European asylum law on internal EU asylum law. In the context of the Belgian humanitarian visa practice, I noted that while this system does not fall under EU law, it does impact the Dublin system and is

[728] See *Chapter 4*.

capable of negatively impacting the objectives of the European Union (at odds with the legal function of loyal cooperation) or the balance between the effectiveness of EU law and the sovereignty of the Member States (at odds with the legal function of mutual trust).

The second conclusion on the legal consequences of the externalization of European asylum law concerns *the relation between mutual trust and fundamental rights*. In the context of the EU-Turkey Deal, a decrease in fundamental rights protection in practice was observed in Europe. This is not only important in terms of fundamental rights protection of individuals, but also because it entails that (some of) the Member States are not fulfilling their fundamental rights obligations. As a result, mutual trust will likely be rebutted or, in case of a previous rebuttal, will likely not be restored. Ultimately, this may lead to the disruption of the Common European Asylum System or possibly even other fields of internal EU law that also rely on the principle of mutual trust. Lastly, in the context of the Belgian humanitarian visa system, I identified a discrepancy in CJEU case law on internal EU asylum law compared to external European asylum law. This discrepancy relates to the approach to interstate cooperation and the relation between mutual trust and fundamental rights. While in internal EU asylum law, the existence of the Dublin system does not release the Member States from their fundamental rights obligations, this seems to be the case in external European asylum law.

As mentioned before in *Chapter 1*, these findings merely display several consequences of externalization. They should be interpreted with caution, given that they result from a limited number of case studies which were studied through the particular lens of mutual trust. However, because of the selection criteria, both for the case studies and for the lens through which to regard these case studies, the findings resulting from this study offer an insight into what the externalization of European asylum law might entail.[729]

In sum, *Chapter 6* points towards the conclusion that the legal consequences of the externalization of European asylum law may threaten the effectiveness of internal *and* external EU law. If this is indeed the case, the externalization of European asylum law may stand at odds with the legal function of mutual trust (which aims at a balance between the effectiveness of EU law and the

[729] Firstly, mutual trust is considered in this study as a pertinent lens through which to study Member State cooperation dynamics. See *Chapter 1, Section 1.2.1.* Secondly, the case studies are critical cases of a typical and an atypical source of external European asylum law that are both interesting playing fields of Member State cooperation dynamics. See *Chapter 1, Section 1.6.3.*

sovereignty of the Member States) and of loyal cooperation (which aims at observing the objectives of the Union). In addition, external European asylum law may decrease the fundamental rights protection in practice in Europe which, in turn, may have a negative impact on the mutual trust between the Member States. Lastly, based on a comparison between the case law on internal and external European asylum law, I identified a discrepancy in the approaches of the CJEU in internal EU asylum law versus external European asylum law to the relation between mutual trust and the fundamental rights obligations of the Member States. These conclusions will lead to answering the general research question in *Chapter 7* and recommending better approaches to mutual trust in the context of external European asylum law – that is, better in the sense that they aim to be more in line with the legal function of mutual trust and its relation to other general principles of EU law.

Conclusion of Part II: Mutual trust in the context of external European asylum law

In *Part II* of this study, I positioned the principle of mutual trust in the context of external European asylum law.

Firstly, *Chapter 5* consisted of two case studies of external European asylum law, more specifically the EU-Turkey Deal and the Belgian humanitarian visa practice. These case studies highlighted that the Member States often act in an official capacity when they cooperate with each other and with third countries, sometimes in collaboration with private actors. I found examples of unilateral and (bi-)multilateral actions resulting in formal and informal legal-administrative instruments, supported by economic instruments. Moreover, the case studies in *Chapter 5* arguably show that the reasoning behind the externalization in the field of European asylum law may be explained by political and ethical rationales, and considerations of efficiency and cost-effectiveness.

Building upon these conclusions, the final chapter of *Part II, Chapter 6*, brought together the different pieces of the puzzle of this study. In *Chapter 6*, I identified several legal consequences of the externalization of European asylum law, in the context of the case studies of *Chapter 5*. The analysis of several legal consequences of the EU-Turkey Deal suggests that the interplay between the Dublin system and the EU-Turkey deal may threaten the effectiveness of EU law and, as a result, the legal function of the principle of mutual trust. Similarly, in the context of the Belgian humanitarian visa practice, I argued that this practice may impact the effectiveness of the Dublin system, even though the Belgian humanitarian visa practice officially does not fall under EU law.

As to the relation between the principle of mutual trust and fundamental rights, I argued that, as a result of the EU-Turkey Deal, the fundamental rights protection in Europe has decreased in practice. Because of the essential requirement nature of fundamental rights in relation to mutual trust, this may also lead to a decrease in the mutual trust between the Member States. Lastly, I identified a discrepancy between the CJEU case law on the Dublin system and its *X and X* judgment on Belgian humanitarian visas. In internal EU asylum law, the existence of the Dublin system is no longer accepted as a reason to exempt the Member States from complying with their fundamental rights obligations under EU law, whereas in external European asylum law, this seems to be the case.

The foregoing findings of *Part II* will allow for a general conclusion in *Chapter 7* and answering the general research question of how the externalization of European asylum law should influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how mutual trust – and its relation to other general principles of EU law – should influence external European asylum law.

Chapter 7 Conclusion and recommendations

By researching mutual trust and external European asylum law, I have laid bare the intrinsic connection between the externalization of European asylum law and the internal dimension of EU public law. I have done so by studying internal EU law and external European asylum law through the lens of the principle of mutual trust, which implies interaction and cooperation between the EU Member States.

This concluding chapter first gives an overview of the road taken during the research which lies at the basis of this study, more specifically the substation and limitations of the study and avenues for further inquiry (*Section 7.1*). Next, the answers to the sub-questions in each chapter will be summarized as the key findings of this study (*Section 7.2).* In *Section 7.3*, the validity of the hypotheses (which were formulated in *Chapter 1)* will be tested against these answers to the sub-questions. Building upon the answers to the sub-questions and the tested hypotheses, *Section 7.4* will answer the general research question of the study: How should the externalization of European asylum law influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how should mutual trust – and its relation to other general principles of EU law – influence external European asylum law? The answer to this question is multifaceted and will be the starting point for recommending better approaches to the principle of mutual trust in the context of external European asylum law in *Section 7.5*.

7.1 The road taken

Substantiation

In this section, I reiterate the road taken in this study: What are the key findings supported and substantiated by in terms of reality and theory?

As to the former, answering the general research question on mutual trust and external European asylum law is a matter closely related to reality. I have relied upon several exemplary cases and case studies: Loyal cooperation and fundamental rights as examples of general principles of EU law (in *Chapter 2*), asylum law and criminal law as examples of contexts of internal EU law in which mutual trust plays an important role (in *Chapter 3)* and the EU-Turkey Deal and the Belgian humanitarian visa practice as case studies of external European asylum law (in *Chapter 5*). These

examples and case studies were selected in such a way to allow making generalized statements about the whole field of law they are positioned in. As a result, in this concluding chapter, I formulate conclusions and recommendations for the broader research topic, which are grounded in reality.

With regard to the theoretic element, this study is substantiated by hypotheses. These hypotheses were formulated early on in the research project based on the status quo in the fall of 2018. They have allowed me to formulate assumptions, the validity of which can be tested against the answers to the sub-questions, as will be done in *Section 7.3* of this chapter.

Limitations of the study and avenues for further inquiry

While this study aims to shed a new light on mutual trust, both in light of the study of general principles of EU law and in the context of external European asylum law, it does not aspire to be all-encompassing. As such, several of its limitations and avenues for further inquiry are described here.

This study leaves room for much more exploration on mutual trust, general principles of EU law, and external European asylum law. While the case studies and illustrations in this study were carefully selected, it is not to be excluded that further legal or empirical research on mutual trust will highlight other features of mutual trust, general principles of EU law, or external European asylum law.

For example, an avenue for future research could be to broaden the scope of the studied case law in a structured case law analysis to further the developed framework on general principles of EU law. Secondly, in order to test the framework on general principles of EU law, developed in *Chapter 2*, future research could apply it to other norms of EU law. An interesting subject of such a study could be the principle of prohibition of fraud or abuse of rights, which has been studied mainly in the field of tax law.[730] However, it could be of additional value to inquire on its potential status *as a general principle of EU law*, especially given its increasing importance in social security

[730] E.g. Lucia Cerioni [2010]

law.[731] The defining characteristics of general principles of EU law, that I identified in this study, could offer a framework for such inquiry.

Another example is that the principle of mutual trust in the internal market was not the focal point of this study,[732] as explained in *Chapter 1, Section 1.6.2*. This necessarily entails that nuances between mutual trust in the context of the AFSJ and in the context of the internal market were not studied.[733] It is well-imaginable that similar research could inquire on mutual trust in the internal market and would position it in the external reach of EU law.[734] It my hope that this study may offer a starting point for future research that adds to our understanding of the complexity of mutual trust.

As to the part of this research in which I study external European asylum law, I point out that the legal consequences of the externalization of European asylum law (identified in *Chapter 6*, based on the case studies of *Chapter 5*) do not intend to map all possible consequences of externalization. Examples of other consequences of externalization could come to light by including other case studies of external European asylum law in future research. Such case studies could include the external operations of Frontex or the data collection for the assessment of asylum applications at the borders of the EU.[735] In addition, the geopolitical scope of the study of external European asylum law was limited to migratory movements towards Europe, and the legal scope to EU law. Thus, the (legal) contexts outside of the European continent were excluded. In addition, within the European continent, the ECHR was also excluded from the scope of this study. Future research could inquire on the cooperation between states in the externalization of asylum law through the lens of the ECHR and ECtHR case law, or by studying externalization practices in other geopolitical contexts altogether.

---

[731] Dorota Leczykiewicz, 'Prohibition of abuse practices as a "general principle" of EU law' [2019] Common Market Law Review 703

[732] See *Chapter 4, Section 4.3.3.* See also *Chapter 3, Section 3.2.*

[733] See Kathrin Hamenstädt [2021] p 27-28

[734] For example, further research could build upon the approaches in this study combined with Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020)

[735] Such case studies could build upon Mariana Gkliati, *Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations* (PhD thesis, Leiden University 2021) ; Evelien Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System* (2008) ; Niovi Vavoula, 'The "puzzle" of EU large-scale information systems for third-country nationals: surveillance of movement and its challenges for privacy and personal data protection' [2020] European Law Review, p 348-372

Lastly, in this study, I have not challenged the idea that the principle of mutual trust is a part of the EU legal system. As such, I do not intend to answer the question whether mutual trust should or should not exist between the EU Member States. Instead, my starting point was the premise that the principle of mutual trust is an element of the EU legal order. In doing so, I hope to clarify the role of mutual trust within the EU legal order as is, and to shed further light on the interaction and cooperation between the EU Member States – internally and externally.

7.2 Key findings

This section summarizes the main findings of each substantive chapter of this study. In doing so, the sub-questions are answered.

7.2.1 Part I

In *Part I* of this study, I studied the constitutionalization of the principle of mutual trust in the sense that I explored mutual trust as a general principle of EU law.

Chapter 2

In *Chapter 2*, I studied general principles of EU law based on two examples: loyal cooperation and fundamental rights. Based on these examples, I answered the sub-questions on what the defining characteristics are of general principles of EU law and what their spatial scope of application is.

Firstly, I developed a framework on what distinguishes general principles of EU law – which I consider as the stardust of the EU – from other norms. I identified four *defining* characteristics of general principles of EU law:

1. They exist independently of written EU law;
2. they derive their legitimacy from their 'specification' within EU law or 'reflection' outside of EU law;
3. they are applicable throughout the broad spectrum of EU law; and
4. they have a certain weight attached to them.

Secondly, I concluded that general principles of EU law may extend beyond the borders of Europe and that this may have far-reaching consequences. The external extension of general principles of EU law is appropriate for both the principle of loyal cooperation – whenever the external action of

the Member State(s) might impact internal or external EU law – and for the principle of fundamental rights – whenever EU law is applicable. However, the external enforceability of the general principles of EU law depends on various other factors.

Chapter 3

Chapter 3 concerned mutual trust in the internal sphere of EU law, more specifically asylum law (the Dublin system of determining the Member State responsible for an application for international protection made in Europe) and criminal law (the European Arrest Warrant system of arresting and transferring criminal suspects and sentenced persons between the Member States). In *Chapter 3*, I answered the sub-questions of what legal function mutual trust fulfills within the EU and what its legal trigger factors are.

Based on the application of mutual trust in the Dublin and the EAW system, and building upon previous legal scholarship on mutual trust, I furthered its conceptualization. The conceptualization of mutual trust showed a cycle of Member State cooperation dynamics, consisting of mutual trust and including rebutting and restoring mutual trust:

Mutual trust implies the cooperation between Member State A and B in which Member State A (the first actor) relies on (i.e. trusts) Member State B (the second actor) to comply with its fundamental rights obligations (i.e. the object of mutual trust). This is materialized in B's system and/or an individual decision (i.e. the subject of mutual trust), towards individuals (the third actor). The third actor is composed of the individuals falling under the jurisdiction of A and, contextualized, falling under the scope of the Dublin Regulation, respectively the EAW Framework Decision. If individuals are able to rely on Member State B to protect their fundamental rights, the mutual trust is intact. However, if this is not the case and individuals need to address Member State A to uphold their fundamental rights, they can act as catalysts for the rebuttal of mutual trust. Mutual trust will be rebutted if (the courts of) Member State A find(s) that the fundamental rights of the individual are not protected in practice in Member State B. Lastly, I have argued in this chapter that restoring mutual trust is possible in as far as the subject of trust (the system as a whole and/or individual decisions of B) once again complies with EU law and is again in conformity with B's fundamental rights obligations.

Another finding of *Chapter 3* was that the legal function of mutual trust is finding a balance between the effectiveness of EU law and the sovereignty of the Member States. Finding that balance ensures the effectiveness of EU law in the horizontal relationship between the Member States. Mutual trust aims to do so in the *sui generis* entity with federal elements that constitutes the EU, without disrespecting the administrative sovereignty of the Member States.

Lastly, I argued in *Chapter 3* that the legal trigger factor of mutual trust in the Dublin system is not the explicit mention thereof in secondary law. Rather, it is the CJEU case law identifying the unwritten assumption that Member States have to trust one another in complying with fundamental rights in order for the Dublin system to function. On the contrary, the EAW Framework Decision explicitly mentions mutual recognition – which is derived from the principle of mutual trust.

Chapter 4

In *Chapter 4*, I inquired upon the following sub-question: Should the principle of mutual trust qualify as a general principle of EU law and how should it relate to (other) general principles? In the concluding chapter of *Part I,* I brought forward the argument that mutual trust should indeed be regarded as a general principle of EU law – and therefore as one of the grains of the stardust of the EU. This argument was developed based on the study of mutual trust in internal EU asylum and criminal law (*Chapter 3)* and the framework on the defining characteristics of general principles of EU law (*Chapter 2*).

Because mutual trust fulfills the four defining characteristics of general principles of EU law, I argued that it should be qualified as a general principle of EU law. Indeed:

1. Mutual trust exists independently of written EU law;
2. it derives its legitimacy from its 'specification' within EU law and 'reflection' outside of EU law;
3. it is applicable throughout the broad spectrum of EU law; and
4. it has a certain weight attached to it.

In *Chapter 4*, I also discussed the relation of mutual trust with the general principles of EU law that were studied previously in *Chapter 2*. I concluded that the connection between general principles of EU law may take different shapes, varying from fundamental rights being an essential requirement to mutual trust, to loyal cooperation having a similar legal function as mutual trust.

What fundamental rights and loyal cooperation have in common in relation to mutual trust, is their solidifying ability in the sense that they may increase the credibility and longevity of the principle of mutual trust. Lastly, in *Chapter 4* I argued that mutual trust should be extended to external EU law whenever the cooperation of the Member States might impact internal or external EU law. This conclusion laid the basis for positioning mutual trust in external European asylum law.

7.2.2 Part II

In *Part II* of this study, I expanded the study of mutual trust from internal EU asylum and criminal law to external European asylum law.

Chapter 5

In *Chapter 5*, the first chapter of *Part II*, I first defined the concept of external European asylum law. I understand external European asylum law as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe.

To answer the sub-question of how the Member States can cooperate externally in the field of European asylum law and what the rationale behind the externalization of European asylum law may be, I analyzed two case studies. I studied the EU-Turkey Deal and the Belgian humanitarian visa practice by mapping their spatial, relational, functional and instrumental dimensions. The case studies showed that the Member States may cooperate in an official capacity, sometimes in collaboration with private actors. Examples have been found of unilateral and (bi-)multilateral actions resulting in formal and informal legal-administrative instruments, supported by economic instruments. Lastly, I found that the reasoning behind the externalization in the field of European asylum law may be explained by political and ethical rationales and considerations of efficiency and cost-effectiveness.

Chapter 6

Chapter 6, the final chapter of *Part II,* brought together the different pieces of the puzzle. It answered the sub-question of the legal consequences of the externalization of European asylum law in view of the legal function of mutual trust and its relation to other general principles of EU law.

By combining the key findings of the previous chapters, I identified several legal consequences of the externalization of European asylum law, more specifically the consequences of the EU-Turkey Deal and the Belgian humanitarian visa practice. This study suggests that the interplay between the Dublin system and the EU-Turkey deal may threaten the effectiveness of EU law and, as a result, the legal function of the principle of mutual trust and of loyal cooperation. Similarly, in the context of the Belgian humanitarian visa practice, I found that this practice may impact the effectiveness of the Dublin system, even though the Belgian humanitarian visa practice officially does not fall under EU law.

As to the relation between the principle of mutual trust and of fundamental rights, I observed in *Chapter 6* that, as a result of the EU-Turkey Deal, the fundamental rights protection in Europe has decreased in practice. Because of the essential requirement nature of fundamental rights for mutual trust, this may also lead to a decrease in the mutual trust between the Member States. Lastly, I identified a discrepancy between the case law on the Dublin system and on the humanitarian visas. In internal EU asylum law, the existence of the Dublin system is no longer accepted as a reason to exempt the Member States from complying with their fundamental rights obligations under EU law, whereas in external European asylum law, this seems to be the case.

7.3 Testing the hypotheses

As noted in *Chapter 1, Section 1.4,* the hypotheses formulated there ensure that the suppositions I had before conducting the study can be tested after having conducted the research. In this section, the validity of each hypothesis will be tested against the answers to the sub-questions (*Section 7.2*).

7.3.1 Hypothesis 1: Mutual trust should be regarded as a general principle of EU law

One of the conclusions of *Chapter 4* was that mutual trust should be regarded as a general principle of EU law, based on the study of *Chapter 2* on general principles of EU law and of *Chapter 3* on mutual trust. Indeed, I argued that the principle of mutual trust fulfills the defining characteristics of general principles of EU law. Mutual trust exists independently of written EU law, it derives its legitimacy from its 'specification' within EU law and 'reflection' outside of EU law, it is applicable throughout the broad spectrum of EU law, and it has a certain weight attached to it. Therefore, I argued that mutual trust should be regarded as a general principle of EU law. As this

is one of the main findings of this study, the qualification of the principle of mutual trust as a general principle of EU law has been elaborated upon in *Section 7.2.1.*

The validity of the first hypothesis is therefore confirmed:

Mutual trust should be regarded as a general principle of EU law.

7.3.2 Hypothesis 2: Externalizing European asylum law cannot circumvent the constitutional structure of the EU

Firstly, the validity of the second hypothesis depends on the definition of the term 'constitutional structure of the EU'. In *Part I* of this study, the constitutionalization of mutual trust referred to its qualification as a general principle of EU law. Even though general principles are considered here as the stardust of the EU and the building blocks of the EU legal system, the constitutional structure of the EU is not limited to general principles of EU law. For instance, the rule of law and democratic safeguards such as the Article 7 procedure[736] could well be considered as elements of the constitutional structure of the EU legal system. As I have not studied the issue of the circumvention of such safeguards in this study, I am unable to fully test the validity of the second hypothesis on the circumvention of the constitutional structure of the EU, since the constitutional structure of the EU is construed broader than the general principles of EU law.

Secondly, as noted in *Chapter 1, Section 1.4.2* when formulating the second hypothesis, I did not intend to make any claims about the *political ability* of externalizing asylum law to circumvent the constitutional structure of the EU.[737] Instead, the word 'cannot' in the second hypothesis relates to the prevention or sanctioning of the alleged circumvention of the constitutional structure of the EU *by judicial review.*

However, as noted in *Chapter 5* and *6*, litigation against the EU-Turkey Deal or the Belgian humanitarian visa practice before the CJEU did not provide judicial review based on general principles of EU law. As such, the case law studied in this study does not validate the hypothesis

[736] Art. 7 Treaty on the European Union [2016] OJ C 202/1: 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. […]'. See Konrad Niklewicz, 'Safeguarding the rule of law within the EU: lessons from the Polish experience' [2017] European View 281

[737] However, it is not to be excluded that future qualitative political or legal empirical research could validate or devalidate such a hypothesis.

that judicial review prevents a circumvention of general principles of EU law.[738] On the contrary, the available CJEU case law on the externalization of asylum law – albeit limited – points in the opposite direction, namely that the externalization of European asylum law can circumvent the constitutional structure of the EU in the sense that no judicial review has taken place based on general principles of EU law.

With these two caveats in mind, this study does offer information on the *desirability* of the circumvention of *general principles of EU law* from the perspective of Member State cooperation dynamics. In the following paragraphs, I will discuss this based on the answers to the sub-questions on the external application of general principles of EU law, on the rationale behind the externalization of European asylum law, and on the legal consequences of the externalization of European asylum law (see *Section 7.2* on the key findings of *Chapter 2 (Section 7.2.1)*, and of *Chapter 5* and *6 (Section 7.2.2))*.

One of the conclusions of *Chapter 2* was that general principles of EU law are able to apply externally (see *Section 7.2.1* on the key findings of *Chapter 2*). While the enforceability depends on various other factors specific to each general principle, the external extension of general principles of EU law is appropriate for both the principles of loyal cooperation – whenever the external action of the Member State(s) might impact internal or external EU law – and fundamental rights – whenever EU law is applicable. As a result, I argue here that the externalization of European asylum law should not excuse the EU and the Member States from complying with the general principles of EU law, nor should it erode the judicial review based on general principles of EU law by the CJEU and the domestic courts.

Such a finding is pertinent to the assessment of the second hypothesis because of its link with the study of the legal consequences of the externalization of European asylum law in *Chapter 6.*[739] Therein, it was found that the externalization of European asylum law, and the interplay between external and internal EU asylum law, may have a negative impact on the legal function of the general principle of mutual trust and of loyal cooperation and the relation between fundamental rights and mutual trust. This negative impact on the general principle of fundamental rights should

[738] See the case law discussed in *Chapter 5, Section 5.4.2* on the EU-Turkey Deal and *Section 5.5.2* on the Belgian humanitarian visa practice. The legal consequences thereof were discussed in *Chapter 6, Section 6.2* (EU-Turkey Deal) and *Section 6.3* (Belgian humanitarian visa practice).
[739] See also the discussion on the third hypothesis in this section.

come as no surprise given the conclusion of *Chapter 5* that the externalization of European asylum law may be explained *inter alia* by political considerations of wishing to prevent triggering the fundamental rights obligations of the Member States.

With these findings in mind, the studied legal consequences of the externalization of European asylum law stand in stark contrast with the general principles of EU law, such as loyal cooperation, fundamental rights, and mutual trust. For that reason, I consider some of the identified legal consequences of the externalization of European asylum law undesirable in view of general principles of EU law.

In conclusion, the second hypothesis is flawed because this study is not able to support any claims on whether or not the externalization of asylum law is able to circumvent the constitutional structure of the EU. However, if the hypothesis is reformulated to reflect the desirability (instead of the ability in terms of judicial review) of circumventing general principles of EU law (instead of the constitutional structure of the EU), its validity is supported by the findings in this study:

Externalizing European asylum law should not be able to circumvent the general principles of EU law.

7.3.3 Hypothesis 3: Some sources of external European asylum law trigger the external extension of the principle of mutual trust to that field of law

As with the first and second hypothesis, the validity of this hypothesis depends firstly on the qualification of mutual trust as a general principle of EU law. As reiterated in *Section 7.2.1* on the key findings of this study, this has been argued in *Chapter 4*.

Because the principle of mutual trust should be considered a general principle of EU law and because general principles of EU law may apply externally,[740] it was argued in *Chapter 4* that the principle of mutual trust may be extended to external EU law, including external European asylum law, whenever the external cooperation of the Member States might impact internal or external EU law.[741]

[740] See also *Section 7.2.1* on this finding of *Chapter 4.*
[741] See also *Section 7.2.1* on this finding of *Chapter 4*.

Mutual trust was conceptualized in *Chapter 3* as implying the cooperation between Member State A and B in which Member State A trusts Member State B to comply with its fundamental rights obligations, materialized in B's system and/or an individual decision, towards individuals, with a possibility to be rebutted and also to be restored.[742] I observed a similar reliance of one Member State on another Member State to comply with EU law in the case studies of the EU-Turkey Deal and the Belgian humanitarian visa practice in *Chapter 6*.[743] One example is the interplay of the EU-Turkey Deal and the Dublin system of determining the Member State responsible for the assessment of an application for international protection made in Europe. In that interplay, the Member States rely on each other in the application of their respective safe third country lists (see *Section 6.2.1*).

Based on the foregoing, I conclude that the validity of this third hypothesis is confirmed. However, this is not a settled matter and depends largely on the understanding of mutual trust. The conceptualization of the principle of mutual trust in this study allows me to understand it in a broad fashion that has been found to extend to external European asylum law. The study of the legal trigger factors of mutual trust in internal EU asylum law indeed highlighted that mutual trust does not require a written basis in EU law.[744]

On the contrary, if mutual trust would be regarded as requiring a written basis in EU (secondary) law, for example for mutual recognition, the extension of mutual trust to the sources of external European asylum law would be more difficult to grasp. Moreover, it would be imprudent to make generalized claims based on two case studies of the sources of external European asylum law. Thus, further research would be required to test this hypothesis. Therefore, considerable care must be taken when specifying this hypothesis to other cases of external European asylum law.

Based on the case studies of *Chapter 5*, and in line with my understanding of mutual trust as a lens through which to regard Member State cooperation dynamics, I conclude here that:

Some sources of external European asylum law may trigger the external extension of the principle of mutual trust to that field of law.

[742] See also *Section 7.2.1* on this finding of *Chapter 3*.
[743] See also *Section 7.2.2* on these findings of *Chapter 6.*
[744] See also *Section 7.2.1* on these findings of *Chapter 3.*

7.3.4 Hypothesis 4: The limitation of mutual trust by certain fundamental rights will increase as European asylum law further externalizes

Rather than considering the relation between fundamental rights and mutual trust as one of tension, the limitation of mutual trust by Article 4 of the Charter (or other substantive, individual rights) functions as a safety valve. Building thereon, I argued in *Chapter 4* that the principle of fundamental rights (i.e. the general principle of fundamental rights, as opposed to an individual, substantial fundamental right such as enshrined in Article 4 of the Charter) functions as an essential requirement for the principle of mutual trust.

From a systemic point of view, the general principle of EU law that fundamental rights are to be protected under EU law offers the reassurance for Member State A that its reliance on Member State B, resulting from the principle of mutual trust, is not unconditional. If B would not comply with its fundamental rights obligations under EU law, mutual trust would be rebutted. From the point of view of the individual Member States, this entails that the fundamental rights obligations of B would be extended to A. Still, from a systemic point of view, fundamental rights may solidify mutual trust in the long run; the more the Member States comply with their fundamental rights obligations, the more the mutual trust between them may increase. As such, the principle of fundamental rights is integral to the application of the principle of mutual trust in practice.

A similar relation between mutual trust and fundamental rights was also observed in *Chapter 6* in the context of the EU-Turkey Deal and the Belgian humanitarian visa practice. There, I argued that a decrease in (or lack of) protection of fundamental rights in Europe – as a result of an instrument of external European asylum law, or as the result of the interplay between internal EU asylum law and external European asylum law – may negatively impact the mutual trust between the Member States. An increase in the observance of fundamental rights in practice, however, would be able to solidify the mutual trust between the Member States.

Based on the foregoing, the fourth hypothesis is not validated by the research in this study. However, if the hypothesis is rephrased to reflect the studied relation between fundamental rights and mutual trust, it is supported by my findings:

The essential requirement nature of the fundamental rights obligations of the Member States for the principle of mutual trust may be disrupted as European asylum law further externalizes.

7.4 Answering the general research question

Based on the key findings of the chapters in this study and the tested hypotheses, I will now answer the general research question of this study:

How should the externalization of European asylum law influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how should mutual trust – and its relation to other general principles of EU law – influence external European asylum law?

Based on this study, I argue that the externalization of European asylum law should bear in mind the legal function of mutual trust, the legal function of loyal cooperation and the essential requirement nature of fundamental rights for mutual trust.

The study's main argument consists of four steps, the first of which is my finding that a general principle of EU law satisfies four defining criteria. It is a norm, that (1) exists independently of written EU law and (2) is applicable throughout multiple fields of EU law, (3) which has a certain weight attached to it and (4) which derives its legitimacy from its specification in a norm under EU law or its reflection in a norm outside of EU law.[745]

Based on the study of mutual trust in the context of the Dublin system and the European Arrest Warrant system,[746] the second step of the argument is that mutual trust should be considered as a general principle of EU law because it fulfills those four defining characteristics of general principles of EU law.[747]

Because mutual trust should thus be considered as a general principle of EU law, and because of its close connection with the principle of loyal cooperation,[748] I argued that mutual trust should extend beyond Europe (i.e. externally) whenever the external action of the Member State(s) might impact internal or external EU law.[749] This is the third step of the argument.

[745] See *Chapter 2, Section 2.5.1.*
[746] See *Chapter 3, Section 3.3* and *3.4.*
[747] See *Chapter 4, Section 4.3.*
[748] See *Chapter 4, Section 4.4.2.*
[749] See *Chapter 4, Section 4.5.*

Based thereon, the principle of mutual trust also extends to external European asylum law whenever such externalization might impact internal or external EU law. I therefore argue that the principle of mutual trust should influence the field of external European asylum law, understood in this study as the legal aspects of proactively managing migration at its source by the EU and/or its Member States, which is limited to international protection and results in instruments, the application of which extends beyond the borders of Europe.[750]

As the fourth step of the argument, I argue firstly that the interplay between internal EU asylum law and external European asylum law may have a negative impact on the effectiveness of internal and external EU law.[751] In turn, this may have a negative impact on the legal function of mutual trust, as the legal function of mutual trust is finding a balance between the effectiveness of EU law and the sovereignty of the Member States.[752] In addition, a deterioration in the effectiveness of EU law may harm the objectives of the Union[753] and therefore stand at odds with the legal function of loyal cooperation.[754] Secondly, another legal consequence of the externalization of European asylum law that I observed in this study is that the interplay between internal EU asylum law and external European asylum law may lead to a decrease in the fundamental rights protection in practice in Europe. Such a decrease in fundamental rights protection entails that (some of) the Member States are not fulfilling their fundamental rights obligations. As a result, mutual trust will likely be rebutted or, in case of a previous rebuttal, will likely not be restored.[755] This exemplifies the essential requirement nature of fundamental rights for mutual trust.[756]

These four steps lead to the main argument that the externalization of European asylum law should avoid entailing negative consequences for the legal function of mutual trust (finding a balance between the effectiveness of EU law and the sovereignty of the Member States), the legal function of loyal cooperation (ensuring the objectives of the Union), and the principle of fundamental rights (which I consider as an essential requirement for avoiding that mutual trust remains a norm without practical value).

---

[750] See *Chapter 5, Section 5.2.*
[751] See *Chapter 6, Section 6.2.1* and *6.3.1.*
[752] See *Chapter 3, Section 3.2.*
[753] See *Chapter 6, Section 6.3.1.*
[754] See *Chapter 2, Section 2.3* and *Chapter 4, Section 4.4.2.*
[755] See *Chapter 6, Section 6.2.2* and *6.3.2.*
[756] See *Chapter 4, Section 4.4.1.*

Based on the foregoing, I answer the general research question as follows:

The externalization of European asylum law should bear in mind the legal function of mutual trust, the legal function of loyal cooperation, and the essential requirement nature of fundamental rights for mutual trust. The principle of mutual trust should influence the field of external European asylum law in such a way that the interplay between internal EU asylum law and external European asylum law guarantees the balance between the effectiveness of EU law and the sovereignty of the Member States, guarantees the objectives of the Union, and guarantees the protection in practice of fundamental rights in Europe.

In addition to this answer to the general research question, I formulate recommendations on *how* this may be achieved in practice in the following section.

7.5 The road ahead: recommendations

After having answered the general research question, I will now look at the road ahead; I will formulate several recommendations in response to the identified issues in *Chapter 6*. Given the answers to the general research question and the sub-questions above, and thus limited by the scope of this study, I will investigate potential *de lege ferenda* approaches to mutual trust in the context of external European asylum law in this section. The recommendations will offer guidance for the externalization of European asylum law that bears in mind the legal function of mutual trust and of loyal cooperation and the essential requirement nature of fundamental rights for mutual trust. Several recommendations will cover how the interplay between external and internal EU asylum law could guarantee the effectiveness of EU law, the objectives of the Union, and the protection in practice of fundamental rights in Europe.

The study supporting these *de lege ferenda* approaches to mutual trust and external European asylum law is legal doctrinal and so the recommendations are tailored to legal practice. As the law exists by virtue of its application, the recommendations in this section are focused on the application of the principle of mutual trust and of external European asylum law. While not intending to be all-encompassing, the recommendations below aim to be a practical and specific addition to the answer to the general research question.

Making such recommendations was provoked by the study of several consequences of externalization in *Chapter 6*. Therein, I identified and flagged certain issues that the externalization of European asylum law may entail. In addition, I now seek for *better approaches* to the identified issues. That entails that the consequences of externalization, for which better approaches will be recommended, will be those that were identified in the context of the case studies of external European asylum law in this study. The identified consequences of the EU-Turkey Deal (*Section 6.2*) and of the Belgian humanitarian visa practice (*Section 6.3*) are used here as a starting point. Whenever relevant, this section will draw inspiration from other fields of EU law, in which similar issues occur, and the better approaches that have potentially been developed there.

In the assessment of the legal consequences of the case studies of external European asylum law, mutual trust has been used as a lens to study Member State cooperation dynamics. The principle of mutual trust will now be used as the starting point to offer recommendations on how to remedy shortcomings that may result from the externalization of European asylum law. More specifically, I will make recommendations in the context of the EU-Turkey Deal and the Belgian humanitarian visa practice. In *Section 7.5.1*, these recommendations will focus on bringing the externalization of European asylum law in line with the legal function of the principle of mutual trust (and loyal cooperation). In *Section 7.5.2*, I will formulate recommendations on the relation between mutual trust and the fundamental rights obligations of the Member States in the context of external European asylum law.

7.5.1 The legal function of mutual trust

Based on the cases studies of external European asylum law and their identified problematic consequences, this section makes recommendations in line with the legal function of mutual trust and, where relevant, of the principle of loyal cooperation.

EU-Turkey Deal

In addition to the study of the abuse of rights as a legal consequence of the Belgian humanitarian visa practice, *Chapter 6, Section 6.2.1* also identified several potentially problematic consequences of the interplay of the EU-Turkey Deal and the Dublin system in terms of effectiveness of EU law. Thus, the balance between effectiveness and the sovereignty of the Member States, which is the legal function of mutual trust, may be disturbed. In light thereof, I recommend introducing

precedence rules and acknowledging the interplay between internal EU asylum law and external European asylum law when reforming internal EU asylum law.

Precedence rules

Based on the study of the consequences of the interplay between the EU-Turkey Deal and the Dublin Regulation, I recommend introducing precedence rules between instruments of internal EU asylum law and external European asylum law whenever creating new instruments of external European asylum law or altering instruments of the CEAS, i.e. internal EU asylum law. While the choice of precedence of one instrument over the other is in my opinion largely political, it is important to the effectiveness of EU law that it is clear which instrument of internal EU asylum law or external European asylum law is applicable in case of a conflict between multiple provisions. As was showcased in the context of the EU-Turkey Deal and the Dublin system, principles of precedence or the hierarchy of criteria of the legal acts of the Union do not solve conflicts between provisions of internal EU asylum law and external European asylum law.[757]

For the introduction of rules of precedence in internal EU asylum law and external European asylum law, inspiration may be drawn from other instruments of EU law, which lay down rules of precedence in European law. This may be done in a general rule of precedence, such as in Directive 2019/770 which stipulates that '[if] any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall take precedence over this Directive'.[758] Alternatively, the rule of precedence may also refer specifically to another instrument of EU law, which was the approach taken in Directive

[757] While the 2016 proposal for a new Dublin IV Regulation proposed an inadmissibility check (including the ground that an applicant comes from a safe third country), this has not been repeated in the new proposal, which was part of the 2020 New Pact on Migration and Asylum. Compare 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) COM(2016) 270 final, p 15; and Art. 8(5) Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] [2020] COM(2020) 610 final

[758] Art. 3(7) Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136

2016/943: 'where the scope of application of Directive 2004/48/EC […] and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.'[759]

Introducing similar rules of precedence in instruments of internal EU asylum law and external European asylum law would avoid situations of conflict in which it is unclear which instrument is applicable, which bears the risk of a lack of judicial review and, consequently, the injusticiability and ineffectiveness of instruments of both internal EU asylum law and external European law. In turn, this would thus avoid that externalization entails a corrosion of the legal function of mutual trust.

Safe third country assumption

In addition, *Chapter 6, Section 6.2.1* identified several issues in the application the EU-Turkey Deal that may be caused by its reliance on a safe third country assumption. Because there are divergences in safe third country approaches between the Member States, it seems that we find ourselves at a fork road in remedying such application issues.

One approach imaginable would be the introduction of a common European safe third country list, entailing the development of a list of third countries designated as safe on the European level.[760] Doing so would erase any divergences between the domestic approaches to the safe third country concept in the Member States. However, a common EU safe third country list may be problematic in light of the legal function of mutual trust and its relation to fundamental rights. First of all, while such a list could enhance the effectiveness of EU law, it could also be at odds with the administrative sovereignty of the Member States in the sense that the national decision-making authorities of the Member States would be bound by such a list. This could disturb the balance sought for by the legal function of mutual trust. Additionally, it would be problematic in light of the fundamental rights obligations of the Member States, which is an essential requirement to the principle of mutual trust. This brings me to the second potentially problematic aspect of a common

[759] Recital 39 of the Preamble of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157

[760] In 2016, the Commission proposed a common EU list of safe third countries (to be distinguished from a list of safe countries of origin) as part of the proposal for a reform of the Common Procedures Directive but this has so far not yielded any result: Recitals 47-53 and 72 of the Preamble and Art. 46 Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2016] COM/2016/0467 final.

third country list. The safe third country concept entails fundamental rights issues that a common European safe third country list would not solve.[761] Thus, I recommend steering clear from introducing such a common list of safe third countries. On the contrary, it would be advisable for the EU and the Member States to avoid relying as much on the safe third country concept in external European asylum law.

Internal EU asylum law

Lastly, I recommend strengthening the Common European Asylum System before concluding agreements with third countries with an asylum component that impact and interact with internal EU asylum law. While an exhaustive list of specific recommendations on how to reform the CEAS and more specifically the Dublin system goes beyond the scope of this study, some preliminary thoughts on which considerations to take into account when reforming EU asylum law are shared here. This will be done based on my research on external European asylum law.

First and foremost, I argue that the EU and its Member States should pay specific attention to including fundamental rights in the functional dimension of the Dublin system. In other words, an additional aim of the Dublin system should be to ensure that the Member States fulfill their fundamental rights obligations towards asylum seekers and refugees in Europe. In *Section 7.5.2,* I will explain the importance of the protection in practice of fundamental rights, in light of the relation between mutual trust and fundamental rights and their importance for the functioning of internal EU asylum law.

Additionally, it should not be excluded that the Dublin system, determining which Member State is responsible for an application for international protection made in Europe, does not rely on the current criteria but rather on a solidarity mechanism, as has been proposed by Rizcallah.[762] If such a reform would increase the effectiveness of EU law – because it would avoid that the net transfers are close to zero[763] – it would be more in line with the legal function of the principle of mutual

[761] Reinhard Marx, 'The European Union's Plan to Amend the "First Country of Asylum" and "Safe Third Country" Concepts' [2019] International Journal of Refugee Law 580; Hallee Caron, 'Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement?' [2017] Journal of Regional Security 27
[762] Cecilia Rizcallah, 'Facing the Refugee Challenge in Europe: A Litmus Test for the European Union. A Critical Appraisal of the Common European Asylum System through the Lens of Solidarity and Human Rights' [2019] European Journal of Migration and Law 238
[763] As currently seems to be the case, see 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

trust, which underlies the Dublin system. Such a solidarity mechanism has been proposed by the 2020 New Pact on Migration and Asylum.[764] However, the workability of the proposed solidarity mechanism has been criticized by Karageorgiou and Noll for being too flexible and therefore unpredictable and abstract.[765]

Finally, a reform of the CEAS should acknowledge the external dimension of European asylum law and the interplay between instruments of internal EU asylum law and external European asylum law. Arguably, the Pact acknowledges this interplay by stating that 'the internal and external dimensions of migration are inextricably linked'.[766] However, the Pact does not include the acknowledgement of the interplay of internal EU asylum law and external European asylum law – including instruments that are officially part of domestic Member State law. Such an acknowledgement could, for example, manifest by introducing rules of precedence, as mentioned earlier. Without delving deeper into the Pact and the reform of internal EU asylum law, I conclude here by urging the EU and its Member States to regard internal EU asylum law as the foundation on which to build external European asylum law. Such a foundation in internal EU asylum law should be solid in terms of fundamental rights protection and respecting the legal function of mutual trust and loyal cooperation.

Belgian humanitarian visa practice

Based on the case study of the Belgian humanitarian practice, I recommend that similar sources of external European asylum law should introduce (more) procedural clarity and that it should include safeguards against the abuse of rights.

In *Chapter 6, Section 6.3.1*, I argued that, if a Member State grants humanitarian visas aimed at applying for international protection in that Member State and subsequently does not follow up on the procedure of the recipients, this results in abuse of rights by the individual, albeit without

for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2016] COM(2016) 270 final/2, p 12
See also *Chapter 6, Section 6.2.1*.
[764] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final, p 5-6
[765] Eleni Karageorgiou and Gregor Noll, 'What is Wrong with Solidarity in EU Asylum and Migration Law?' [2021] Available at SSRN: https://ssrn.com/abstract=3974596 or http://dx.doi.org/10.2139/ssrn.3974596, p 18-21
[766] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final, p 2

practical consequences in terms of fundamental rights protection for individuals. More importantly to this study, such a situation also results in the Member State concerned not fulfilling its obligations towards the Union and the other Member States under the principles of loyal cooperation and mutual trust. Here, I formulate two recommendations to remedy this shortcoming and to add to Article 12(2) Dublin Regulation.[767] The recommendations aim to bring the Belgian humanitarian visa practice in line with the legal function of mutual trust and of loyal cooperation, namely to streamline the cooperation of the different entities in the EU legal order.[768]

Procedural clarity

Firstly, it would be advisable to increase procedural clarity. In the context of applications for humanitarian visas, I recommend including the grounds for refusal and making explicit the role of private actors in the procedure of the humanitarian visa.

As Bianchini recommended in the context of the Italian humanitarian visa practice and the proposals for a European humanitarian visa system, the assessment of an application for a humanitarian visa should rely on a *prima facie* basis[769] and should lead to a subjective right to a humanitarian visa for the applicant if the criteria are fulfilled.[770]

In addition, I recommend that the obligations of private actors and the political responsibility for their actions regarding the selection procedure for humanitarian visas, should be included in the formal humanitarian visa procedure. Preferably, this would be unified in a common European humanitarian visa system. Because of the impact a national humanitarian visa system may have on the Dublin system and the CEAS as a whole,[771] this should not be left to the individual Member States. This stance is supported by the role of the Member States in potential abuse of rights cases, which is the subject of the next paragraph.

Abuse of rights

Secondly, I recommend setting up a system which is aimed at protecting fundamental rights while offering sufficient safeguards for Member State B if it is confronted with an extension of

[767] See *Chapter 6, Section 6.3.1.*
[768] See *Chapter 4, Section 4.4.2.*
[769] See *Chapter 5, Section 5.5.1* on the *prima facie* assessment.
[770] Katia Bianchini (2020) p 191-195
[771] See *Chapter 6, Section 6.3.1.*

obligations from A to B in relation to the individual who has abused their rights, in as far as this was facilitated by Member State A. In other words, sufficient (fundamental rights-based) safeguards for B should exist to protect B against the facilitation of abuse of rights by A.

In doing so, I draw inspiration from the approach to abuse of rights in social security. There are parallels between abuse of rights in social security law and in the context of the Dublin system – in the latter as a result of the issuing of humanitarian visas, as was the case in the Belgian practice. In both fields of law there is a triangular relationship between Member State A, Member State B and the individual. The individual may be the instigator of the abuse of rights but the conduct of Member State B may facilitate such abuse of rights by creating a situation in which (fundamental rights) obligations are extended to Member State A.[772] Such a triangle in the context of the abuse of rights complicates not only the relationship between the individual and Member State A, respectively between the individual and Member State B, but also the interaction between Member State A and Member State B. The latter is most important in light of the central concept of this study: It may lead to the conclusion that the conduct of Member State A stands contrarily to the legal function of mutual trust and of loyal cooperation, as argued previously in *Chapter 6.*

However, as also argued there, one vital difference between abuse of rights by beneficiaries of social security and abuse of rights by asylum seekers or refugees, is that the latter does not lead to a withdrawal of the subjective right to international protection, nor to a withdrawal of any rights resulting from making an application for international protection, such as the right to legal assistance during the asylum procedure.[773] Thus, any inspiration drawn from the approach to fraud in the field of social security must be approached with that caveat in mind.

In the field of social security, the Commission proposed taking a preventive approach to abuse of rights in 2018. While the discussions on this proposal between the Commission, Council and Parliament have so far not led to tangible results, several elements of the proposal may be useful

[772] For illustrations of such an extension of fundamental rights obligations from one Member State to another in the Dublin system, see *Chapter 3, Section 3.3* and *3.5.2.* In the context of social security law, the *Altun* case provides a good example: *Altun* [2018]
[773] Art. 22 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180

in the approach to abuse of rights in internal EU asylum law and external European asylum law.[774] Most importantly, the proposal introduces a definition to fraud:

> '"fraud" means any intentional act or omission to act, in order to obtain or receive social security benefits or to avoid to pay social security contributions, contrary to the law of a Member State'.[775]

Transposed to asylum law, I suggest adapting this definition of abuse of rights and introducing the following definition in European asylum law:

> 'Abuse of rights' or 'fraud' means any intentional act or omission to act, in order to receive international protection in a Member State, contrary to the distribution of responsibility for the assessment of an application for international protection made in Europe. A conclusion of abuse of rights may not derogate from the right to international protection or any rights resulting therefrom.

Most importantly, I argue that the definition of abuse of rights should be identical for internal EU asylum law and external European asylum law. Such coherence is important as it would avoid the disturbance of the legal function of the principle of loyal cooperation and of mutual trust. This would require an explicit connection to be made between internal EU asylum law and external European asylum law. I argue here that such a link is necessary in light of the influence of instruments of external European asylum law on the intra-European cooperation of the Member States and the effectiveness of internal EU asylum law and external European asylum law.

For instance, if the recipient of a humanitarian visa does not apply for asylum in the Member State that issued the humanitarian visa, this affects the *effet utile* of, firstly, the humanitarian visa system and, secondly, of the Dublin system in as far as it facilitates abuse of rights under the Dublin system. Thus, this is true even if the externalization takes place at the national Member State level, as I observed in *Chapter 6* in the context of the *Kucam* case in the Belgian humanitarian visa

[774] The discussion on the proposals are limited here to those elements which may provide inspiration for a preventive approach to abuse of rights in European asylum law. For a discussion on the approach to abuse of rights in the context of social security, see Frans Pennings, 'Fouten, misbruik en fraude bij grensoverschrijdende sociale zekerheid' [2021] SEW Tijdschrift voor Europees en economisch recht 12

[775] Art. 2(4) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) [2016] COM/2016/0815 final

practice. Moreover, I illustrated elsewhere that it is often obfuscated who the author of an instrument of external European asylum law is, for example in the context of the EU-Turkey Deal.[776] Thus, the relational dimension[777] of the humanitarian visa practice, which is an instrument of external European asylum law, should not be decisive in introducing a connection between that national humanitarian visa practice and the CEAS, i.e. internal EU asylum law.

In sum: Recommendations based on the legal function of mutual trust

Based on the case studies of external European asylum law, and in line with the legal function of the principle of mutual trust – be it alone-standing or in combination with the legal function of loyal cooperation – I recommend

1. that humanitarian visa systems should provide for a clear procedure in terms of the grounds for refusal, the subjective right to a humanitarian visa, and regarding the actors involved;
2. that instruments of external European asylum law (including national law instruments) should bear in mind their impact on internal EU asylum law in order to prevent abuse of rights resulting from the application of such an instrument of external European asylum law;
3. that rules of precedence should be introduced in instruments of internal EU asylum law and external European asylum law to ensure the effectiveness of EU law; and
4. that any reform of the Common European Asylum System, including the Dublin system, should be in accordance with the fundamental rights obligations of the Member States and that such a reform should acknowledge the interplay between internal EU asylum law and external European asylum law.

7.5.2 Mutual trust and fundamental rights

Based on the analysis of the identified consequences of the EU-Turkey Deal and the Belgian humanitarian visa practice, this section makes recommendations in line with the essential requirement nature of fundamental rights for mutual trust.

[776] See Lynn Hillary [2021]

[777] Based on Zaiotti's multidimensional approach to external control of migration, the 'relational dimension' is understood in this study as the relationships among various policy actors. The relational dimension can be multilateral, unilateral, or bilateral between sending and receiving or transit countries, or between receiving countries. See *Chapter 5, Section 5.3.2.*

EU-Turkey Deal

Based on the case study of the EU-Turkey Deal and its identified legal consequences in *Chapter 6, Section 6.2.2*, I recommend including an escape clause in agreements with third countries with an asylum component in case the Member States do not uphold their fundamental rights obligations.

Fundamental rights clause

Agreements with third countries with an asylum component should ensure that such a clause (in line with the Charter and the rights protected by the instruments of the CEAS) applies not only to the third country concerned but also to the EU and its Member States. While the section on international cooperation of the 2020 Pact attaches great value to fundamental rights, it mainly emphasizes facilities for people on the move in the third country and the obligations of the member States in supporting the third country in complying with fundamental rights.[778] Adding a clause in agreements with third countries that is specifically aimed at the fundamental rights protection in the Member States should ensure that the agreement would be suspended in case of fundamental rights violations on either side of the agreement. Fundamental rights clauses for the EU and its Member States could strengthen the credibility of fundamental rights adherence within Europe, in addition to the existing focus of fundamental rights protection in the third country.[779] Also, and most pertinent to the central focal point of this study, such a clause would prevent external European asylum law from negatively impacting the level of fundamental rights protection in the Member States. As such, the clause could prevent the decrease in fundamental rights protection to lead to a rebuttal of mutual trust and, in turn, to decrease the functioning in practice of internal EU asylum law. In addition, such clauses in agreements with third countries could even solidify mutual

[778] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final p 18 and 20

[779] Including fundamental rights clauses in agreements with third countries with an asylum component has been recommended before by *inter alia* the EU Fundamental Rights Agency: 'Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries' (Fundamental Rights Agency 5 December 2016) <https://fra.europa.eu/en/publication/2016/guidance-how-reduce-risk-refoulement-external-border-management-when-working-or> accessed 23 November 2021 . See also Section II. Respect for the rule of law, democracy, human rights and fundamental freedoms of the European Parliament resolution of 14 April 2016 on the 2015 report on Turkey [2016] 2015/2898(RSP)

trust between the Member States, in as far as it would be able to strengthen fundamental rights protection in Europe in practice.

Belgian humanitarian visa practice

Based on the case study of the Belgian humanitarian visa practice, I recommend that external European asylum law should be governed by the same conception of the principle of mutual trust as in internal EU asylum law.

Discrepancy in case law

As observed in *Chapter 6, Section 6.3.2,* the CJEU seems to approach the relation between mutual trust and fundamental rights differently in external European asylum law (in the *X and X* judgment) as opposed to internal EU asylum law (in the *NS* line of case law).

On the one hand, it has to be acknowledged that the situation and legal framework in *X and X* are different from *NS*. In the *NS* line of case law, the asylum applicants were already on the EU territory and there was no discussion on the applicability of the Dublin Regulation and, consequently, EU law. On the contrary, in the *X and X* case, the applicants were outside the EU territory and the applicability of the Visa Code and EU law was disputed.

On the other hand, I fail to understand why the core of the reasoning of the CJEU in *internal EU asylum law* – that the existence of an EU system relying on mutual trust does not release the Member States of their fundamental rights obligations – would not be equally applicable in *external* European asylum law. The CJEU has not clarified its stance on this point. Moreover, in the Opinion to the *X and X* case, Advocate General Mengozzi did not even mention the possible impact on the Dublin system of accepting humanitarian visas to fall under EU law.[780] Thus, the reasoning in *X and X* remains unconvincing in my opinion.

While I agree that the Belgian humanitarian visa practice has the ability to impact the Dublin system,[781] I argue that this should lead to a different outcome – one that is in line with the relation between mutual trust and fundamental rights. As argued in *Chapter 4, Section 4.4.1,* fundamental

[780] *X and X v Belgium* [2017] Opinion AG Mengozzi
[781] Similarly, see the discussion in *Chapter 6, Section 6.3.1*.

rights should be viewed as an essential requirement for the principle of mutual trust. This relationship was deducted from the CJEU case law on *inter alia* internal EU asylum law.

This differs from the approach taken in external European asylum law, as in the *X and X* case the relationships between the Member States in the Dublin system are placed at the forefront of the Court's reasoning. The reasoning underlying the decision to deny the external extension of the Visa Code to humanitarian visas may be considered problematic in light of relationship between mutual trust and fundamental rights. Arguably, the reasoning in *X and X* is similar to the CJEU's line of case law on mutual trust in the Dublin system *before* the *MSS* judgement. In that (now forsaken) line of case law, the CJEU considered the presumption of mutual trust irrebuttable. However, in the context of internal EU asylum law, it is clear that the CJEU has long let go of that stance.[782]

Mutual trust as a lens to study Member State cooperation

Resulting from the conceptualization of the principle of mutual trust in *Chapter 3, Section 3.5*, I regard mutual trust as a principle governing the interstate relationships within the EU legal system. As a result, I consider that mutual trust is not solely triggered by, for example, an explicit mentioning of mutual recognition in written EU secondary law, but also extends to Member State cooperation without an explicit, written legal basis for mutual trust.[783] With this point of view in mind, I argue that, even though the principle as such is not mentioned in the judgment, the CJEU's reasoning in *X and X* does implicitly touch upon mutual trust as a lens through which we can regard Member State cooperation and interaction.

Comparing the *X and X* case to the *NS* line of case law in light of such an understanding of mutual trust (and interstate relations and cooperation dynamics) lays bare a discrepancy in the CJEU case law. The cooperation between the Member States in relation to the fundamental rights obligations of the Member States is approached differently under internal EU asylum law and external European asylum law or, at least, in one judgment on external European asylum law. As noted in *Chapter 6,* the CJEU may change its stance in *X and X* in the future case law on humanitarian visas. In my opinion, this would be advisable. If the existence of the Dublin system and the

[782] See the discussion on the CJEU case law on the Dublin system in *Chapter 3, Section 3.3.2.*
[783] See *Chapter 4, Section 4.3.1* on mutual trust as a general principle of EU law and its fulfilling of the defining characteristic 'independent of written EU law' of general principles of EU law.

importance of mutual trust for its functioning are insufficient to release the Member States of their fundamental rights obligations in internal EU asylum law, it should not be sufficient in external European asylum law.

The foregoing should entail that, also in external European asylum law, the existence of a legal system like the Dublin system, which relies on mutual trust, would not release the Member States of their fundamental rights obligations. In other words, also in the context of external European asylum law, the Member States would have to comply with their fundamental rights obligations under EU law. This would be a conceptually more accurate and consistent approach to the principle of mutual trust, because the fundamental rights obligations of the Member States are an integral part of the principle of mutual trust. I recommend here that this should also be the case in external European asylum law.

In sum: Recommendations based on the relation between mutual trust and fundamental rights

Based on the case studies of external European asylum law, and in line with the essential requirement nature of the principle of fundamental rights for the principle of mutual trust, I recommend

5. that the relation between the principle of fundamental rights and the principle of mutual trust in the context of external European asylum law should be approached in the same vein as in internal EU asylum law: the Dublin system, which relies on mutual trust, should not exempt the Member States from complying with their fundamental rights obligations; and
6. that escape clauses should be introduced in agreements with third countries with asylum components, making the application of such an instrument of external European asylum law conditional upon the Member States (in addition to the third country) complying with their fundamental rights obligations.

7.6 Mutual trust – one of the grains of the stardust of the EU

Mutual trust between the Member States, which should be considered as a general principle of EU law, is one of the building blocks of the EU legal order. As such, it is a pertinent lens through which I have studied Member State cooperation dynamics.

Because the EU legal order also includes the instruments of EU law which extend beyond borders of Europe, the principle of mutual trust (and its interplay with other general principles of EU law) should not be left out of the equation when externalizing European asylum law. Reversely, the externalization of European asylum law may also influence the interaction and mutual trust between the EU Member States.

In this study, I have argued that, if the choice for the externalization of European asylum law is made, the connection and interplay of such externalization strategies with instruments and systems of internal EU asylum law should be at the forefront of the policy considerations of the EU and the Member States. Cooperation between the Member States in the external sphere of European law, which supposedly 'relieves' the internal Common European Asylum System by focusing mainly on deterrence strategies, and which does not keep in mind the intrinsic connection between internal EU asylum law and external European asylum law, misses the mark. Externalization without keeping Member State cooperation dynamics and their fundamental rights obligations in mind does not fully harness its potential. Instead, I recommend an integrated approach to internal EU asylum law and external European asylum law. Finally, such an approach should be aimed at strengthening EU public law – of which mutual trust is one of the grains of its stardust.

Summary

Mutual trust as a general principle of EU law. External European asylum law through the lens of member state cooperation

In this study, I inquire upon how the externalization of European asylum law should influence the application of the principle of mutual trust and its relation to other general principles of EU law, and, vice versa, how mutual trust – and its relation to other general principles of EU law – should influence external European asylum law.

The core of this study is that the principle of mutual trust constitutes a general principle of EU law. Mutual trust between the Member States is therefore one of the building blocks of the EU legal order. As such, it is a pertinent lens through which this book studies Member State cooperation dynamics.

The study's main argument consists of four steps, divided into two parts of the book. In the first part, the principle of mutual trust is explored as a general principle of EU law. In order to be able to do that, I develop a framework on the defining characteristics of general principles of EU law, which aims to contribute to the academic body of knowledge on general principles of EU law.

The first step of the main argument is my finding that a general principle of EU law satisfies four defining criteria. It is a norm, that (1) exists independently of written EU law and (2) is applicable throughout multiple fields of EU law, (3) which has a certain weight attached to it and (4) which derives its legitimacy from its specification in a norm under EU law or its reflection in a norm outside of EU law.

Based on a study of mutual trust in internal EU migration and criminal law, the second step of the argument is that mutual trust should be considered as a general principle of EU law because it fulfills those four defining characteristics of general principles of EU law.

Because mutual trust should be considered as a general principle of EU law, and because of its close connection with the principle of loyal cooperation, I argue that mutual trust should extend beyond the borders of Europe whenever the external action of the Member State(s) might impact internal or external EU law. This is the third step of the argument.

In the second part of the book, I use mutual trust as a lens through which to study various dynamics of European interstate cooperation in the specific context of external European asylum law. As the fourth step of the argument, I argue, firstly, that the interplay between internal EU asylum law and external European asylum law may have a negative impact on the effectiveness of internal and external EU law. In turn, this may have a negative impact on the legal function of mutual trust, as the legal function of mutual trust is finding a balance between the effectiveness of EU law and the sovereignty of the Member States. In addition, a deterioration in the effectiveness of EU law may harm the objectives of the Union and therefore stand at odds with the legal function of loyal cooperation. Secondly, another consequence of the externalization of European asylum law is that the interplay between internal EU asylum law and external European asylum law may lead to a decrease in the fundamental rights protection in practice in Europe. Such a decrease in fundamental rights protection entails that (some of) the Member States are not fulfilling their fundamental rights obligations. As a result, mutual trust will likely be rebutted or, in case of a previous rebuttal, will likely not be restored. This exemplifies the essential requirement nature of the principle of fundamental rights for the principle of mutual trust.

These four steps lead to the main argument that the EU and its Member States should approach internal EU asylum law and external European asylum law as integrated. The externalization of European asylum law should avoid entailing negative consequences for the legal function of mutual trust (finding a balance between the effectiveness of EU law and the sovereignty of the Member States), the legal function of loyal cooperation (ensuring the objectives of the Union), and the principle of fundamental rights (an essential requirement for avoiding that mutual trust remains a norm without practical value). Therefore, I recommend an integrated approach to internal EU asylum law and external European asylum law. Finally, such an approach should be aimed at strengthening European public law – of which mutual trust is one of the grains of its stardust.

Samenvatting

Wederzijds vertrouwen als een algemeen beginsel van Unierecht. Extern Europees asielrecht door de bril van samenwerking tussen de lidstaten

In dit onderzoek ben ik ingegaan op hoe de externalisatie van Europees asielrecht de toepassing van het wederzijds vertrouwensbeginsel en zijn relatie met andere algemene beginselen van Unierecht moet beïnvloeden en, *vice versa*, hoe wederzijds vertrouwen – en zijn relatie met andere algemene beginselen van Unierecht – extern Europees asielrecht moet beïnvloeden.

De kern van dit onderzoek is dat het wederzijds vertrouwensbeginsel een algemeen beginsel van Unierecht. Het wederzijds vertrouwen tussen de lidstaten is daarom één van de bouwstenen van de rechtsorde van de EU. Als zodanig is het een pertinente bril om de samenwerkingsdynamiek tussen de lidstaten te bekijken.

Het hoofdargument bestaat uit vier stappen, onderverdeeld in twee delen van het boek. In het eerste deel wordt onderzocht of wederzijds vertrouwensbeginsel een algemeen beginsel van Unierecht is. Ten behoeve daarvan heb ik een kader ontwikkeld voor de onderscheidende kenmerken van algemene beginselen van Unierecht, waarmee het beoogt bij te dragen aan onderzoek naar andere algemene beginselen van Unierecht.

De eerste stap van de kern van dit onderzoek is mijn bevinding dat een algemeen beginsel voldoet aan vier onderscheidende kenmerken. Het is een norm die (1) onafhankelijk van het geschreven Unierecht bestaat en (2) die van toepassing is in verschillende Unierechtelijke rechtsgebieden, (3) waaraan een zeker gewicht verbonden is en (4) die zijn legitimiteit ontleent aan zijn ‘specificatie’ in een Unierechtelijke norm of zijn ‘reflectie’ in een norm buiten het Unierecht.

Op basis van een onderzoek naar het wederzijds vertrouwensbeginsel in intern EU-asielrecht en EU-strafrecht is de tweede stap van het hoofdargument dat wederzijds vertrouwen moet worden beschouwd als een algemeen beginsel van Unierecht, omdat het voldoet aan de vier onderscheidende kenmerken van algemene beginselen van Unierecht.

Omdat het wederzijds vertrouwensbeginsel moet worden beschouwd als een algemeen beginsel van Unierecht, en vanwege zijn nauwe connectie met het beginsel van loyale samenwerking, betoog ik dat wederzijds vertrouwen zich uitstrekt tot buiten de grenzen Europa wanneer de externe

actie van de lidstaten impact zou kunnen hebben op intern of extern Unierecht. Dit is de derde stap van het hoofdargument.

In het tweede deel van het boek gebruik ik wederzijds vertrouwen als een bril waardoor ik verschillende samenwerkingsdynamieken van Europese interstatelijke samenwerking bekijk in de specifieke context van extern Europees asielrecht. Als de vierde stap van het hoofdargument, beargumenteer ik, ten eerste, dat de wisselwerking tussen intern EU-asielrecht en extern Europees asielrecht een negatieve impact kan hebben op de doeltreffendheid van intern en extern Unierecht. Dit kan op zijn beurt een negatieve impact hebben op de juridische functie van wederzijds vertrouwen, omdat de juridische functie van het wederzijds vertrouwensbeginsel bestaat uit het vinden van een balans tussen de doeltreffendheid van Unierecht en de soevereiniteit van de lidstaten. Bovendien kan een verslechtering van de doeltreffendheid van Unierecht ook de doelstellingen van de Unie schaden en om die reden op gespannen voet staan met de juridische functie van loyale samenwerking. Ten tweede is een juridisch gevolg van de externalisatie van Europees asielrecht dat de wisselwerking tussen intern EU-asielrecht en extern Europees asielrecht zou kunnen leiden tot een afname van de bescherming in de praktijk van fundamentele rechten in Europa. Een dergelijke afname van bescherming betekent dat sommige lidstaten hun verplichtingen niet nakomen, met als resultaat dat het wederzijds vertrouwen ten aanzien van die lidstaten wellicht wordt weerlegd of, in geval van eerdere weerlegging, wellicht niet wordt hersteld. Dit voorbeeld geeft weer dat de bescherming van mensenrechten essentieel is voor de duurzame toepassing van het beginsel van wederzijds vertrouwen.

De voorgaande vier stappen leiden tot de algemene conclusie dat de EU en de lidstaten intern EU-asielrecht en extern Europees asielrecht als integraal geheel zouden moeten beschouwen. Om die reden moet worden voorkomen dat de externalisatie van Europees asielrecht negatieve gevolgen met zich brengt voor de juridische functie van het wederzijds vertrouwensbeginsel (het vinden van een balans tussen de doeltreffendheid van Unierecht en de soevereiniteit van de lidstaten), de juridische functie van het beginsel van loyale samenwerking (het waarborgen van de doelstellingen van de Unie) en het beginsel van fundamentele rechten (een essentiële vereiste om te voorkomen dat wederzijds vertrouwen een norm wordt zonder praktische waarde). Daarom beveel ik een geïntegreerde aanpak aan van intern EU-asielrecht en extern Europees asielrecht. Een dergelijke

aanpak moet tot slot bijdragen aan het versterken van Europees publiekrecht – waarvan wederzijds vertrouwen een van de deeltjes van zijn sterrenstof is.

Bibliography

Literature

Birgit Aasa, *The Principle of Mutual Trust in EU Law. What is in a name?* (PhD thesis, European University Institute 2021)

Majd Achour and Thomas Spijkerboer, 'The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya' (EU Immigration and Asylum Law and Policy 2 June 2020) <https://eumigrationlawblog.eu/the-libyan-litigation-about-the-2017-memorandum-of-understanding-between-italy-and-libya/> accessed 23 November 2021

Michael Addo and Nicholas Grief, 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?' [1998] European Journal of International Law 510

Chiara Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing 2018)

Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' [2017] European Journal of Migration and Law 307

Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' [2015] The European Journal of International Law 1071

Hemme Battjes, 'Kroniek Dublinverordening' [2018] Asiel&Migrantenrecht 75

Hemme Battjes and others, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law. Reconciling Trust and Fundamental Rights* (Meijers Committee/FORUM Institute for Multicultural affairs 2011)

Malu Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017)

Katia Bianchini, 'Humanitarian Admission to Italy through Humanitarian Visas and Corridors' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 157-197

Karen Birchard, 'Dublin Convention on handling of EU asylum seekers becomes law' [1997] The Lancet 722

Wouter Blokland, 'Het verbod op misbruik: een algemeen beginsel van unierecht dat de EU en de lidstaten tegen de burger beschermt' [2018] Nederlands Tijdschrift voor Europees Recht 80

Serge Bodart, 'Humanitarian Admission to Belgium' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 225-237

Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses (case note)' [2018] European Constitutional Law Review 662

Jasper Bongers and others, 'Aligning rulesets: understanding cooperation in the European Union' [2021] Political Research Exchange 1

Tanja Börzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics' [2016] Journal of Common Market Studies 8

Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020)

Evelien Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System* (2008)

Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' [2013] Utrecht Law Review 135

Evelien Brouwer, 'Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts' [2016] European Papers 893
Evelien Brouwer, 'Mutual trust and judicial control in the Area of Freedom, Security, and Justice: an anatomy of trust' (Mapping mutual trust: understanding and framing the role of mutual trust in EU law, Florence, 2016)
Evelien Brouwer, 'Legality as a Challenge to EU Asylum and Migration Policies and vice versa' in Kilpatrick and Scott (eds), *Collected Courses of the Academy of European Law: Contemporary Challenges to EU Legality* (Oxford University Press 2021) 48-70
Pedro Caeiro and others, 'The evolving notion of mutual recognition in the CJEU's case law on detention' [2018] Maastricht Journal of European and Comparative Law 689
Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' [2017] European Papers 93
Hallee Caron, 'Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement?' [2017] Journal of Regional Security 27
Sergio Carrera and others, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019)
Sergio Carrera and others, 'The external dimensions of EU migration and asylum policies in times of crisis' in Carrera and others (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 1-19
Frederico Casolari, 'The principle of loyal cooperation: a "master key" for EU external representation?' [2012] CLEER Working Papers 11
Lucia Cerioni, 'The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re-reading of the ECJ Case Law and the Quest for a Unitary Notion' [2010] European business law review 783
Damian Chalmers and others, *European Union Law* (4th edition, Cambridge University Press 2019)
Merijn Chamon, 'Implied exclusive powers in the ECJ'S post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine' [2018] Common Market Law Review 1101
Anna Chatelion Counet and Nadine Imminga, 'Uitspraak Uitgelicht – Statushouders niet zonder betere motivering terugsturen naar Griekenland' [2021] Asiel&Migrantenrecht 552
Franceso Cherubini, 'The "EU-Turkey Statement" of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing' (British International Studies Association Annual Conference, Edinburgh, 2016)
Paul Craig, 'General Principles of Law: Treaty, Historical, and Normative Foundations' in Ziegler and others (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Press 2019)
Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2011)
Armin Cuyvers, 'General Principles of EU Law' in Cuyvers and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 217-228
Manfred Dauses, 'Quelques réflexions sur la signification et la portée de l'article 5 du traité CEE' in Bieber and Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts: Die Auslegung des Europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe* (Nomos Verlagsgesellschaft 1987)
Geert De Baere and Timothy Roes, 'EU Loyalty as Good Faith' [2015] International and Comparative Law Quarterly 829

Astrid Declercq, 'Het humanitair visum: balanceren tussen soevereine migratiecontrole en respect voor de mensenrechten' [2017] Tijdschrift voor Vreemdelingenrecht 118
Maarten den Heijer, *Europe and Extraterritorial Asylum* (PhD thesis, Leiden University 2011)
Maarten den Heijer, 'Frontex and the shifting approaches to boat migration in the European Union. A legal analysis' in Zaiotti (ed), *Externalizing Migration Management. Europe, North America and the spread of "remote control" practices* (Routledge 2016) 53-88
Maarten den Heijer and Thomas Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (EU Law Analysis 7 April 2016) <http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html> accessed 23 November 2021
Ronald Dworkin, *Taking rights seriously* (Harvard University Press 1978)
Ronald Dworkin, *Law's empire* (Harvard University Press 1986)
Christina Eckes, 'Protecting Fundamental Rights in the EU's Compound Legal Order. Mutual Trust against Better Judgment?' in Azoulai and others (eds), *Collected Courses of the Academy of European Law* (Oxford University Press 2017)
Pauline Endres de Oliveira, 'Humanitarian Admission to Germany – Access vs. Rights?' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 199-224
Lena Enqvist and Markus Naarttijärvi, 'Administrative Independence Under EU Law: Stuck Between a Rock and Constanzo?' [2021] European Public Law 707
Ulrich Everling, 'The European Union as a Federal Association of States and Citizens' in von Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart 2010) 701-734
Elizabeth Ferris and Kemal Kirişci, *The consequences of chaos. Syria's humanitarian crisis and the failure to protect* (Brookings Institution Press 2016)
Thomas Gammeltoft-Hansen and Nikolas Tan, 'Beyond the deterrence paradigm in global refugee policy' [2016] Suffolk Transnational Law Review 637
Thomas Gammeltoft-Hansen and Nikolas Tan, 'The End of the Deterrrence Paradigm? Future Directions for Global Refugee Policy' [2017] Journal on Migration and Human Security 28
Paula García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' [2018] Common Market Law Review 157
Paula García Andrade and Iván Martín, *EU cooperation with third countries in the field of migration* (European Parliament Policy Department C Citizen's rights and constitutional affairs 2015)
Madeline Garlick, *Solidarity Under Strain. Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union* (PhD thesis, Radboud University 2016)
Adèle Garnier and others, *Refugee resettlement: power, politics, and humanitarian governance* (Oxford University Press 2018)
Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)' (EJIL: Talk! 18 April 2016) <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/> accessed 23 November 2021
Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2)' (EJIL: Talk! 19 April 2016) <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/> accessed 23 November 2021
Damien Gerard, 'Mutal Trust as Constitutionalism?' (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law, Florence, 2016)

James Gibson and Gregory Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court' [2011] Law & Society Review 195
Mariana Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees' [2017] movements 213
Mariana Gkliati, *Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations* (PhD thesis, Leiden University 2021)
Laurence Gormley, 'Some Further Reflections on the Development of General Principles of Law Within Article 10 EC' in Bernitz and others (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 303-314
Boryana Gotsova, 'Rules Over Rights? Legal Aspects of the European Commission Recommendation for Resumption of Dublin Transfers of Asylum Seekers to Greece' [2019] German Law Journal 637
Hans Gribnau, 'Eenheid en verscheidenheid door rechtsbeginselen' in Gaakeer and Loth (eds), *Eenheid en verscheidenheid in recht en rechtswetenschap* (Kluwer 2002) 43-65
Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006)
Xavier Groussot and others, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Vogenauer and Weatherill (eds), *General Principles of Law. European and Comparative Perspectives* (Hart Publishing 2017) 102-135
Antoine Guérin, 'The European Approach to Hotspots in Greek Islands' (University of Oxford Border Criminologies 2 April 2021) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/04/european-approach> accessed 23 November 2021
Elspeth Guild and Luisa Marin, 'Still Not Resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges Ahead after the Lessons Learned from the Past' in Guild and Marin (eds), *Still Not Resolved? Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2009) 1-10
Sim Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts* (PhD thesis, Utrecht University 2019)
Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' [2015] Michigan Law Public Law and Legal Theory Research Paper Series 1
Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection - On *Opinion 2/13* on EU Accession to the ECHR' [2015] Human Rights Law Review 485
Kathrin Hamenstädt, 'Mutual (Dis-)trust in the Area of Freedom, Security and Justice?' [2021] Review of European Administrative Law 5
Philip Hanke and others, 'The "spirit of the Schengen rules", the humanitarian visa, and contested asylum governance in Europe – The Swiss case' [2018] Journal of Ethnic and Migration Studies 1361
Trevor Hartley, *The Foundations of European Union Law* (Oxford University Press 2014)
Gerda Heck and Sabine Hess, 'Tracing the Effects of the EU-Turkey Deal. The Momentum of the Multi-Layered Turkish Border Regime' [2017] movements 35
Lynn Hillary, '*ABRvS 20190435/1/V3* Voorlopig nog geen Dublinoverdrachten van asielzoekers aan Griekenland (case note)' [2020] AB Rechtspraak Bestuursrecht 275
Lynn Hillary, 'Uitzonderingen op het interstatelijk vertrouwensbeginsel in het Dublinsysteem in navolging van strafrechtelijke jurisprudentie' [2020] Asiel&Migrantenrecht 500

Lynn Hillary, 'Down the Drain with General Principles of EU Law? The EU-Turkey Deal and "Pseudo-Authorship"' [2021] European Journal of Migration and Law 127
Ian Hurd, 'Legitimacy' (Encyclopedia Princetoniensis) <https://pesd.princeton.edu/node/516#:-:text=legitimacy> accessed 22 November 2021
Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013)
Frédérique Jurgens and Ashley Terlouw, 'Uitspraak Uitgelicht – Niet terug naar Griekenland als rechtsbijstand ontbreekt' [2020] Asiel&Migrantenrecht 25
Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' [2019] Nordic Journal of International Law 315
Eleni Karageorgiou and Gregor Noll, 'What is Wrong with Solidarity in EU Asylum and Migration Law?' [2021] Available at SSRN: https://ssrn.com/abstract=3974596 or http://dx.doi.org/10.2139/ssrn.3974596
Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014)
Nicole Koenig and Marie Walter-Franke, 'One year on: What lessons from the EU-Turkey "deal"?' (Jacques Delors Institut Berlin 17 March 2017) <https://www.delorscentre.eu/en/publications/detail/publication/one-year-on-what-lessons-from-the-eu-turkey-deal> accessed 23 November 2021
Nikos Kourachanis, 'Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015-2017)' [2018] International Migration & Integration 1153
Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' [2018] European Papers 395
Xandra Kramer, 'Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights' [2013] Netherlands International Law Review 343
Henri Labayle and Philippe de Bruycker, 'The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?' (EU Immigration and Asylum Law and Policy 1 April 2016) <https://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/> accessed 23 November 2021
Rick Lawson, 'O campo preto. Op zoek naar een Portugese Zwartveld' in Campo and others (eds), *Loyale Samenwerking binnen de EU. Liber Amicorum voor Ivo van der Steen* (Boom juridisch 2020) 23-37
Rick Lawson, 'Hard Gras – Xero Flor en de Rechtsstaat in Polen' (Nederland Rechtsstaat 25 May 2021) <www.nederlandrechtsstaat.nl/forum/id377/27-05-2021/hard-gras-%E2%80%93xero-flor-en-de-rechtsstaat-in-polen.html> accessed 23 November 2021
Rick Lawson, 'Over Naar de VAR? De Rechtsstaat in Polen III' (Nederland Rechtsstaat 23 July 2021) <www.nederlandrechtsstaat.nl/forum/id398/23-07-2021/over-naar-de-var?-de-rechtsstaat-in-polen-iii.html> accessed 23 November 2021
Rick Lawson, 'Verschroeide Aarde – Xero Flor en de Rechtsstaat in Polen II' (Nederland Rechtsstaat 17 June 2021) <www.nederlandrechtsstaat.nl/forum/id382/17-06-2021/verschroeide-aarde-%E2%80%93-xero-flor-en-de-rechtsstaat-in-polen-ii.html> accessed 23 November 2021
Nicole Lazzerini, '"Please, Handle with Care!"—Some Considerations on the Approach of the European Court of Justice to the Direct Effect of General Principles of European Union Law' in Pineschi (ed), *General Principles of Law. The Role of the Judiciary* (Springer 2015) 145-168
Luc Leboeuf, *Le droit européen de l'asile au défi de la confiance mutuelle* (Anthemis 2016)

Luc Leboeuf and Marie-Claire Foblets, 'Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation' in Leboeuf and Foblets (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2019) 12-45
Dorota Leczykiewicz, 'Prohibition of abuse practices as a "general principle" of EU law' [2019] Common Market Law Review 703
Roman Lehner, 'The EU-Turkey-"deal": Legal Challenges and Pitfalls' [2019] International Migration 176
Koen Lenaerts, 'Beginselen van behoorlijk bestuur in de Europese Unie' in Opdebeek and Van Damme (eds), *Beginselen van behoorlijk bestuur* (die Keure 2006) 67-98
Koen Lenaerts, 'The Court of Justice of the European Union and the Refugee Crisis' in Lenaerts and others (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019)
Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Role of General Principles of EU Law' in Arnull (ed), *A Constitutional Order of States?* (Hart Publishing 2011) 179-197
Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Peers and others (eds), *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing 2014) 1559-1594
Koen Lenaerts and Piet Van Nuffel, *Europees recht* (Intersentia 2017)
Oskar Losy, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law' [2018] Adam Mickiewicz University Law Review 185
Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?' [2016] European Papers 943
Tony Marguery and Ton Van Den Brink, 'Mutual Recognition and Mutual Trust: Reinforcing EU Integration? Introduction' [2016] European Papers 861
Daniel Martin, 'Book Review: Ruben Zaiotti (ed), Externalizing Migration Management. Europe, North America and the spread of "remote control" practices (Routledge 2016)' [2016] Sociological Research Online 219
Reinhard Marx, 'The European Union's Plan to Amend the "First Country of Asylum" and "Safe Third Country" Concepts' [2019] International Journal of Refugee Law 580
Pauline Melin, 'The Global Compact for Migration: Lessons for the Unity of EU Representation' [2019] European Journal of Migration and Law 194
Elvira Mendez-Pinedo, 'The principle of effectiveness of EU law: a difficult concept in legal scholarship' [2021] Juridical Tribune 5
Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Invidivual' [2012] Yearbook of European Law 319
Valsamis Mitsilegas, 'Judicial dialogue, legal pluralism and mutual trust in Europe's area of criminal justice' [2021] European Law Review 579
Riona Moodley, 'Rethinking the Role of External Processing in the European Union: A Legal Perspective' [2017] Human Rights Defender 21
Clare Moran, 'Strengthening the principle of non-refoulement' [2021] The international journal of human rights 1032
Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford Academic 2017)

Sílvia Morgades-Gil, 'The "Internal" Dimension of the Safe Country Concept: the Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts' [2020] European Journal of Migration and Law 82
Minos Mouzourakis, '"We Need to Talk about Dublin": Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union' [2014] Working Paper Series Refugees Studies Centre University of Oxford 1
Konrad Niklewicz, 'Safeguarding the rule of law within the EU: lessons from the Polish experience' [2017] European View 281
Rolf Ortlep and Rob Widdershoven, 'European Administrative Law' in Seerden (ed), *Comparative Administrative Law* (Intersentia 2018) 267-356
Andrea Ott, 'EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multi-layered Relationship?' [2017] CLEER Working Papers 2017/4 1
Jannemieke Ouwerkerk, 'Grenzen aan wederzijds erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM' [2021] SEW Tijdschrift voor Europees en economisch recht 615
Daniël Overgaauw, *A Polyphony of Principles* (PhD thesis, University of Groningen 2022)
Laurent Pech and Sébastien Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juízes Portugueses' (EU Law Analysis 13 March 2018) <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> accessed 22 November 2021
Laurent Pech and others, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' [2021] Hague Journal on the Rule of Law 1
Frederik Peeraer and Rob van Gestel, 'Systematische jurisprudentieanalyse als uitdaging voor onderwijs en onderzoek' in Verbruggen (ed), *Methoden van systematische rechtspraakanalyse. Tussen juridische dogmatiek en data science* (Boom 2021) 185-2011
Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' (EU Law Analysis 5 February 2016) <http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html> accessed 23 November 2021
Frans Pennings, 'Fouten, misbruik en fraude bij grensoverschrijdende sociale zekerheid' [2021] SEW Tijdschrift voor Europees en economisch recht 12
Annick Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration* (Intersentia 2021)
Annick Pijnenburg and Conny Rijken, 'Moving beyond refugees and migrants: reconceptualising the rights of people on the move' [2021] Interventions 273
Jennifer Platt, 'Case study' in Outhwaite and Turner (eds), *The SAGE Handbook of Social Science Methodology* (SAGE Publications 2007) 100-118
Sacha Prechal, 'Europeanisation of National Administrative Law' in Jans and others (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 39-70
Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' [2017] European Papers 75
Eugenia Relaño Pastor, 'EU Initiatives on a European Humanitarian Visa' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 341-361
Jorrit Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' [2017] European Papers 571

Cecilia Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' [2019] European Law Journal 1
Cecilia Rizcallah, 'Facing the Refugee Challenge in Europe: A Litmus Test for the European Union. A Critical Appraisal of the Common European Asylum System through the Lens of Solidarity and Human Rights' [2019] European Journal of Migration and Law 238
Cecilia Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise des valeurs* (Bruylant 2020)
Jan Willem Sap, *De opstanding van Europa* (Ars Aequi Libri 2016)
Jan Willem Sap, 'Double standards. The political character of international human rights' [2020] NTKR Tijdschrift voor Recht en Religie 197
Sophie Scholten and Paul Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands' [2008] European Journal of Migration and Law 123
Michael Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' [2018] European Law Journal 124
Michael Scriven, 'Evaluation Research' in Outhwaite and Turner (eds), *The SAGE Handbook of Social Science Methodology* (SAGE Publications 2007) 523-533
Ben Smulders, 'De loyale samenwerkingsverplichting tussen de EU en haar Lidstaten: bespiegelingen over de praktische uitvoering van deze kernnorm' in Campo and others (eds), *Loyale Samenwerking binnen de EU. Liber Amicorum voor Ivo van der Steen* (Boom juridisch 2020) 15-22
Jukka Snell, 'The Single Market: Does Mutual Trust Suffice?' (Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law, Florence, 2016)
Arend Soeteman, 'Hercules aan het werk. Over de rol van rechtsbeginselen in het recht' [1991] Ars Aequi
Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' [2017] Journal of Refugee Studies 216
Maximilian Steinbeis, 'Editorial: So this is what the European Way of Life looks like, huh?' (Verfassungsblog 6 March 2020) <https://verfassungsblog.de/so-this-is-what-the-european-way-of-life-looks-like-huh/> accessed 23 November 2021
Tineke Strik, 'De externe dimensie van het EU migratiebeleid: uit het oog uit het recht?' [2018] Nederlands Tijdschrift voor de Mensenrechten 64
John Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' [1990] Common Market Law Review 645
John Temple Lang, 'Article 10 EC - The Most Important "General Principle" of Community Law' in Bernitz and others (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 75-114
John Temple Lang, 'Emerging European General Principles in Private Law' in Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 65-117
Andrea Terlizzi, 'Narratives in power and policy design: the case of border management and external migration controls in Italy' [2021] Policy Sciences 749
Hervé Thijssen, *De juridische dissertatie onder de loep. De verantwoording van methodologische keuzes in juridische dissertaties* (Boom Juridische Uitgevers 2009)
Anna Triandafylliadon and Angeliki Dimitriadi, 'Migration Management at the Outposts of the European Union: The Case of Italy's and Greece's Borders' [2013] Griffith Law Review 598
Takis Tridimas, *The General Principles of EU law* (Oxford University Press 2006)

Takis Tridimas, 'Keynote speech: Introduction: Europeanisation of Administrative law through general principles of law' (Conference on the Europeanisation of national administrative law through general principles of law: from resistance to voluntary adoption, Leiden, 2019)
Takis Tridimas, 'The general principles of EU law and the Europeanisation of national laws' [2020] Review of European Administrative Law 5
Lilian Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' [2021] European Constitutional Law Review 471
Tom Tyler, 'A psychological perspective on the legitimacy of institutions and authorities' in Jost and Major (eds), *The psychology of legitimacy: emerging perspectives on ideology, justice, and intergroup relations* (Cambridge University Press 2001)
Orçun Ulusoy, 'Turkey as a Safe Third Country?' (University of Oxford Border Criminologies 29 March 2016) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third> accessed 23 November 2021
Orçun Ulusoy and Hemme Battjes, 'Returned and Lost: What Happens After Readmission to Turkey?' (University of Oxford Border Criminologies 19 October 2017) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/10/returned-and-lost> accessed 23 November 2021
Orçun Ulusoy and Hemme Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement* (Migration Law Series 2017)
Marie-Sophie Vachet, 'Proposition de refonte du règlement "Dublin": quelle efficacité pour quels enjeux?' [2018] La Revue des droits de l'homme 1
Wouter van Ballegooij and Cecilia Navarra, 'Humanitarian visas. European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (Rapporteur: Juan Fernando Ló pez Aguilar)' (European Parliamentary Research Service PE 621.823 22 November 2018) <https://op.europa.eu/en/publication-detail/-/publication/a3b57ef6-d66d-11e8-9424-01aa75ed71a1/language-en/format-PDF> accessed 23 November 2021
Jacobine van den Brink and others, 'General Principles of Law' in Jans and others (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 135-260
Niovi Vavoula, 'The "puzzle" of EU large-scale information systems for third-country nationals: surveillance of movement and its challenges for privacy and personal data protection' [2020] European Law Review
Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International 2002)
Pieter Verrest, 'Zorgen om de rechtsstaat in Polen bij uitvoering van een Europees aanhoudingsbevel' [2021] Nederlands Tijdschrift voor Europees Recht 81
Armin von Bogdandy, 'Founding principles' in von Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart 2010) 11-54
Thomas Wahl, 'Fair Trial Concerns: German Court Suspends Execution of Polish EAW' (eurcrim.eu spotlight 2 April 2020) <https://eucrim.eu/news/fair-trial-concerns-german-court-suspends-execution-polish-eaw/> accessed 23 November 2021
Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe' [2020] eucrim the European Criminal Law Associations' Forum 321
Henrik Wenander, 'Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-Determination, and Individual Rights' [2011] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law 755

Henrik Wenander, 'A Network of Social Security Bodies – European Administrative Cooperation under Regulation (EC) No 883/2004' [2013] Review of European Administrative Law 39
Mattias Wendel, 'Mutual Trust, Essence and Federalism - Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' [2019] European Constitutional Law Review 17
Ramses Wessel, 'The EU and International Law' in Wessel and Larik (eds), *EU External Relations Law. Text, Cases and Materials* (Hart 2020) 139-173
Ramses Wessel, 'The European Union as a Global Legal Actor' in Wessel and Larik (eds), *EU External Relations Law. Text, Cases and Materials* (Hart 2020) 1-28
Tristan Wibault, 'Making the Case X&X for the Humanitarian Visa' in Foblets and Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Hart 2020) 271-282
Rob Widdershoven, 'Acting apart together. Loyale samenwerking tussen bestuurlijke instanties en de positie van de burger' [2015] SEW Tijdschrift voor Europees en economisch recht 561
Rob Widdershoven, 'Een ervaring als staatsraad advocaat-generaal: op zoek naar een rechtsbeginsel' in Bosma and others (eds), *De conclusie voorbij. Liber amicorum aangeboden aan Jaap Polak* (Ars Aequi Libri 2017) 87-101
Thomas Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' [2016] German Law Journal 339
Anna Wójcik, 'Muzzle Law leads German court to refuse extradition of a Pole to Poland under the European Arrest Warrant' (Rule of law 6 March 2020) <https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/> accessed 23 November 2021
Catherine Woollard, 'Weekly Editorial: EU-Turkey – Deconstructing the deal behind the statement' (European Council on Refugees and Exiles 16 March 2018) <https://ecre.org/weekly-editorial-deconstructing-the-deal-behind-the-statement/> accessed 23 November 2021
Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice. A Role for Proportionality?* (Hart Publishing 2019)
Ruben Zaiotti, 'Mapping remote control: the externalization of migration management in the 21st century' in Zaiotti (ed), *Externalizing Migration Management. Europe, North America and the spread of "remote control" practices* (Routledge 2016) 3-30

EU case law

Court of Justice of the European Union Case C-8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1956]
Court of Justice of the European Union Case C-1/58 *Stork* [1959]
Court of Justice of the European Union Case C-36/59, C-37/59, C-38/59 and C-40/59 *Geitling* [1960]
Court of Justice of the European Union Case C-11/70 *Internationale Handelsgesellschaft* [1970]
Court of Justice of the European Union Case C-22/70 *Commission v Council (ERTA)* [1971]
Court of Justice of the European Union Case C-45/76 *Comet* [1976]
Court of Justice of the European Union Case C-33/76 *Rewe-Zentralfinanz* [1976]
Court of Justice of the European Union Case C-4/73 *Nold* [1977]
Court of Justice of the European Union Case C-177/76 and C-16/77 *Ruckdeschel (Quellmehl)* [1977]

Court of Justice of the European Union Case C-46/76 *W.J.G. Bauhaus v The Netherlands State* [1977]
Court of Justice of the European Union Case C-44/79 *Hauer* [1979]
Court of Justice of the European Union Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979]
Court of Justice of the European Union Case C-218/82 *Commission v Council* [1983]
Court of Justice of the European Union Case C-222/84 *Johnston* [1986]
Court of Justice of the European Union Case C-201/85 and C-202/85 *Klensch* [1986]
Court of Justice of the European Union Case C-314/85 *Foto-Frost* [1987]
Court of Justice of the European Union Case C-222/86 *Heylens* [1987]
Court of Justice of the European Union Case C-120/86 *Mulder* [1988]
Court of Justice of the European Union Case C-170/86 *von Deetzen* [1988]
Court of Justice of the European Union Case C-25/88 *Esther Renée Bouchara, née Wurmser* [1989]
Court of Justice of the European Union Case C-46/87 and C-227/88 *Hoechst* [1989]
Court of Justice of the European Union Case C-347/87 *Orkem* [1989]
Court of Justice of the European Union Case C-5/88 *Wachauf* [1989]
Court of Justice of the European Union Case C-37/89 *Weiser* [1990]
Court of Justice of the European Union Case C-2/88 *Zwartveld* [1990]
Court of Justice of the European Union Case C-314/89 *Rauh* [1991]
Court of Justice of the European Union Case C-2/92 *Bostock* [1994]
Court of Justice of the European Union Case C-58/94 *Netherlands v Council* [1996]
Court of Justice of the European Union Case C-13/94 *P v S* [1996]
Court of Justice of the European Union Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996]
Court of Justice of the European Union Case C-404/97 *Commission v Portugal* [2000]
Court of Justice of the European Union Case C-110/99 *Emsland-Stärke* [2000]
Court of Justice of the European Union Case C-274/99 *Connolly v Commission* [2001]
Court of Justice of the European Union Case C-189/01 *Jippes* [2001]
Court of Justice of the European Union Case C-467/98 *Commission of the European Communities v Denmark (Open Skies)* [2002]
Court of Justice of the European Union Case C-94/00 *Roquette Frères* [2002]
Court of Justice of the European Union Case C-387/02 *Berlusconi and others* [2005]
Court of Justice of the European Union Case C-105/03 *Maria Pupino* [2005]
Court of Justice of the European Union Case *Opinion 1/03* [2006]
Court of Justice of the European Union Case C-523/04 *Commission of the European Communities v the Netherlands (Open Skies)* [2007]
Court of Justice of the European Union Case C-402/05 P and C-415/05 P *Kadi* [2008]
Court of Justice of the European Union Case C-174/08 *NCC Construction Danmark* [2009]
Court of Justice of the European Union Case C-491/10 PPU *Aguirre Zarraga* [2010]
Court of Justice of the European Union Case C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011]
Court of Justice of the European Union Case C-130/10 *European Parliament v Council of the European Union (Al-Qaeda)* [2012]

Court of Justice of the European Union Case C-581/11 P *Muhamad Mugraby v Council of the European Union and European Commission* [2012]
Court of Justice of the European Union Case C-396/11 *Ciprian Vasile Radu* [2013]
Court of Justice of the European Union Case C-168/13 PPU *Jeremy F* [2013]
Court of Justice of the European Union Case C-394/12 *Shamso Abdullahi* [2013]
Court of Justice of the European Union Case C-399/11 *Stefano Melloni* [2013]
Court of Justice of the European Union Case C-249/13 *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques* [2014]
Court of Justice of the European Union (Full Court) Case *Opinion 2/13* [2014]
Court of Justice of the European Union Case C-141/12 and C-372/12 *YS* [2014]
Court of Justice of the European Union Case C-536/13 *Gazprom* [2015]
Court of Justice of the European Union Case C-404/15 *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016]
Court of Justice of the European Union Case C-63/15 *Mehrdad Ghezelbash* [2016]
Court of Justice of the European Union Case C-965 PPU *Mirza* [2016]
Court of Justice of the European Union Case C-578/16 PPU *C.K. and others v Slovenija* [2017]
Court of Justice of the European Union Case C-578/16 *C.K., H.F., A.S. v Republika Slovenija* [2017]
Court of Justice of the European Union Case C-251/16 *Edward Cussens a.o. v T.G. Brosnan* [2017]
General Court of the European Union Case T-192/16 *NF v European Council (General Court)* [2017]
Court of Justice of the European Union Case C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the EU* [2017]
Court of Justice of the European Union Case C-638/16 PPU *X and X v Belgium* [2017]
Court of Justice of the European Union Case C-359/16 *Altun* [2018]
Court of Justice of the European Union Case C-64/16 *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018]
Court of Justice of the European Union Case C-73/17 *France v Parliament* [2018]
Court of Justice of the European Union Case C-216/18 PPU *LM* [2018]
Court of Justice of the European Union Case C-208/17 to C-210/17 P *NF v European Council (Court of Justice)* [2018]
Court of Justice of the European Union Case C-163/17 *Abubacarr Jawo v Germany* [2019]
Court of Justice of the European Union Case C-297/17 *Bashar Ibrahim and others v Germany* [2019]
Court of Justice of the European Union Case C-192/18 *Commission v Poland* [2019]
Court of Justice of the European Union Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019]
Court of Justice of the European Union Case C-620/16 *European Commission v Germany* [2019]
Court of Justice of the European Union Case C-585/18, C-624/18 and C-625/15 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* [2019]
Court of Justice of the European Union Case C-17/19 *Bouygues travaux publics* [2020]
Court of Justice of the European Union Case C-354/20 PPU and C-412/20 PPU *L & P* [2020]
Court of Justice of the European Union Case C-558/18 and C-563/18 *Miasto Łowicz* [2020]
Court of Justice of the European Union Case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* [2021]
Court of Justice of the European Union Case C-896/19 *Repubblika* [2021]

Member State case law

German Constitutional Court Case 2 BvG 1/55 *Reichskonkordat* [1957]
Belgian Constitutional Court Case 124/210 [2010]
Lyon Administrative Court of Appeal Case 17LY02181 - 17LY02184 [2018]
Amsterdam District Court Case ECLI:NL:RBAMS:2018:7032 *13/751441-18 RK 18/3804* [2018]
Belgian Council for Alien Law Litigation Case 208 991 *223 867 / IX* [2018]
Dutch Council of State Case ECLI:NL:RVS:2018:1795 *201706354/1/V3* [2018]
Belgian Council for Alien Law Litigation Case 205 104 *X* [2018]
Munich Administrative Court Case M 11 S 19.50722 and M 11 S 19.50759 [2019]
Amsterdam District Court Case ECLI:NL:RBAMS:2019:9983 *13/737516-13* [2019]
Amsterdam District Court Case ECLI:NL:RBAMS:2019:9098 *13/751306-19* [2019]
Amsterdam District Court Case ECLI:NL:RBAMS:2019:6583 *13/751551-19* [2019]
Amsterdam District Court Case ECLI:NL:RBAMS:2019:8020 *13/751671-19* [2019]
Dutch Council of State Case ECLI:NL:RVS:2019:2384 *201901667/1/V3* [2019]
Dutch Council of State Case ECLI:NL:RVS:2019:2385 *201902302/1/V3* [2019]
Dutch Council of State Case ECLI:NL:RVS:2019:3537 *201904035/1/V3* [2019]
Karlsruhe Higher Regional Court Case Ausl 301 AR 95/18 [2020]
Amsterdam District Court Case ECLI:NL:RBAMS:2020:184 *13.752.083-19* [2020]
Amsterdam District Court Case ECLI:NL:RBAMS:2020:1850 *13/751003-20* [2020]
Amsterdam District Court Case ECLI:NL:RBAMS:2020:1105 *13/751348-18* [2020]
Amsterdam District Court Case ECLI:NL:RBAMS:2020:181 *13/751948-19* [2020]
Amsterdam District Court Case ECLI:NL:RBAMS:2020:103 *13/752099-18 (EAB I)* [2020]
Dutch Council of State Case ECLI:NL:RVS:2020:1382 *202002276/1/V3* [2020]
Amsterdam District Court Case ECLI:NL:RBAMS:2021:855 *13.752.149-20 RK 20/6239* [2021]
Dutch Council of State Case ECLI:NL:RVS:2021:1626 *202005934/1/V3* [2021]
Dutch Council of State Case ECLI:NL:RVS:2021:1627 *202006295/1/V3* [2021]
Antwerp Court of First Instance, Chamber AC10 Case 19A001065 *K.M.* [2021]
Amsterdam District Court Case ECLI:NL:RBAMS:2021:420 *RK 20/771 13/751021-20* [2021]
Amsterdam District Court Case ECLI:NL:RBAMS:2021:179 *RK 20/3065 and 13/751520-20* [2021]

ECHR case law

European Court of Human Rights (Grand Chamber) Case 30696/09 *M.S.S. v Belgium and Greece* [2011]
European Court of Human Rights (Grand Chamber) Case 29217/12 *Tarakhel v Switzerland* [2014]
European Court of Human Rights Case 3599/18 *M.N. v Belgium* [2020]

Legislation and travaux préparatoires

United Nations General Assembly 2198 (XXI) of 16 December 1966: Protocol relating to the Status of Refugees [1967]
Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the protection of human rights and fundamental freedoms [1977] OJ C 103/1

Belgian Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers – Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen [1980] Moniteur belge – Belgisch Staatsblad 1980121550
Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985) [1985] COM(85) 310 final
Presidency Conclusions, Tampere European Council, 15 and 16 October 1999 [1999]
Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338
Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland) [2004] OJ L 166
Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01
Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L 218
Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243
Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284
Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337
Treaty on the Functioning of the European Union [2012] C 326/47
Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180
Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157
European Parliament resolution of 14 April 2016 on the 2015 report on Turkey [2016] 2015/2898(RSP)
Joint Way Forward on migration issues between Afghanistan and the EU [2016]
Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) [2016] COM/2016/0815 final
Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2016] COM/2016/0467 final
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) [2016] COM(2016) 270 final/2
Question for written answer to the Commission: Compliance of EU-Turkey deal with the non-refoulement principle [2016] Parliamentary questions E-002892-16
Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013 of the European Parliament and of the Council [2016] OJ L 340/60
Treaty on the European Union [2016] OJ C 202/1
Dutch Parliament: Aanhangsel van de Handelingen II [2018] 2017/18 no. 2499
Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2020] COM(2020) 609 final
Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] [2020] COM(2020) 610 final
Joint Declaration on Migration Cooperation between Afghanistan and the EU [2021] 5223/21 ADD 1
The Stockholm Programme. An open and secure Europe serving and protecting citizens [2010] OJ C 115/1
Council of the EU, 'EU-Turkey statement' 870/15 (29 November 2015)
Council of the EU, 'EU-Turkey Statement' 144/16 (18 March 2016)
Council of the EU, 'Statement on the situation in Afghanistan' 665/21 (31 August 2021)
2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1
European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' IP/15/6330 (15 December 2015)
EU-Turkey joint action plan [2015] MEMO/15/5860
European Commission, 'Facility for Refugees in Turkey: €47 million to strengthen migration management and to support education of Syrian refugees ' IP/16/1908 (26 May 2016)
European Commission, 'Relocation and Resettlement: EU Member States urgently need to deliver' IP/16/829 (16 March 2016)
European Commission, 'Turkey's progress on the visa liberalisation roadmap' (4 May 2016)
Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31
Charter of Fundamental Rights of the European Union [2000] OJ 2000/C 364/01

Official publications

'External Dimension' (EASO) <www.easo.europa.eu/operational-support/external-dimension> accessed 23 November 2021
'UNHCR Global Report 2005: Glossary' (UNHCR 2005) <https://www.unhcr.org/449267670.pdf> accessed 23 November 2021

UNHCR Guidelines on international protection no. 11: Prima Facie Recognition of Refugee Status [2015]
'Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries' (Fundamental Rights Agency 5 December 2016) <https://fra.europa.eu/en/publication/2016/guidance-how-reduce-risk-refoulement-external-border-management-when-working-or> accessed 23 November 2021
'UNHCR on EU-Turkey deal: Asylum safeguards must prevail in implementation' (UNHCR 18 March 2016) <www.unhcr.org/56ec533e9.html> accessed 23 November 2021
'UNHCR urges immediate safeguards to be in place before any returns begin under EU-Turkey deal' (UNHCR 1 April 2016) <https://www.unhcr.org/56fe31ca9.html> accessed 23 November 2021
'EASO External Cooperation Strategy' (EASO February 2019) <https://www.easo.europa.eu/sites/default/files/easo-external-cooperation-strategy.pdf> accessed 23 November 2021
'Glossary on Migration' (IOM 2019) <https://www.iom.int/glossary-migration-2019> accessed 23 November 2021
'Nota van Myria voor de Kamercommissie Binnenlandse Zaken, Algemene Zaken en Openbaar Ambt: Humanitaire visa: naar een omkaderd en transparant beleid' (Myria Federaal Migratiecentrum 29 January 2019) <www.myria.be/files/Myria-Nota-voor-de-Kamercommissie-290119.pdf> accessed 23 November 2021
UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees [2019]
'Migratie in cijfers en in rechten 2020 | Katern uit het jaarverslag: Toegang tot het grondgebied' (Myria Federaal Migratiecentrum 2020) <www.myria.be/files/CHAP3-Toegang_tot_het_grondgebied-NL-AS.pdf> accessed 23 November 2021
Fundamental Rights Agency, 'FRA Opinion 5/2016: Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2016)
Fundamental Rights Agency, 'FRA Opinion 3/2019: Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (2019)
IOM, 'Global Compact Thematic Paper | Readmission' (IOM) <https://www.iom.int/sites/g/files/tmzbdl486/files/our_work/ODG/GCM/IOM-Thematic-Paper-Readmission.pdf> accessed 23 March 2022

NGO publications

'Greece: Chaos and squalid conditions face record number of refugees on Lesvos' (Amnesty International 24 August 2015) <www.amnesty.org/en/latest/news/2015/08/chaos-and-squalid-conditions-face-record-number-of-refugees-on-lesvos/> accessed 11 September 2022
'Intentieverklaring betreffende het opzetten van een privaat gefinancierde "humanitaire corridor" voor 150 Syrische kwetsbare vluchtelingen uit Libanon en Turkije naar België tussen de Belgische Staatssecretaris voor Asiel en Migratie en De Gemeenschap van Sant'Egidio in partnerschap met de erkende erediensten van België' (Sant'Egidio Belgium 22 November 2017) <www.santegidio.be/wp-content/uploads/2019/01/Intentieverklaring-Humanitaire-Corridors.pdf> accessed 23 November 2021

'Country Report: Greece 2018 Update' (AIDA Asylum Information Database March 2019) <https://asylumineurope.org/reports/country/greece/> accessed 23 November 2021
'Greece: Camp Conditions Endanger Women, Girls. Asylum Seekers Lack Safe Access to Food, Water, Health Care' (Human Rights Watch 4 December 2019) <www.hrw.org/news/2019/12/04/greece-camp-conditions-endanger-women-girls> accessed 23 November 2023
'Nota Sant'Egidio over project 'Humanitaire corridor' (2017-2018) voor hoorzitting Kamercommissie Binnenlandse Zaken' (Sant'Egidio Belgium 5 February 2019) <www.santegidio.be/wp-content/uploads/2019/02/2019-Nota-voor-Hoorzitting-Kamercommissie-5-feb.pdf> accessed 23 November 2021
'Country Report: Greece 2019 Update' (AIDA Asylum Information Database June 2020) <https://asylumineurope.org/reports/country/greece/> accessed 23 November 2021
'Country Report: Greece 2020 Update' (AIDA Asylum Information Database June 2021) <https://asylumineurope.org/reports/country/greece/> accessed 23 November 2021
'EU Regional Trust Fund in Response to the Syrian Crisis 8th Results Report Special edition with COVID-19 results' (External Monitoring and Evaluation for the European Union Regional Trust Fund in Response to the Syrian Crisis March 2021) <https://ec.europa.eu/trustfund-syria-region/system/files/2021-05/8th_RR%20EUTF%20Syria-FINAL.pdf> accessed 23 November 2021
'Country Report: Greece 2021 Update' (AIDA Asylum Information Database May 2022) <https://asylumineurope.org/reports/country/greece/> accessed 12 September 2022
Susan Fratzke, *Not adding up. The fading promise of Europe's Dublin system* (Migration Policy Institute Europe 2015)
Bill Frelick, 'Is Turkey Safe for Refugees?' (Human Rights Watch 14 June 2019) <www.hrw.org/news/2016/03/22/turkey-safe-refugees> accessed 23 November 2021
Amnesty International, 'A blueprint for despair. Human rights impact of the EU-Turkey Deal' (Amnesty International 14 February 2017) <www.amnesty.org/en/documents/eur25/5664/2017/en/> accessed 23 November 2021

Media

EPA, 'Noodkreet Vluchtelingenwerk over retourtickets migranten' *NOS* (24 May 2018) <https://nos.nl/artikel/2233324-noodkreet-vluchtelingenwerk-over-retourtickets-migranten> accessed 23 November 2021
Melvin Ingleby, 'EU is indirect betrokken bij terugsturen Syrische vluchtelingen' *Trouw* (27 August 2019) <www.trouw.nl/buitenland/eu-is-indirect-betrokken-bij-terugsturen-syrische-vluchtelingen~b7f344ca/?utm_campaign=shared_earned&utm_medium=social&utm_source=whatsapp> accessed 23 November 2021
Farah Karimi, 'Opinie: Deal van EU met Turkije is grote morele dwaling' *Trouw* (12 april 2016) <www.trouw.nl/opinie/deal-van-eu-met-turkije-is-grote-morele-dwaling~b54acd6a/> accessed 23 November 2021
Nikolaj Nielsen, 'Greek migrant hotspot now EU's "worst rights issue"' *euobserver* (7 November 2019) <https://euobserver.com/migration/146541> accessed 24 November 2021
Andrew Rettman, 'EU prepares to keep out Afghan refugees' *euobserver* (31 Augustus 2021) <https://euobserver.com/world/152759?utm_source=euobs&utm_medium=email> accessed 31 August 2021

Jarl van der Ploeg, 'Lekkende tentjes, blubber en ziekten: zo leven vluchtelingen in de "openluchtgevangenis" op dit Griekse eiland' *de Volkskrant* (28 december 2017) <www.volkskrant.nl/nieuws-achtergrond/lekkende-tentjes-blubber-en-ziekten-zo-leven-vluchtelingen-in-de-openluchtgevangenis-op-dit-griekse-eiland~bd4f0ea6/> accessed 23 November 2021