Beyond the Nation-State: 
In Search of a Post-National Response to Asylum

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Man in his elemental state is a peasant
with a possessive love of his own turf;
a mercantilist who favours exports over imports;
a populist who distrusts banks, especially foreign banks;
a monopolist who abhors competition;
a xenophobe who feels threatened by
strangers and foreigners.

- Charles Kindleberger
Executive Summary

This study is intended to offer an insight into the difficulties experienced by the nation-state in its policy response to asylum and to determine whether there is a post-national solution. Processes of globalization accompanied by war and conflicts, increased migration flows of refugees, and a growing interdependence among nation-states have pressed for the development of international jurisdiction and institutions. As a result, the nation-state is no longer the only actor to provide rights to the individual. The establishment of international law provides rights that transcends national borders and can legally bind states to uphold human rights. For instance, the individual that has a well-founded fear of being prosecuted in its home country for reasons of, for example, race, religion, or political opinion, has the right to enjoy international protection according to the 1951 Geneva Convention. A party to the Convention is obliged to live up to that responsibility and to offer asylum to persons that carry the refugee status. The research has shown that this Convention has influenced both European as Dutch asylum law to a great extent as it has been fully incorporated in both systems. Yet, incorporation of international law into domestic law relies heavily on the willingness of the national government to do so. Moreover, there is no enforceable framework in international law that prevents a nation-state from expelling or excluding foreigners. Thus the foreigner has no protection from expulsion by the nation-state, unless, the foreigner resides legally on the territory according to national law. Additionally, the research shows that a nation-state is only bound to an international agreement when it has signed and ratified it. If not, then the state is not obliged to transpose any provisions from international law into domestic law. In this case, national sovereignty remains untouched. The study therefore reveals that international law does provide transnational jurisdiction but cannot be called post-national. This also applies to the EU and its asylum policy, mainly illustrated by the Common European Asylum System that seeks ways to harmonize existing asylum and migration policies among the member states. Although, the system has succeeded in this to a certain extent, the dissertation presents findings to conclude that the European Union may never carry a post-national solution to asylum, mostly because EU policy remains a product of political compromise between member states. Nonetheless, growing interdependence will continue to press for international and European cooperation, also in the interest of the nation-state. Analysis of struggles with issues of asylum experienced within both the Netherlands and the European Union as a whole reveal that it is perhaps better not focus on an ultimate post-national solution. Instead, the study recommends that states should look for a system of solidarity that integrates a shared responsibility, not only for the sake of national interest but also for the sake of human rights.
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Abbreviations

AMIF  Asylum, Migration and Integration Fund
CDA  Christen-Democratisch Appel Christian Democratic Appeal
EASO  European Asylum Support Office
EC  European Community
ECHR  European Convention on Human Rights
ECtHR  European Court of Human Rights
EU  European Union
GNP  Gross National Product
ICCCPR  International Covenant on Civil and Political Rights
ICESCR  International Covenant on Economical, Social and Cultural Rights
IRO  International Refugee Organisation
NGO  Non-governmental Organization
UDHR  (United Nations) Universal Declaration of Human Rights
UN  United Nations
UNHCR  United Nations High Commissioner for Refugees
PVV  Partij voor de Vrijheid Party of Freedom
VVD  Volkspartij voor Vrijheid en Democratie People’s Party of Freedom
Introduction

“Italy mourns 300 dead in Lampedusa migrant boat tragedy” (the Telegraph, 2013, October 4).
“Lampedusa: 900 feared dead as migrant boat sinks off Libya” (Channel4, 2015 April 19).

Many migrants risk their lives every day to cross the Mediterranean Sea in search of a better life within the borders of the European Union. Conflicts, instability and no economic prospects drive desperate people in the hands of smugglers to make the dangerous journey overseas from Africa and the Middle East to Italy (BBC, 2014, September 15). The Mediterranean Sea is turning into a graveyard, a humanitarian disaster that has become the “symbol of Europe’s migrant crisis” (Lyman, 2015, March 8). The Italian premier Matteo Renzi talks of “a plague in the history of our continent and the Mediterranean Sea” and calls it “the slavery of the 21st century caused by human traffickers” (Hilbrand, 2015, May 22).

Nowadays, a process of rapid globalization fosters migration by new technological advances that have lowered the costs of transportation and communication. Moreover, the increasing liberalization of trade and capital markets, like that within the European Union, has reduced protectionism and has promoted free trade instead (World Bank, 2004, p.1). As a result of the elimination of trade barriers, the highest “GNP per capita” growth rates are enjoyed by the most globalized developing economies (ibid.). However, those countries that fail to participate in globalization processes, like many countries in Africa, experience negative income growth rates (ibid.). It is for this reason that globalized developing economies, like those in the European Union, have become a magnet to immigrants and refugees from third world countries that seek a better future. As globalization makes “currently existing borders and boundaries less relevant”, the benefits generated by globalization are accompanied by new challenges (ibid. Steger, 2013, p. 9). One major challenge is experienced at the borders of the European Union. The tragedies in the Mediterranean Sea have been the stimulus to this research and has finally led to the research question of this thesis: Is there a post-national solution to issues of asylum?

To answer the research question the following sub questions are drawn:

• How are citizenship and the nation-state linked?
• What is the migrant to the nation-state?
• What difficulties does a nation-state face in their policy response to asylum?
• Are there ways to provide the individual rights beyond the nation-state?
• *Are there any binding policies and regulations regarding to asylum?*

• *To what extent does the EU embody a post-national solution to issues of asylum?*

This provides a certain understanding of developments in alien and asylum policy. The first chapter of this study describes how the concept of the nation-state stands in direct relation to the citizen. It explains why the citizen is important to the nation-state and why the migrant is treated differently from the national. The chapter furthermore shows some struggles experienced by the nation-state and which influenced their policy response to asylum. It moreover illustrates how globalization and the emergence of international and European law have influenced domestic asylum policy and how it has diminished state sovereignty to some extent.

Asylum issues that transcend national borders and growing interdependence among states pose new dilemmas to the nation-state. The second chapter discusses whether the European Union embodies a post-national solution by analysing whether EU citizenship offers post-national rights, the influence of EU regulations and directives on domestic policy, and the establishment of a Common European Asylum System.

The third chapter contains a case study. It applies the concepts discussed in the two previous chapters in the context of the Netherlands. The chapter sets out how the Dutch nation-state has dealt with issues of migration and how alien law has developed through history. Its shows the impact of international agreements and the challenges exposed with the incorporation of international law into domestic law. Moreover, the research reveals the political sensitivity of asylum matters and how coordination and cooperation within the European Community had become inevitable. However, additionally it shows how the Dutch government has struggled with transferring parts of its sovereignty to Brussels.

Finally, chapter four concludes the study with an answer to the research question.
Methodology

This chapter describes the means used in the research to answer the main and sub questions. The objective was to answer these questions through findings by the use of qualitative information. The choice for a qualitative method is because of the preference to research the field of the subject with much openness and curiosity to gather as much themes that are important to get a good understanding of the matter. This approach will consequently make the thesis theoretical instead of empirical.

The study approaches the matter from different angles through an analysis of the relation between the nation-state and asylum policy, history, public opinion, political thought on citizenship versus the alien, and developments in migration law both national as international. Theoretical concepts about the nation-state, citizenship, sovereignty, migration, refugee, asylum, human rights and post-nationalism have been key concepts of the research.

Various sources provided the information to formulate the descriptive answers to my research questions. The research is based on the consultation of academic literature such as books and both juridical and scientific articles written by experts in academic journals. Furthermore, the study refers to international law and treaties, European regulations and directives, policy documents, debates within the Dutch House of Parliament and various other publications like news articles and the reports of, for example, the United Nations High Commissioner for Refugees (UNHCR). The reading of literature and documentation often led to further reading and new information. Most of the information was retrieved through the Internet by the use of terms like ‘nation-state’, ‘citizenship’, ‘migration’, ‘refugees’, ‘alien’, ‘asylum policy’, ‘post-nationalism’, ‘European Union’, ‘Europeanization’, ‘securitization’ in online scientific search engines such as Google Scholar and EBSCO.
1 The Nation-State: Who is in, who is out?

1.1 Citizenship vs. ‘the Other’

Nowadays, the nation-state is a notion someone thinks of when describing or discussing modern states. In modern times, as Stephen Castles argues, it is hard not to perceive a state as a nation as well. This is illustrated by the concept of the “United Nations” (Castles, 2000, p. 188). However, the meaning of the nation theory is different from the theory of state. The nation refers to the sense of coherence by culture defined by a “common heritage” among a community of people and the state indicates “a legal and political organization which controls a certain territory” (ibid.). James Caporaso adds to this definition by saying that a state, regarded by neorealists, “is a pure agent, an actor with the ultimate right to decide within a given territory” (Caporaso, 1996, p. 33).

The idea of the nation-state comes from the Westphalian system and the rise of modern states (ibid. p. 34). The Peace Treaty of Westphalia of 1648 changed the old structures of states within the international political order. The power of the Holy Roman Empire declined and the feudal principalities ended (Farr, 2005, pp. 156). In return, international relations became subject to sovereign states, introducing the balance of power. Jason Farr notes that “after 1648, national sovereignty, characterized by autonomy and interstate competition became the primary governing system among European states” (ibid.).

According to Andreas Wimmer and Nina Glick Schiller, the establishment of “the nation-state has shaped the way immigration is perceived and received fundamentally” (Wimmer, Schiller, 2002, p. 301). It is important to understand how nationalism influences the study of migration (and therefore migration policy) (ibid. p. 308). Scholars divide four distinct types of peoplehood on which nationalist thinking is built. These are (i) democracy: the political power exercised by the people within a sovereign state, (ii) citizenship: the people “holding equal rights before the law”, (iii) social security: the people within a group bound by “obligatory solidarity” as an “extended family”, and (iv) national self-determination: “the people as an ethnic community undifferentiated by distinctions” (ibid.). The correlation between the peoplehood and the nation-state is characterized by the fact that the nation-state defines its people. Meaning that the nation-state determines who is in and who is out based on territorial borders. The ‘free citizen’ used to belong to medieval cities that consisted of refugees from feudal servitude (Castles, 2000, p. 188). Now the citizen belongs to the nation-state and is called Dutch, British, French, or in other words a national (ibid.). Without the concept of a ‘citizen’, there would not be a justification for nation-states to
treat some “individuals more favourably and others less so” (Guild, 2009, p. 29). Thus, there are some privileges for those who are ‘property’ of the state and to which ‘the others’ are excluded. Castles even argues that by differentiating its people from ‘the other’, the nation-state forces the culture of the dominant group upon the mass and tries to reject all other cultural aspects of the minority (Castles, 2000, p. 189). This homogenization of the mass may go through imposition, but may also come naturally by gradual evolution through “economic and social interaction”. The French Revolution attempted to overcome religious and cultural differences by creating the “civic nation” and this did not go without the homogenization of language and “political centralization” (ibid.). Regardless of the effort of the nation-state to homogenize, history has proven that the nation has often failed to resolve “the contradiction between the citizen and the national” (ibid.). This has led to separatist movements, nationalism and racism, which dominated the wars that devastated Europe during the nineteenth and twentieth century (ibid.).

For the reason that citizenship is so closely intertwined with the nation-state, it comes without surprise why special attention is given to policy regarding migration. The study of Wimmer and Schiller explains that citizens as nationals share the same “loyalty towards the same state” (Wimmer, Schiller, 2002, p. 309). In return, the state guarantees them equal rights. On the other hand, immigrants are perceived as foreign and are presumed to be “loyal to another state” (ibid.). Additionally, according to Castles, immigration, and therefore diversity, poses a threat to “national cohesion and identity” (Castles, 2000, p. 191). The influence of rapid globalization and international migration leaves little time for nation-states to diminish cultural diversity (ibid.). Globalization generates “transcontinental or interregional flows and networks of activity, interaction, and the exercise of power” (Held, McGrew, Goldblatt, and Perraton, 1999). As Steger correctly outlines, the process of globalization makes “currently existing borders and boundaries irrelevant” (Steger, 2013, p. 9). This is not an invented process. The theory of globalization has always existed as people have always had the urge to travel, to migrate, either because of push or pull factors, causing the transport of goods, capital, ideas, and people (Castles, 2000; Bhabha, 1999). Migration, being a new phenomenon or not, poses a great dilemma to rich nations (often Western countries), as the immigrant is seen as the enemy when sharing the same cake of social benefits, fuelled by the fear of getting “dragged down to Third-World poverty” (Castles, 2000, p. 191).

These threats to the nation and interstate competition within international relations create the incentive for the nation-state to differentiate its people from the Other. The urge to manage the flows of people across borders effectively and to know “who is who” has led to identification measures. For all the reasons mentioned above, the modern state holds a monopoly on the “legitimate means of movement” (Torpey, 1997, p. 1).
By controlling its borders and making people dependent of the state for traveling legitimately, the state is more able to “embrace its members” (ibid.). Only by doing this, the modern state can provide social and economic benefits like shelter, rights, health care and education. On the other hand, by defining its territory and citizen, it can, for example, also extract taxes, create a military service, “control brain drain”, observe and contain “undesirable elements – whether these are of an ethnic, national, racial, economic, religious, ideological, or medical character” (ibid. p. 3). In other words, the modern state reaches into its society to extract from its citizens what it needs in order to survive (ibid. p. 5). With the advent of new technologies and improved bureaucracies, it has become possible to expand the power by the nation-state to control the movement of people. Developed technologies make it easier to document and code individuals in administrative systems and to share this information among the nation-state’s authorities to guard, manage and control all aspects of its sovereignty. Gerard Noiriel identified this process as the “revolution identificatoire” (Noiriel in Torpey, 1997, p. 3). To travel through spaces, it has become required to have an identification document that makes it legitimate. Without today’s advances and technologies, the nation does not enjoy the same centralized power. During old times, smaller entities like urban authorities and social communities controlled the freedom of movement. These were, for example, landlords who had control over their serfs’ right to move and so did the owners of slaves (Torpey, 1997, p. 3). Over time, the principalities or the city-states, landowners or slave drivers, religious organizations or any other social group, no longer solely maintained the control and administration of individuals. Its scope gradually moved to the national level. The development of the passport, for instance, made it possible for members of a state to pass its borders legally. However, when something becomes legal it always creates something defined as illegal. Meaning that, in this sense, being undocumented makes a person illegal (ibid. p. 4). A person who migrates illegally is, therefore, prosecutable by the state. Moreover, Jaqueline Bhabha, a former practising human rights lawyer, adds that “the right to unqualified indefinite residence is a key attribute of nationality; conversely, vulnerability to exclusion or expulsion is a critical signifier of non-belonging” (Bhabha, 1999, p.19).

1.2 The Alien, Human Rights and State Sovereignty

The subject of expulsion and exclusion raises the question; to what extent does the state has the legitimacy to expel or exclude a person? According to Max Weber the state has every right to do so as the state is defined by the following elements: “(i): the existence of a regularized administrative stave able (ii) to sustain the claim to the legitimate monopoly of control of the means of violence and (iii) to uphold that monopoly within a given territorial area” (Weber in Giddens, 1985, p. 18). However, with the outbreak of the Second World War, the perspective on
The horrific experiences during the war and the Holocaust put the freedom of the state into question. In 1948, states signed the United Nations Declaration of Human Rights (UDHR) as an effort to limit state sovereignty (Guild, 2009, p. 49). In the preamble of the Declaration the following is said:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas Disregard and contempt for human rights have resulted in barbarous acts, which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

The General Assembly proclaims:

THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

(United Nation Universal Declaration of Human Rights, 1948)

This declaration is created to grant every person, as an individual, as a member of the human family, regardless of belonging to a territory, universal rights. These rights transcend the borders of the nation-state into transnational moralities. However, states argue that the rights carried out by the UDHR are not enforceable as “the argument is that it is a declaration of intent not a binding commitment […] declared by the General Assembly of the UN, not signed and ratified by each state” (Guild, 2009, p. 50). Therefore, it can be concluded that an agreement is only binding, and therefore enforceable, when a state has signed it. For this reason, other agreements followed, which embody most of the rights paraphrased in the declaration also called “the International Bill of Human Rights”. These are, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economical, Social and Cultural Rights 1966, signed in New York (ibid.).
The ICCPR, in this case, has 74 signatories and 168 parties (United Nations Treaty Collection, 2012). Whether a state is legally bound depends on its status. A signatory state is not bound by “a treaty’s specific provisions and obligations” as a state with this status only “agrees to act, in good faith, not to defeat the object and purpose of the treaty”, (Vienna Convention on the Law of Treaties 1969; Article 18, Inside Justice, 2014). Moreover, a signatory state can also decide to withdraw its signature. Although, when a state is a party to a treaty, this state is “legally bound by the provisions within the treaty and accepts all the treaty’s obligations, subject to legitimate reservations, understandings, and declarations (RUDs)” (Inside Justice, 2014). Therefore, it appears that states give up parts of their sovereignty by signing international agreements such as the International Bill of Human Rights.

Although the UDHR seeks to equalize every individual to the same human family with uniform rights, there is no enforceable framework that prevents the nation-state from expelling or excluding foreigners. As Bhabha rightfully argues and mentioned earlier in this chapter, “the right to unqualified indefinite residence is a key attribute of nationality; conversely, vulnerability to exclusion or expulsion is a critical signifier of non-belonging” (Bhabha, 1999, p. 19). Article 9 and 13 UDHR refer to exile and deportation and the right to entry or leave a country of a nationality:

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.
Article 13 (2): Everyone has the right to leave any country, including his own, and to return to his country. 

(UDHR, 1948)

First, the adjective of ‘arbitrary’ indicates that arrest, detention or exile is acceptable when it is not arbitrary. Second, article 13 (2) suggests that everyone should be able to return to “his country”. This means that this article is in contradiction with the banishment of at least nationals but is unclear about the position of foreigners (Guild, 2009, p. 50). However, the only treaty to refer to the “expulsion or refoulement of aliens” is the International Covenant of Civil and Political Rights (Vibeke Eggli, 2002, p. 184). It states:

Article 13: An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. 

(ICCPR, 1966)

By analysing the article, it can be concluded that ‘lawful’ refers to national law dealing with aliens, residence and stay (Vibeke Eggli, 2002, p. 184). Meaning that this article is inapplicable when an alien resides irregularly on the territory of a State Party.
Thus, unless the state has signed and ratified any of these treaties, one could say that its sovereignty remains untouched. However, being a UN member state implies that “human rights abuses of nationals by their states are a ground for the international community to condemn a state and require it to explain its action in the context of the UN bodies” (Guild, 2009, pp. 69-70). Although, when the state in question has become subject to another state and therefore not able to provide human rights, “that other state may find itself responsible to the international community for the delivery” of those rights (ibid. p. 70).

State sovereignty eventually means that, within its borders, it has the responsibility of its nationals, “for his or her care” (Guild, 2009, p. 69). However, many violent conflicts, human rights abuses, and social and political instability, forces many to leave the country of nationality to seek protection across borders. With the experience of the Second World War, the right to asylum was first cited by the UDHR in article 14 “everyone has the right to seek and enjoy in other countries asylum from prosecution” (UDHR, 1948). The United Nations Convention Relating to the Status of Refugees followed in 1951. The Refugee Convention was initially founded to protect European refugees, however, its protocol of 1967 “removed geographical and temporal restrictions to the convention” (UNHCR, 2015). With the status of refugee, the individual comes under the protection of the international community. The definition of a refugee is given in the first article of the Convention and the adjustments by the Protocol:

Article 1(2): Any person (As a result of events occurring before 1 January 1951 and) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence (as a result of such events), is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

(UNHCR, 1951)

In sum, the individual must be outside the borders of its country of origin, must have a grounded fear of prosecution based upon the above-mentioned elements, which makes it impossible for the individual to return. When the individual seeks protection in one of the Contracting States, it will be registered as ‘asylum seeker’, and then the state will determine whether the individual fits the description of the Convention (Guild, 2009, p. 70).

The states that have ratified the Convention are obliged to cooperate with UNHCR under article 35, to inform UNHCR about its national legislation and regulation in order to demonstrate its compliance with the Convention, and once an individual is granted the title of refugee, expulsion
or return to the country of origin where the life or freedom of the refugee is threatened, is prohibited according to article 33, also called the *non-refoulement* principle (Guild, 2009, p. 81).

So, it can be argued that these international agreements challenges state authority. On the contrary, it is this sovereignty that makes protection to the refugee possible, according to Guild. “For the individual seeking security and protection, the existence of sovereign borders which are protected by the institutions of the state is critical to being able to mount a claim based on international obligations” (Guild, 2009, p. 70). She adds to this that if there was no differentiation between being a citizen and becoming a foreigner, the person in question could not become a refugee.

On a European scale, the forty-seven members of the Council of Europe have all signed the European Convention on Human Rights. The ECHR was established in 1950 to offer “an unprecedented system of international protection for human rights, whereby individuals received the possibility of applying to the courts for the enforcement of their rights” (Europa.eu, 2015). In the case of the foreigner, the immigrant, it is possible to refer to the ECHR “as a source of rights beyond the state but capable of providing protection against the state’s claims in favour of expulsion” (Guild, 2009, p. 48). The ECHR includes most of the UDHR and the International Bill of Human Rights and is to be interpreted by the European Court of Human Rights (ECtHR), established to supervise the member states that have failed to comply with the ECHR (ibid. p. 55). States are alleged to change its national jurisdiction and regulation according the provisions of the Convention and the rulings of the ECtHR. As Guild further explains: “decisions of courts like the ECtHR have the effect of being a precedent – the state is required to change its law, rules or practices on expulsion to ensure that it does not repeat the human rights breach identified by the court” (ibid. p. 48).

In addition, every state that participates in the internal market needs to comply with the ECHR (ibid.). Ever since the Treaty of Lisbon has entered into force (2009), European Union Law now contains a “legal basis for the Union’s accession to the ECHR”, which allows “EU law to be interpreted in light of the Convention” (Europa.eu, 2015). As is stated in the preamble of the Charter, it encompasses the rights of the ECHR:

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

(Chartor of Fundamental Rights of the EU, 2007)

1.3 Conclusion

The definition of citizenship is born within the nation-state. Its roots lie within the French Revolution when the ‘civic nation’ was established trying to overcome cultural differences. To determine who is in and who is out, the nation is better able to survive by extracting what is needed from its society and therefore needs to differ its people from those of competing states within international relations. In return, it offers the ‘national’ safety and equal rights. In contrast, non-nationals do not enjoy the same rights as they are perceived as a threat to the social and economic cohesion within the nation-state and are seen loyal to another state. And as former practising human rights lawyer describes, the notion of non-belonging is the “vulnerability to exclusion and expulsion” (Bhabha, 1999, p.19). According to the definition by the realist and sociologist Max Weber, sovereign states have the right to exclude and expel foreigners from their territory as the nation-state has “a regularized administrative stave able to sustain the claim to the legitimate monopoly of control of the means of violence and to uphold that monopoly within a given area” (Weber in Giddens, 1985, p. 18).

The Second World War has led to the questioning of this sovereignty and several international agreements have been created to limit national authority to some extent, starting with the Universal Declaration of Human Rights in 1948, from which the moralities became enforceable through the establishment of the International Covenant on Civil and Political Rights 1966 and International Covenant on Economical, Social and Cultural Rights 1966. One can notice that states agree with the limitation of their sovereignty by signing and ratifying those international contracts. However, further and fastening globalisation might not leave them any other option than to do so, as states want to participate in the international community or the internal market of the European Union. To this extent, all member states of the European Union need to comply with the EU Charter of Fundamental Rights, which incorporates the rights of the European Convention on Human Rights. The European Court of Human Rights assesses every member state whether this actually happens.

Ever since the Second World War, the foreigner, as any other individual, is able to refer in court to international law for the compliance to human rights. However, the exclusion and expulsion
mainly remains subject to the national law (with the exception of the non-refoulement principle). The UDHR is not clear about the position of aliens when it cites that ‘no one shall be subjected to arbitrary arrest, detention or exile’ (UDHR, article 9, 1948). Article 13 of the ICCPR does address the position of the alien and the possibility of expulsion. Though, the article indicates that when the alien is unlawfully on the territory of the State Party, expulsion is legitimate.

On the other hand, when the foreigner seeks asylum, article 14 of the UDHR provides that “everyone has the right to seek and enjoy in other countries asylum from prosecution” (UDHR, 1948). In special cases, when individuals fear prosecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion” in the country of origin, one can be provided the status of ‘refugee’ under the UN Convention Relating to the Status of Refugees (UNHCR, article 1(2), 1951). All the Contracting States to this Convention are obliged to cooperate with UNHCR and provide protection to those with the status of refugee. Under the Convention, refugees are protected from expulsion according the non-refoulement principle, which also differentiates them from other asylum seekers. For those it is possible to refer to article 18 of the Charter of Fundamental Rights when the individual seeking asylum is within the borders of the EU.

Thus, it can be concluded that human rights transcends states sovereignty as it is derived from international law. However, it is demonstrated that this is also limited. On one hand, transnational agreements have helped to guarantee human rights across borders. On the other, state sovereignty and the identification of the ‘Other’ makes it possible to identify the refugee and other groups of asylum seekers to provide them protection within its sovereign borders.
2 The post-national approach

The emergence of international agencies and institutions, international law, increased migration, transnational flows of capital, are all examples of trends that binds nations into a web of interstate cooperation and “into a truly international community” (Smith 1995 in Morris, 1997, p. 192). With the international linkages of today some may argue that we are moving towards a post-national society. In this section I will examine whether this could apply to the issue of migration and in particular, the issue of asylum. As we have seen, international law grants the individual rights that transcends the nation’s borders, but what is the role of the European Union? Does the European Union offer a post-national solution to the situation in which the nation-state is losing its capacity to secure and control its borders?

2.1 Post-nationalism and the EU citizen

In February 2010, Guy Verhofstadt wrote an essay for the Belgian website Liberales. In this essay he argues, “Europe will be post-national or not be”. He describes the discovery of the ‘national identity’ as a “necessary search for the collective unconsciousness that drives and holds everyone together” (Verhofstadt, 2010, 26 February). However, by opposing this concept, Verhofstadt claims that the essence of national identity lies with the individual’s desire to belong. Thus, in contrast to this collective unconsciousness, according to him, national identity is based on independent choice. “People are not prisoners of their identities nor nations. They are its justification” (ibid.). A nation is rather a case of conscious solidarity, “an actual decision to live together on the basis of common laws and assumptions” (ibid.). This is decided by the individual not by a collective identity. Therefore, he stresses the importance of the identity of the individual that is not subject to the collective. A one-dimensional form of collective identity leads to the classification of society into ethnic, national, cultural or religious boxes from which the individual is not able to escape. Consequently, a society of common identity is a society of exclusion and struggle (ibid.). In case of the European Union, he reasons that it is because of the multipolar world we live in that the future of Europe will not be based on national identity. It will rather lie in the post-national.

As discussed in the previous chapter, the nation-state defines its citizen. It shapes part of a person’s identity. However, the American Political socialist Soysal describes the creation of a more transnational or universal personhood, a process in which the nation-state is no longer relevant for citizenship. She further argues “post-national citizenship confers upon every person the right and
the duty of participation in the authority and public life of a polity, regardless of their historical and cultural ties to that community” (Soysal in Jacobs, Maier, 1997, p. 6). Because the post-war era gave rise to international human rights, this was accompanied by an international debate of individual rights, which go beyond the notion of nationhood (Soysal in Jacobs, Maier, 1997, p. 6). International law, the creation of the European Union, globalization, international interconnection and interdependence all enforced the post-national identity (ibid.). To European integration and the realization of a supra-national political union, promoting a consciousness and creating of a European identity is crucial (Jacobs, Maier, 1997, p. 7). This was officially introduced in article 8 of the Maastricht Treaty in 1993. It states that “every person holding the nationality of a member state shall be a citizen of the Union” (Bhabha, 1999, p. 15). Next to a single currency, the promotion of European ideologies and symbolism, the development of the acquis communautaire and the establishment of the European Court of Justice to enforce these rights, fosters this European citizen identity even more (Jacobs, Maier, 1997, p. 8).

Castles refers to EU citizenship as quasi-citizenship. Quasi-citizenship only grants residents few rights of citizenship (Castles, 2000, p. 195). In case of the European Union, the quasi-citizenship, linked to EU membership as quoted above, offers only little political rights but quite some social rights (ibid.). Nonetheless, because EU citizenship is only granted to residents of member states, access to this quasi-citizenship is denied to immigrants. Therefore, European citizenship could also be perceived as rather a “unitary basis for exclusion rather than a coherent set of criteria for inclusion” (Bhabha, 1999, p. 15). It leads to the differentiation between the national and the non-national, thus the EU citizen and consequently to the identification of the non-European foreigner (Jacobs & Maier, 1997, pp. 9-10). To this extent, there is a trend as noticed in the Netherlands, in which non-EU foreigners are rather identified as Turks, Arabs or Asian (and are often more disliked than other foreigners) (ibid.). Thus, paradoxically, although European citizenship goes beyond national borders, it lacks the ability to go beyond those of the EU. Common historical and cultural ties, links to territory, personhood and human rights, are all features that define the European project. Together with the internal exclusion of non-European foreigners, it seems like the European project is more or less a nation-state defined by “us” versus “the Other”.

2.2 Common European Asylum System

Asylum law remains the least coordinated among the EU member states (Fry, 2005, p. 99). However, the removal of internal borders, greater interdependence among the states and the expansion of the Union from 15 to now 28, the need for harmonization has never been greater (ibid. p. 107). It has become apparent that member states rather choose to remain more restrictive than becoming too liberal, and EU asylum policy has become a product of political compromise
and only provides minimum standards (ibid.). The different interests of member states formed by national economic and political considerations make it unlikely that a synchronization of asylum policies will happen without a top-down unification (ibid. p. 106). According to Ezra: “The member states, however, were not ready to follow this reasoning [harmonization of asylum policy]. In stead they favoured a coordination of their policies, striving to protect their national interest by limiting the entrance of potential asylum seekers into EU territory and encouraging the notion of unfounded claims for asylum” (Ezra, 2004, p. 98).

When member states experienced a substantial increase of the influx of immigrants during the 1980s, this migration became perceived as a threat to security (Marinho, Heinonen, 1998, p. 2). Individually, the member states revised their immigration policy, which in turn, influenced the immigration in their neighbouring states. The creation of the single market and the abolition of the internal borders had a great impact on national immigration policy. Restrictive actions in one member state led to a high volume of applications in the other (ibid.). Therefore, individual action appeared to be insufficient. The need for European coordination was responded with the Dublin Convention, also called the Convention Determining the State Responsible for Examining the Applications for Asylum Lodged in one of the (then twelve) member states of the European Communities, on the 15 June 1990 (ibid.). The Convention needed to address two problems: First, it needed to resolve the problem of “refugees in orbit”, refugees that wander from member state to member state in a constant quest for asylum because no state is willing to take responsibility for the examination of their asylum application (ibid.). Second, the Convention needed to address the problem of asylum seekers that have multiple asylum claims lodged in different member states (ibid.). Consequently, the Dublin Convention created a method to determine which country is responsible to deal with the asylum application to prevent “asylum shopping” and rules that this would be the country of first entry (Hatton, 2015, p. 5). Moreover, the ministers decided on a measure in 1992 to design a list of “safe countries of origin”, meaning that “applicants from such countries could be safely rejected” (ibid.).

Europeanization of asylum law and policy has evolved since the European Council met in Tampere in 1999 (Toshkov, 2012, p.2). The EU ministers called for a Common European Asylum System (CEAS) in an effort to harmonise asylum policies (Hatton, 2005, p. 8). As asylum issues had moved from the intergovernmental pillar, the Third Pillar, to the First Pillar, the European Commission was now provided with the power to propose legislation for the harmonisation of asylum policies (ibid.). At the Tampere meeting, the EU ministers reaffirmed that the Geneva Convention and the principle of non-refoulement should lie at the basis of EU asylum policies (ibid.). The agreement involved four main building blocks: the Reception Conditions Directive, the Temporary Protection Directive, the Qualification Directive and the Procedures Directive (ibid.).
Furthermore, it consisted the regulations of Dublin II underpinned by the EURODAC fingerprint database (ibid. and Bendel, 2014, p. 2). Through several five-year programs (the Tampere Programme 1999-2004, Hague Programme 2005-2009, Stockholm Programme 2010-2014), CEAS has evolved from setting minimum standards across the EU to common standards (Blendel, 2014, p. 3). The Dublin Regulation that governs the responsibility of the member state that “played the biggest role in the entry of the migrant”, now also provides “a rapid alert mechanism that makes it easier to identify member states (like Greece, potentially) whose national asylum system proves unsatisfying, and organises solidarity measures in favour of these member states” (Balleix, 2014, p. 3). As another means of burden sharing, the European Refugee Fund was established in 2000 to support the efforts of member states in receiving refugees and displaced persons, especially in case of mass influx (Europa.eu, 2007). Now a new fund, the Asylum, Migration and Integration Fund (AMIF) is established to contribute to the financing of issues regarding asylum, integration and return (European Commission, 2015). Moreover, institutions like EURODAC, which records the fingerprints of migrants and helps member states to trace them within the EU, and the European Asylum Support Office (EASO), which “aims at supporting concrete cooperation among member states, such as sharing information on the situation of human rights in the countries of origin, sending technical support teams to member states facing difficulties, or promoting the transfer of asylum seekers”, both contribute to the objective of harmonisation within a Common European Asylum System (Balleix, 2014, p. 3). The most important directives are set out below:

**The Reception Conditions Directive**

The directive is to ensure that there are common standards of conditions of living across the EU for asylum seekers that are awaiting the decision on their application (European Commission, 2015). The latest version of the directive will become valid on the 21 July 2015. Among other things, it comprises detailed rules on the issue of detention. For example, it sets out reception conditions in which it is stated that the asylum seeker should have “access to fresh air, communication with lawyers, NGOs and family members” and also it “includes an exhaustive list of detention grounds that will help to avoid arbitrary detention practices and limits detention to as short a period of time as possible” (ibid.). Moreover, it encompasses that an individual assessment is to be conducted to give special attention to minors and other vulnerable asylum seekers (such as victims of torture) and provide them the access to psychological support (ibid.).

**The Qualification Directive**

The Geneva Convention and the Protocol as well as the *non-refoulement* principle are incorporated in the Qualification Directive. The directive sets out common rules that prescribes who qualifies for international protection (European Commission, 2015). It also provides a series of rights such
as access to accommodation, education, healthcare, residence permits, travel documents and access to employment etc. (ibid.).

The Procedures Directive
This directive has the aim to ensure that all member states examine asylum applications with “a common high quality standard” (European Commission, 2015). It sets rules to accelerate procedures and to make them more efficient. Furthermore, it sets out rules that regulate that unaccompanied children and vulnerable asylum seekers are treated with special care and respect, that aims to reduce the pressure on the European Court of Human Rights (ECtHR) in Strasbourg by fostering the access to national courts, and it equips the member states to deal more effectively with abusive claims, which means that indefinitely prevention of removal will no longer be possible when someone does not need protection (ibid.).

The Temporary Protection Directive
Because of massive influx of refugees experienced during the 1990s as a result of the conflicts in former Yugoslavia and Kosovo there was a great need for coordination within the EU. The Temporary Protection Directive was introduced in 2001 and established to promote solidarity and burden sharing in times of mass influx (European Commission, 2015). Article 24 of the Direction (2001/55/EC) also provides the member state the possibility to qualify for financial support. As it is set out as one of its objectives in article 3 of Regulation (EU) No 516/2014, the Asylum, Migration and Integration Fund may finance temporary protection.

A harmonized Asylum System?
As the directives were established to set minimum standards throughout the EU regarding to issues of asylum, now these have evolved into common standards (Blendel, 2014, p. 3). Therefore, it can be concluded that the developments by creating a common asylum system has led to some extent of harmonization. Large strides have been made. Still, the harmonization appears to be not sufficient enough and relies heavily on the solidarity among the states. This can be illustrated with the Arab Spring in 2011. The extent to which member states implement the common rules reveals the solidarity among them. During the Arab Spring, a Franco-Italian dispute erupted. Italy faced an influx of 28,000 migrants and felt that it couldn't find enough support within the EU (Balleix, 2014, p. 4). In response, Italy dropped its loyalty to the EU and instead decided to grant all migrants 6-month humanitarian permissions to stay and allowed them to move freely across the European borders (ibid.). Now France, who feared mass influx coming from the Italian borders, subsequently reinforced border checks, jeopardising the principle of free movement of persons (ibid. pp. 4). However, since 2013 the Schengen Area governance allows member states to
reintroduce internal border checks in case this state “encounters serious and persistent deficiencies in controlling the external borders of the Schengen Area” (ibid.).

A further critical assessment on the side of solidarity, the leading principle in this system, is needed. For example the Temporary protection Directive (designed to enhance solidarity) has never been activated. However, it would have been fully justified by the occurrence of the Arab Spring and the Syrian crisis (Balleix, 2014, p. 4). According to Hatton, the direction lacks “a formal triggering mechanism or a formula for redistribution” and has therefore “never been invoked” (Hatton, 2015, p. 6). Moreover, a receiving state can request other member states to share the burden of reception of displaced persons in the event of mass influx (2001/55/EC). However, this does not automatically mean, that other member states respond to this request (Dongen, 2012, p. 30). Member states are not obliged to do so. In addition, the transfer from the receiving state to another member state requires the consent of the individual that seeks temporary protection (ibid.).

The overall problem to the harmonisation of the directives is that they are mainly focused on the result of the measures and that they leave quite some space to member states to manoeuvre. This enables them to stick to existing practices that are not entirely compatible to the directive (Blendel, 2014, p. 3). Because of the many optional regulations, the Asylum Procedures Directive, for example, may therefore never lead to uniform common standards (Vilmar 2013 in ibid.).

Lampedusa
In October 2013, in an attempt to reach the European shore, an estimated 360 migrants drowned. The tragic events in the Mediterranean Sea near the coast of Lampedusa have led to the accusations towards the EU. Their European migration policy had shown incompetent and lacked solidarity (Balleix, 2014, p. 1). Now two years later, Lampedusa has become the “symbol of Europe’s migrant crisis” (Lyman, 2015, March 8). The press release of UNHCR again reported “a boat tragedy” on the 19 April 2015 “that may be the biggest ever” (UNHCR, 2015, April 19). On that day, a boat carrying up to 700 migrants had sunk and only a few had been rescued (BBC, 2015, April 19). According to the UN refugee agency, already up to April this year at least another 900 people had died (ibid.). Moreover, the agency reported; “in 2014, around 219,000 people crossed the Mediterranean, and 3,500 lives were lost” (UNHCR, 2015, April 19).

After the many deaths in the Mediterranean 2013, the Commission decided to set up the Task Force operation intending to prevent such events from happening again (Balleix, 2014, p. 1). FRONTEX joint operations, in support of Italy’s Mare Nostrum operation (which ended 1 November 2014), the relocation of refugees in Italy and Malta and the support of EASO, much stress was laid on the solidarity among the member states in a joint control of the EU external
borders (Capasso 2015 and ibid.). In an attempt to answer to the pressure that was (and still is) experienced by some of the European countries, a system to distribute asylum seekers across Europe was also considered (Balleix, 2014, p. 5). However, this idea was swept aside by the heads of state and government considering that in 2012 Germany received 77,500 asylum applications and France 60,500, in contrast to Italy and Malta who received 15,700 and 2,000 of them (ibid.).

According to Hatton, a mechanism to distribute asylum-seekers fairly across EU member states is needed. He even argues that full harmonization of asylum policies will lead to greater divergence in the burden of the refugee reception (Hatton, 2015, p. 6). This is for the simple reason that different countries face different demands for asylum. He claims that countries will toughen their policies in order to limit the amount of asylum applications to a desirable level. Imposing the same policy for all countries means that some countries will receive too much refugees and some too few (ibid. p. 4). To resolve this problem, a central mechanism should be established that distributes the total amount of asylum-seekers fairly across the Union. Currently, the Dublin Regulation rules that the first state of entry is responsible for the application, which could mean that the asylum-seeker is to be send back to a state that is already under a lot of pressure (ibid. p. 7). Thus, although CEAS has been successful in harmonizing important standards, it might want to focus more on the distributive component of the European asylum issue and may want to revise the Dublin Regulation for an alternative mechanism. Such mechanism requires a top-down centralized European government, in which the member state hands over the responsibility of adjudicating asylum claims to the EU. Some will argue that this transfer of power would mean a threat to national sovereignty. Nonetheless, following the recent dramas in the Mediterranean Sea, on the 29 April 2015 at the European parliament in Strasbourg, Jean-Claude Juncker, president of the European Commission called for solidarity and announced a proposal to be released before the 13 of May that will look into the possibility of a quota system for the distribution of asylum seekers across all of Europe (Europa Nu, 2015, April 29). Also the German government stated that it favours a quota.

2.3 The European Union will be post-national or not be.

The essay of Guy Verhofstadt in Liberales suggests that the future of Europe will be post-national and not based on national identity. This theory is examined by analysis of EU citizenship and asylum policy. The findings show that although the EU has post-national characteristics, it is still far from being post-national. The description of a transnational personhood, described by Soysal displays the first argument to claim that EU citizenship is not a post-national concept. Soysal argues that post-national citizenship does not exclude any person “the right and duty of participation in the authority and public life of a polity” because of the absence of “historical and
cultural ties to that community” (Soysal in Jacobs & Maier, 1997, p. 6). For this reason, EU citizenship cannot be a post-national concept. As nationality of a member state is a prescription to EU citizenship, persons without it are excluded.

Second, although the Common European Asylum System may have harmonized to some extent and has set common standards across the Union, a lack of solidarity among the member states makes it impossible to fulfill the pursuance of harmonization. Protection of national interest lies at its roots, making CEAS a product of rather political compromise. This is also shown by the fact that the initial idea of common asylum regulation came from the request for coordination of the asylum problem within the Schengen Area. The removal of internal borders had revealed a great interdependence among the States and major changes in immigration policy in one state would affect the amount of asylum applications in the neighbouring state. This resulted in great stress of the nations that wanted to secure their borders and protect their national socio-economic interests. The minimum standards needed to coordinate and reduce the amount of applicants and member states never intended to establish a top-down central European mechanism to govern asylum policy over all EU member states. The directives of CEAS still leave a lot of room for those States to manoeuvre. Therefore, member states are still able to deviate from the EU directive to optional regulations according to national interest. In addition, creating a successful Common European Asylum System, it relies heavily upon solidarity. Without this element, European policy will fail. Nonetheless, current crisis of immigration show a desperate need of solidarity. An unequal division of asylum applicants in several EU countries do not only affect them, but affects all of the Union. Interdependence will further press for cooperation to secure national social-economic and security interests. The abolition of internal borders and greater interdependence reveal this need, but also compliance with human rights, through the International Bill of Human Rights, the 1951 Convention and the European Convention of Human Rights, is a responsibility that is laid upon every single member state within the Union. Therefore, solidarity should not only be extracted from national interest but also from this responsibility. Tragedies, like those occurring in the Mediterranean Sea, require this.

Whether the European Union is a post-national answer to these kinds of immigration tragedies and asylum issues remains to be questioned. Yes, the Union provides transnational directives and regulation that have resulted in some common standards and the Union does requires member states to live up to the ECHR, still, the presence of national interests and the unwillingness to establish a top-down mechanism to centrally govern asylum issues across the EU, show that national asylum legislation will remain prominent. In addition, the focus on the securitization of EU’s external borders along with a EU citizenship based on exclusion, uncovers that the Union rather acts like a nation-state itself and determines who is in and who is out. For this reason, this
study shows that the EU may never be post-national as the transnational solutions it provides are, again, limited by borders.
3 Beyond the Dutch borders

"The king errs when he says one in this country will endure the continuously bloody edicts against heretics. As much as I am attached to the Catholic faith, I cannot approve that monarchs on the conscience of their subjects desire to control and deprive them of the freedom of belief."

(Willem van Oranje 1564 in Van Reisens 1898, p. 12)

These words spoken in the Council of State by Willem of Orange became a symbol of the Dutch strife for the freedom of religion, tolerance, and for a long time, the Dutch hospitality towards aliens. As religious wars raged across Europe, those who fled from the fear of persecution based upon their religious beliefs, found refuge in the Netherlands. During the 16th and 17th century, many Spanish and Portuguese, and later German, Polish and Lithuanian Jews fled and settled mainly in Amsterdam (Hoeksma, 1982, pp. 76-78). One particular reason for the hospitality of these refugees was often because of their wealth and for the reason that they benefited both employment and the local economy. For instance, the Huguenots, Calvinist Protestants who faced tyranny in France, were received with open arms, as many of them were skilled soldiers (ibid. p. 79). As a reward for being a good citizen over the years, the States of Holland declared in 1709 that “all of those within the province, who fled from France or other countries because of the true religion, were provided the right of naturalisation” (Hoeksma, 1982, p. 82).

3.1 The legitimacy of security and control of the alien

Security

In the Netherlands, present asylum policy is under the responsibility of the Ministry of Security and Justice. This is for the simple reason that, over the years, the alien, especially when undocumented, became gradually more subject to the politics of fear and perceived as a potential threat to the identity and security of the state (Ceyhan & Tsoukala, 2002, p. 2). After the religious wars during the 17th century, security became an important pillar for modern states to deprive their legitimacy for ruling and authority (de Graaf, 2013, p. 23). The focus on management of personal relations and safety shifted to a more territorial and geographical security focus (ibid.). Security policy became divided into internal and external policy areas (Zwierlein & de Graaf, 2013, p. 19). External security was to protect the state from war and subjugation. Citizenry and society became issues of internal security policy. According to Beatrice de Graaf, the realist point of view on security politics is based upon the essential need for autonomy and sovereignty (ibid. p. 22). Moreover, the perception of security is an ideal, a developing concept that is shaped by dilemmas within a period of time.
Until the nineteenth century, nationalist thought arose among Dutch citizens. The Netherlands had lost its good economic position in Europe and was now coping with economic malaise (Dekkers, 2003). During the 17th and 18th century, the Netherlands, and in particular the States of Holland, was quite a magnet to immigration and caused cities like Amsterdam and Haarlem to flourish (ibid.). Now aliens had become an economic threat and risk to security (Dekkers, 2003). Yet, there existed no central policy to manage refugees or aliens. Municipalities controlled the entrance of its city walls and Dutch national borders were of marginal importance (ibid.). Until the half of the nineteenth century, the constitution was the only law that addressed aliens. Article 4 of the 1815 constitution mentions that residents and aliens had the right to equal claim to protection of person and property:

Allen die zich op het grondgebied van het Rijk bevinden, hetzij ingezetenen of vreemdelingen, hebben gelijke aanspraak op bescherming van persoon en goederen.

All who are in the territory of the State, either residents or foreigners, have equal claim to protection of person and property.

(Constitution of the Netherlands, 1815)

Nevertheless, the implementation of this article appeared to be difficult as local authorities ignored the article and rather wanted to exclude “foreign beggars” and “troublemakers” (Leenders, 1998, p. 1).

The first Aliens Act

The first Aliens Act was established in 1849. The unemployment that followed the economic malaise had pushed the Dutch government to create a law that needed to control the presence of aliens. Moreover, many developments outside the Dutch borders like the revolutions of 1848 in many European cities out of dissatisfaction with political leadership, the upsurge of nationalism and demands for participation in government and demands by the working class, motivated the Dutch government to regulate the free movement of aliens (Evans and von Strandmann 2000 pp.4, ibid.). For example labour seeking migrants from Germany kept on coming despite of the great unemployment in the Netherlands. Ten per cent of the Dutch men between the age of 23 and 65 were unemployed by this time (Leenders, 1998, p. 2). However, the bill of 1849 was not so much to keep all aliens out. It simply separated the aliens that were able to provide for themselves from the ones that were poor. It permitted entrance to Dutch territory for everyone who had enough capital to be self-sufficient and was not a potential threat to Dutch society (ibid.). Those aliens were granted a travel and residence permit for duration of three months, which could later on be extended (Van Lier, 1934, p. 2 in ibid.). If an alien had left its country out of political reasons, then it was not subject to this law (Nederlandse Grondwet, 2015).
The First World War

Although, a central asylum act was developed, still it must be noted that, especially regarding asylum, local governments kept their own policies for a long time. For instance during the First World War, most cities had a different approach towards aliens, although the Dutch government authorized every refugee that sought shelter in the Netherlands (Leenders, 1998, p. 3). Great flows of asylum seekers passed the Dutch borders in search for shelter and many municipalities had a hard time providing such. For instance, Maastricht, close to the German and Belgian borders, never really regarded the Belgian refugees as aliens (ibid. p. 5). In contrast, Rotterdam, having an international harbour, carried the fear of getting overwhelmed by foreigners and this coloured their policy towards aliens (ibid. p. 4).

After the fall of Antwerp, 700,000 Belgian refugees were within the Dutch borders, all of which needed housing (Hoeksm, 1982, p. 84). The Central Commission for the Representation of the interests of refugees who fled to the Netherlands tried to spread the refugees over the provinces but most of them remained in the southern parts of the Netherlands. Most of the housing happened voluntarily in private households but because of the immense inflows (an estimated million refugees during the war) the Netherlands received also some financial support from other European countries (ibid.). For example, Denmark funded the building of ‘the Danish Village’, a refugee camp in Ede (ibid. pp. 85).

3.2 Breaking the Dutch tradition

Acts for Extraordinary Circumstances

WWI left Europe devastated and fear for communist propaganda was on the rise. Although, the Netherlands had remained ‘neutral’ during the war and was merely damaged, it could not close its eyes for developing and threatening dangers coming from outside its borders. Riots, strikes and revolutions were the order of the day and to protect its society, the Dutch government introduced a new law regarding aliens’ control. Under the Aliens Supervision Act 1918 for extraordinary circumstances, the police was provided with new responsibilities to control aliens in their cities (Hoeksma, 1982, p. 88). With the introduction of this law, the Dutch government broke with a tradition of Dutch hospitality. A strict registration and plural obligations made it harder for refugees and other foreigners to seek harbour in the Netherlands on one hand, and easier for the authorities to remove aliens from its territory on the other (ibid.). The Act was complemented with the Border Guard Act in 1920, which gave the inspector of the Royal Military Police at the borders the power to remove or to arrest any alien that did not meet the description set out in the law (ibid.). Consequently, both acts had removed any legal certainty for the admission of political refugees. Moreover, a new regulation in 1933 needed to ward off any political refugee that had any
conviction that was socialist, communist or anarchist. Aliens, who trespassed this law, could be expelled from Dutch territory according article 2 of the Aliens Act of 1918 (ibid.).

The Second World War
The attitude towards aliens had changed dramatically during the years of the Second World War. Clearly during this period in Dutch history, the government has tried to shield Dutch society and labour market from aliens and refugees. This was proven with another circular in 1934, which was set up to separate the refugee from the general Aliens Act of 1849 with special prescriptions to further reduce the influx of immigrants (Hoeksma, 1982, p. 99). As result, many refugees like the Jews, had to rely on support of organisations and had become unavoidably illegal. Moreover, the Netherlands refused to sign the Convention concerning the Status of Refugees coming from Germany in 1938 (ibid. p. 98). According to Loescher, it was because of the economic crisis, fear of increasing unemployment and high costs of the reception of refugees that blocked international cooperation (Loescher, 2001, p. 29). For this reason, the Dutch government had no obligations towards international treaties or what so ever. The right to asylum remained only subject to the Dutch Aliens law and the words of the minister of Justice in a circular of 7 May 1938 underlined the sentiment of the government: ‘A refugee will henceforth be regarded as an undesirable element of Dutch society and therefore as an undesirable alien’ (Goseling in Hoeksma, 1982, p. 102).

3.3 Incorporation of International and European law
This sentiment did not change much after the Second World War. The horror experienced during the war, the concentration camps, and the economic and social damage that was left, made people distrust any stranger coming from outside the Dutch border. The war had left the Netherlands significantly almost ‘uninhabitable’ (Walaardt, 2012, p. 54). Throughout the next few years after the liberation, there were only few refugees that found a haven in the Netherlands. In 1949 an estimated 17,500 refugees resided here, a third of which were Jew and had come from Germany and Austria before the war (Hoeksma, 1982, p. 105).

The 1950s and the Geneva Convention
The Netherlands had joined the International Refugee Organisation (IRO) by the end of the war and had signed the United Nations Convention Relating to the Status of Refugees in Geneva in 1951 (Hoeksma, 1989, p. 105). However, it would take until 1967 to replace the Aliens Act of 1849 by a new aliens act that would regulate the position of refugees by law (ibid.). The Geneva Convention was only ratified in 1956 and was not incorporated into law until 1957 (ibid.). For this reason, asylum seekers were not assessed according to the description of the refugee status (article 1 of the Geneva Convention). Moreover, because aliens were distrusted and suspected to be
In Search of a Post-National Response to Asylum

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Incorporating international law

In 1922, the Constitution was already revised to incorporate the influence of international affairs into legislature (Panday, 2011, p. 13). In an international agreement, it became “possible to deviate from the Constitution” so it would serve “the interest of the development of international law” (ibid. p. 16). However, when a treaty is in contradiction with the Constitution, a revision of the Constitution is needed on before hand (ibid.). This illustrates how the development of Treaty Law inferred with the Dutch sovereignty. The government further notes to that when establishing international agreements, the rights of the Dutch citizen given in the Constitution are to be taken into account in the procedure of approval and moreover, that treaties that transfer powers to international organisations are not to impair constitutional rights (ibid. p. 18).

The Refugee Decision of 1957

The Convention relating to the Status of Refugees was signed in 1951. Many refugees were still wandering through Europe or living in camps (UNHCR, 2001, p. 2). The main aim of the treaty was to provide legal protection for those who were considered to be a refugee under the description in the Convention. However, incorporating the Convention into national law has not been easy and has been subject to public debate for a long time, mostly because of the clear social en economic problems (Hoeksma, 1982). When in 1951 the Convention was signed, the House of Parliament was critical. It had accepted the Convention as it acknowledged that it was a cornerstone for refugees but opinionated that it lacked a provision for granting asylum and a provision for the procedure of such (ibid. p. 17). National legislation needed to provide better protection and a separate refugee act needed to fill in the gab (ibid. p. 18).
The Refugee Decision of 1957 set out the right of the lawfully residing refugee to remain on Dutch territory, the procedure of expulsion and the provision on the recognition of the refugee (ibid. p. 19). The possession of a mandate declaration qualified these aliens as refugees. This declaration proved that they were under the care of the United Nations High Commissioner for Refugees and therefore recognised refugees (ibid.). Moreover, the Decision provided the asylum seeker the right to object to a decision of rejection (Walaardt, 2012, p. 130). Yet, many officials within the ministries of Justice and Foreign Affairs were worried that admission of every asylum seeker would cause a pulling effect, and consequently, that this would attract numerous of asylum seekers, searching to improve their economic situation. In addition, because there was no unambiguous interpretation of the term ‘fear of persecution’, the asylum seeker was often negatively assessed and found to be incredible (ibid. p. 131).

The Aliens Act of 1965

In 1967 a new Aliens Act went into force, a law that the ministry of Justice opposed for a long time. The debates between the Parliament, who favoured a better legal position for refugees, and the government were fierce. For a long time, even when the new Aliens Act went into force, it remained unclear on what basis refugees needed to be admitted (Hoeksma, 1982, p. 127). As mentioned earlier, according to the Refugee Decision of 1957, a refugee was a person who was in the possession of a mandate declaration provided by UNHCR, thus the official refugee status as mentioned in the Geneva Convention was not incorporated (Doesschate, 1993, p. 28). The refugee description, as mentioned in the 1951 Convention, finally resulted in article 15 of the Aliens Act of 1965 in which is stated that:

“Aliens who come from a country where they have good reason to fear persecution because of their religious or political beliefs or their nationality or by reason of membership of a particular race or a particular social group may be admitted by our minister as refugees”

(Scholten, Y, 1965, Article 15).

The refugee status was complemented in 1974 by a new status. According to the Council of State compelling reasons of humanitarian nature were to determine the granting of the so-called “B-status” (Doesschate, 1993, p. 28). The B-status offered a solution to those asylum seekers that the Dutch government did not want to recognize as refugees under the definition of the Convention (the A-status) but whose expulsion to the country of origin was impossible (Alink, 2006, p. 79). Refugees with “the A-status” are given a Nansen passport (refugee passport) and have rights and duties comparable to nationals (ibid.). A third possibility to reside in the Netherlands as asylum seeker was to get the C-status. The C-status offered a residence permit called ‘vergunning tot verblijf’ (vtv) (ibid.). This residence permit was valid for only a year and under the Aliens Act, the
government had a legal basis to also withdraw the license (ibid.). However, in 2000, these statuses were again abolished. The Aliens Act of 2000 introduced the single status system to prevent asylum seekers to continuously litigate for a better status (ACVZ, 2006, p. 18). Now every asylum seeker is provided with a residence permit for a fixed period, as referred to Article 28, who, for instance, 1) qualifies as a refugee, 2) can demonstrate that he/she has good grounds for believing that by deportation he/she faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment, 3) cannot reasonably be required to return to the country of origin based on compelling humanitarian reasons in the opinion of the minister, 4) is a spouse of minor child and belongs to the family of the alien, caries the same nationality and who has entered simultaneously or followed the alien within three months to the Netherlands (Article 29(1) of Vw 2000 in ibid. p. 17). Article 1A(2) of the 1951 Refugee Convention and article 3 (No torture, inhuman or degrading treatment) ECHR are incorporated in the first two grounds to qualify for the provision of the residence permit (ibid. p. 16).

3.4 Inevitability of cooperation

Ever since the 1970s, immigration policy had become more restrictive. The government tried to halt the influx of guest workers and migrants of former colonies. For example, immigration caused by family reunification had become subject to stricter housing and income requirements. Moreover, after its independence, effort was made to control immigration from Surinam (Kromhout, 2006, p. 33). Nevertheless, a bigger immigration problem emerged in the upcoming decennia when great amount of asylum seekers needed to be addressed (ibid.). To do so, revision of the Aliens Act of 1965 was inevitable. In 1994, the jurisdiction became concentrated at the court in The Hague, in asylum cases it was no longer possible to appeal, and the Conditional Permit to Stay (VVTV) was introduced (ibid.). Additionally, the desirability of European cooperation became subject to the asylum seekers debate. On 24 March 1994, the House of Representatives was largely critical about the role of the Schengen Agreement and the way it had opened up internal borders and therefore stimulated the flow of refugees towards the Netherlands. It was argued that the removal of the internal borders had to lead to stricter external borders to reduce the influx. Therefore, better cooperation among the states within the Schengen Agreement, and later in the European Community, seemed inevitable (Geuijen 2004, TK 1994, March 24, 66-4854). As compensation for the removal of the (internal) borders some pleaded for intensification of internal control on migration (VVD in TK 1994, March 24, 66-4854). The awareness that a tightening of asylum laws in Germany had major consequences for the number of asylum applications in the Netherlands made it also apparent that a partnership with other European countries was necessary and the burden of the reception and costs needed to be shared (de Hoop Scheffer (CDA) in ibid.).
3.5 Asylum policy in the new millennium

In the first years of the new millennium a lot of new law has changed national asylum policy. Most apparent are the international developments like the Lisbon Treaty and founding of the EU Charter of Fundamental Rights. In an explanatory memorandum, the minister of Immigration and Asylum, Gerd Leers, explained: “collective elements in the asylum subject, under the influence of the ECHR and EU-law, have become more apparent in the verification on international grounds for the provision of asylum” (TK 2011-2012, 33 293, nr. 3, p. 3). The following sections will shortly discuss how the harmonisation of European policy has affected national asylum law on the basis of a few directives.

The Qualification Directive

The Qualification Directive was set by the European Council on 29 April 2004 and implemented by the Netherlands on 25 April 2008 (Jennissen, Nicolaas, 2014, p. 170). The Directive sets out which persons are qualified to asylum and international protection. With this qualification the person additionally enjoys rights regarding to work, health care, social services, education and integration (ibid.). In 2011 a new government was established with the liberal People’s Party for Freedom and Democracy (VVD), the Christian Democratic Appeal (CDA) in a ‘toleration agreement’ with the right-wing Party of Freedom (PVV). The election program of the VVD stated that ‘European agreements and (parts of) international treaties need to support the Dutch restrictive regime, not counteract. Therefore, “unnecessary or out-dated agreements or rules need to be revised” (VVD, 2010, p. 37). The focus of the new government was on “reducing immigration, limiting the number of asylum applications and mitigate Brussels’ influence on national policy” (Goudappel, Hoevenaars, 2012, p. 2). The position paper of Flora Goudappel and Judith Hoevenaars in 2012 argues that a majority of the Dutch population supported this policy. According to this paper, the attitude of this majority towards immigration was in line with a trend in Europe (ibid.). In a speech at Harvard University in Boston, former European Commissioner Cecillia Malmström addressed migration issues as highly sensitive political matter and “often play an important role in election times” (Malmström, 2012, p. 6). She adds: “…the overall political climate in Europe has turned sour, some would even say toxic. We are seeing increasing nationalistic tendencies in several member states” (ibid.). Not surprisingly, the influence of the PVV within the government increased the focus on national control of migration and the tightening of admission policy. The coalition together with this right-wing “toleration party” the PVV were not able to pursue the goals of their governmental agreement regarding to asylum and migration policy without the adjustment of European legal instruments (Goudappel, Hoevenaars, 2012, p. 4). Therefore, minister Leers, wrote a position paper ‘the Dutch standpoint on EU migration policy’ in an attempt to get the support of other EU member states to revise these legal instruments according
to the wishes of the Netherlands. By doing this, Leers hoped to reduce the influx of immigrants drastically. Although, his lobbying at EU level never led to an adjustment of the Dublin Regulation, Family Reunification Directive, or the Long-Term Residents Directive, however, at the request of the Dutch government, the Qualification Directive was revised (ibid.). The responsibility of the burden of proof shifted from the EU member states towards the asylum seeker. The revised Qualification Directive (2011/95/EG) states that in certain cases the asylum seeker needs to provide the evidence to demonstrate that its country of origin is unsafe and there is no protection alternative (Jennissen, Nicolaas, 2014, p. 170). In addition, the revision comprised an extension of the rights attached to the subsidiary protection status. First of all, it contains a further alignment with the refugee status in terms of access to the labour market, education and healthcare (European Migration Network, 2011, December 20). Moreover, refugees were provided with a residence permit of a minimum of 3 years, persons with a subsidiary protection status are entitled to a residence permit of a minimum of 1 year, when the status is extended; this permit is prolonged with 2 years (ibid.). The directive was implemented into national law by 1 of October 2013 (Jennissen, Nicolaas, 2014, p. 170).

The Dublin Regulation
The Dublin Regulation had to provide some coordination over the asylum applications within the EU. It needed to halt refugees in orbit that wandered from member state to member state with a constant quest for asylum. Moreover, it needed to prevent multiple applications in different EU countries. The Regulation, therefore, provides a mechanism to point out the responsible member state to deal with the asylum application. However, in certain occasions the European Court of Human Rights had decided to deviate from the Regulation. This was illustrated in 2011 when a judgement by the ECtHR ruled that 1,950 asylum seekers were to remain in the Netherlands and not to be sent back to Greece, although, this was permitted according the Dublin Regulations. The Court found the detention and living conditions in Greece too poor and feared an inhumane treatment of the asylum seekers concerned (Jennissen, Nicolaas, 2014, p. 169). The Dublin Regulation of 2013 (fully implemented into Dutch national law by 1 of January 2014) has now incorporated this judgement and governs that an asylum seeker is not to be sent back to the country of first entry when this person faces inhumane treatment or conditions (ibid.).

The Reception Conditions Directive
As discussed in the previous chapter, the Receptions Conditions Directive is concerned with minimum standards for the reception of asylum seekers. In 2007, the Commission stated that ‘the Directive has been transposed satisfactorily in the majority of member states’ (Commission of the European Communities, 2007, p. 10). Though, the 2013 revision of the directive needs to be implemented in national law by 20 July 2015 (Jennissen, Nicolaas, 2014, p. 172). State Secretary
of Security and Justice, Fred Teeven, argued in an explanatory memorandum, that although “the system of the directive is yet compelling, in the sense that the Netherlands is obliged to follow the directive herein […]]. Nevertheless, I consider it appropriate to adopt the system of the directive. [...] The adoption of the system of the directive provides benefits in the context of effective and efficient organization of asylum procedures and legal protection in asylum cases” (TK 2014-2015, 34 088, Nr. 3, p. 9).

The Procedures Directive
On 19 December 2007, the Procedures Directive (2005/85/EC) was implemented into national law. With this directive, the European Council had set minimum standards for the procedures of the granting and withdrawal of the refugee status across the member states (Jennissen, Nicolaas, 2014, p. 171). However, for the achievement of harmonisation across the Union, a revision of the Directive was introduced in 2013 that now speaks of ‘common procedures’ instead of ‘minimum standards’ (ibid.). The new directive comprises stricter rules on the education of the employees that work with asylum seekers, the treatment of vulnerable groups of asylum seekers that require special care, and the provision of juridical assistance (ibid.). In addition, it now sets explicit deadlines to the asylum procedures and is limited to the standard of six months (ibid).

Although, the Dutch government supported the goal of the EU, in advance of the revision, it was worried about the implementation of the new provisions. Since the revision of the Aliens Act in 2000, the basis of the Dutch asylum procedure became based upon a ‘single status system’ (ibid.). Yet, the Directive is based upon the distinction between the refugee status and the subsidiary protection status. Therefore, the government feared that an alteration of the Dutch status system would lead to extra procedural costs. As it turns out, the final version of the new Procedures Directive leaves enough space for the maintenance of this single status system in the Netherlands (TK 2011-2012, 32 317, nr. 131). The Directive must to be transposed into national law by 20 July 2015 (Jennissen, Nicolaas, 2014, p. 170).

Return Directive
Aliens who reside unlawfully on the territory of one of the EU member states, including asylum seekers who are exhausted of legal remedies, are subject to the Return Directive. In the case of the latter group of persons, the member state should issue the return decision after pending procedures have come to an end (Europa.eu, 2009, April 29). When the return decision is made, the alien is requested to leave within a certain period of time, he/she can be taken into detention up to a maximum of six months (Jennissen, Nicolaas, 2014, p. 172). According to article 11 of the Directive, the return decision could be complemented by an entry ban to the entire Schengen area (ibid). When the granted period is not respected or when an alien did not comply with the return
decision, the member state is entitled to enforce his/her removal (Europa.eu, 2009, April 29). Still, in all cases, “the best interest of children, family life, the health of the persons concerned should be taken in consideration, additionally, the principle of non-refoulement should always be respected (ibid.). On 31 December 2011, the Directive was adopted into the Aliens Act 2000 (Jennissen, Nicolaas, 2014, p. 172).

3.6 Bed, Bath, Bread

On 10 November 2014, the European Committee of Social Rights published a decision on the merits in response to a complaint by the Conference of European Churches. Every year an estimated eight thousand asylum seekers, who exhausted all legal remedies, end up on the streets (NOS, 2014, November 10). The Conference of European Churches found these practices inhumane and went to court. The Committee of Social Rights has assessed the compliance with the European Social Charter. This Charter supports the European Convention on Human Rights. In its assessment the Committee alleged that “the relevant legislation and practice concerning irregular adult migrants are in violation of Article 13 (4), the right to social and medical emergency assistance, and Article 31 (2), the right to housing, of the European Social Charter” (European Committee of Social Rights, 2014, November 10).

One of the most contested provisions of the domestic law is Article 8 of the Aliens Act 2000, which provides a list of grounds on which the alien can reside lawfully on Dutch territory (ACVZ, 2012, p. 30). If, according to this article, an alien resides unlawfully in the Netherlands, than this person is excluded from any benefits and services and is obliged to leave the Netherlands (ibid.). Article 10 sets out that “an alien who is not lawfully resident may not claim entitlement to benefits in kind, facilities and social security issued by decision of an administrative authority” (European Committee of Social Rights, 2014, November 10, p.2). Thus, according to national law, the Netherlands is not responsible for the provision of any care, benefits or shelter. In addition, the Central Agency for the Reception of Asylum Seekers (COA) is only responsible for the reception of asylum seekers in the Netherlands that reside lawfully (ACVZ, 2012, p. 30). Likewise, the municipalities have the task to offer social assistance and shelter for the homeless, but only for those with a valid residence permit (ibid.). However, the Council of Europe has judged according to the decision of the Committee that the Dutch government needs to provide shelter, clothing and offer food (NOS, 2014, November 10). As the Dutch state is not obliged to obey the ruling of the Council, the subject of the provision of the so-called ‘bed, bad, bread’ has become subject of a quarrel within the Dutch government. The minister of Security and Justice, Fred Teeven, has said to oppose the provision of food, shelter and clothing and has even prohibited municipalities to do so. He argues that people who don’t qualify for a residence permit must leave the country. Only if
they are willing to return and cooperate in this process, he/she can find shelter in an asylum seekers centre (Bakker, 2014, November 9). Yet, several municipalities expressed concerns about the situation of irregular migrants in their cities and decided to offer relief: a bed for the night, the possibility to have a bath, and breakfast in the morning. Nonetheless, during the day, the asylum seeker needs to leave the building (ibid.).

The verdict of the Committee of Ministers of the Council of Europe needed to be decisive for the road that the government was about to follow in their policy for providing shelter to irregular migrants. However, the verdict turned out to be too vague and leaves too much room for interpretation (Kas, Heck, 2015, April 15). The quarrel between the coalition parties, the People’s Party for Freedom (VVD) and the Labour Party (PvdA), almost resulted in a cabinet crisis. Because of the different positions of the parties on the matter, both had hoped for a clear verdict that would bite the bullet. On 22 April 2015, after a week of negotiations, the coalition finally came with a compromise and a plan. Five of the Dutch biggest municipalities will be financed by the state to offer irregular asylum seekers a bed, bath and bread (Klompenhouwer, van den Dool, 2015, April 23). Shelter is only provided for a limited number of weeks and if the migrant shows to be unwilling to return after those weeks, the migrant is excluded from the facility (ibid.). Thus, although the coalition parties presented the plan as a solution, it can be concluded that the situation remains unchanged. If the irregular migrant is unwilling to cooperate and does not want to leave the country; he/she is to live on the streets.

3.7 Conclusion

Asylum policy in the Netherlands has gone through some great changes throughout the years. Although the Netherlands carried out a tradition of hospitality for a long time, this altered when unemployment and economic malaise pressed for a more central approach to manage migration, protecting the labour market from poor job seeking aliens and society from the homeless foreign troublemakers. Analysing the case of the Netherlands, it seems like unemployment and economic malaise are recurring factors for tightening asylum policy. Moreover, as presented during the Second World War, fear of international public unrest and the circulation of certain political ideologies outside the Dutch borders that could possibly threaten the stability and security of Dutch society, added to the list of reasons to ward off migrants. However, the development of international law has influenced Dutch migration policy to a great extent. Interdependence and greater cooperation on the issues of migration and asylum has pressed the government to live up to international agreements and obligations. The incorporation of the 1951 Refugee Convention, increasing Europeanization through the transposition of directives and regulations, and the increasing role of the ECHR, have transferred bits of sovereignty regarding migration issues from
the national to the international level. Thus, although, the Dutch government fears loss of sovereignty and an increasing power from Brussels, it also acknowledge the importance of European and international cooperation when fastening globalization reduces the relevance of currently existing borders.
4 Conclusion

This study provides an analysis of the concepts about the nation-state, its relation to citizenship and the migrant and developments within the EU that might offer a post-national solution to asylum issues. The research reveals that difficulties experienced by a nation-state in its policy response to asylum is intrinsically linked to survival and the need to define its citizen from the ‘other’. This is for the purpose that the nation-state can extract from its citizens what is needed to survive, like taxes and a military service. In a way, citizens become property of the state, which in return offers them privileges like protection and security and it hopes to reach a certain degree of loyalty to the state. The research concludes that the immigrant, who is not a national, in theory, is seen to be loyal to another state and a potential threat to economic and social stability. For this reason, the nation-state holds the exclusive power to control migration flows within its territory. This has been illustrated by the case of the Netherlands where unemployment and economic malaise have been reasons to impose a more restrictive aliens policy.

Further analysis of the developments in Dutch alien law and the growing importance of International law and the European Union show the existence of transnational processes that transfer bits of sovereignty to the supranational and international level. However, it can be concluded that these transnational processes are not post-national. First of all, the European Union does not offer a post-national citizenship for the reason that EU citizenship requires nationality of a member state. Therefore, EU citizenship, like national citizenship, is based on a theory of exclusion and bound to historical and cultural ties to the community. Second, EU directives also leave a lot of room for states to manoeuvre and to deviate from the EU directive to optional regulations according to national interest. Third, because of this national interest, protectionist attitudes of member states often led to a lack of solidarity to fulfil the pursuance of harmonization. For this reason, the Common European Asylum System rather seems to be a product of political compromise than a post-national concept that exceeds national interest. Finally, the European Union might never be post-national for the simple reason that although member state transfer some of its sovereignty to the supranational level, the entity of the EU is again bound by borders and it may act like a nation-state itself. On the other hand, maybe a solution to issues of migration and asylum need to be found in better cooperation that is based on solidarity rather than an ultimate form post-nationalism. The current crisis of immigration in the Mediterranean Sea is in great need of this solidarity. To find a solution to this problem within the territory of the Union, member states need to look beyond their national interest to make the Common European Asylum System
work. Interdependence will foster and cooperation will become more important to secure national social-economic and security interests as well. Moreover, compliance with human rights, through the 1951 Convention and the European Convention of Human Rights, is a responsibility that is laid upon every single member state within the Union. This responsibility should lie at the roots of solidarity. Tragedies, like those occurring in the Mediterranean Sea, require this. Not only for the sake of national interest but also for the sake of human rights.
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