



## Evaluation of the “Carriers’ Liability” Regime as a Part of the EU Asylum Policy under Public International Law

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### Abstract

*The European States, which transformed asylum into a legal concept in the post-WWII period, produced various mechanisms to eliminate this creation of theirs with the change in the world conjuncture and in their economic needs. Among these mechanisms, one that has not been studied much in Turkish literature is carriers’ liability. This study aims to introduce the regime of carriers’ liability, to connect the regime with the EU asylum policy and to evaluate the regime within the framework of public international law. Firstly, the European understanding of asylum is briefly reviewed from the historical perspective and afterwards the emergence of the carriers’ liability regime within laws of European States’ as well as EU law is addressed. Then legal problems that the regime creates and potential ways of recourse are discussed.*

**Keywords:** *European Union, Asylum, Carriers’ Liability, Carrier Sanctions, Non-refoulement*

### INTRODUCTION

As a supranational organization offering integration, the European Union (EU) struggles to harmonize many different policy fields of Member States ranging from agriculture to animal welfare. Among these, asylum policy has a special character stemming from the nature of the institution of asylum: being the

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<sup>1</sup> The writer acknowledges her gratitude to Mr. Mehmet Özcan, whom she does not know personally, for bringing in one of the very few books in Turkish on refugee law and for giving her the idea to research more about this paper’s topic while she was reading his book. The writer also thanks to Mr. Mehmet C. Uzun for spending his time on her work and sharing his valuable comments about it.

“unwanted children of States” as quoted by Byrne and Shacknove<sup>2</sup>. Asylum policy can be summarized as the incessant clash of between two rightful motives: the urgency of aid to the humanitarian needs and the States’ self interests relating to security as well as economy.

Beginning with the 1980s, concerned with false documentation, European States preferred to concentrate on the procedural aspects instead of the substantive aspects of the asylum seekers’ claim to refugee status<sup>3</sup> through the carriers’ liability regime. The purpose of this paper is to characterize the regime in the context of EU and evaluate it under public international law, particularly by focusing on its effects on refugees.

The first part is a brief historical description of international refugee law’s formation and its relationship with Europe which has transformed into its relationship with EU. The second part focuses on the characterization of the regime and its regulation in the Union. Beginning with the third part, a legal assessment of the regime is done, firstly with specific reference to international refugee law. In the fourth part, numerous consequences of the substance and implementation of the regime causing potential breaches in other branches of public international law will be discussed. In the fifth part, ways of redress will be mentioned in the light of current and future judicial procedures.

## EUROPE, EUROPEAN UNION AND ASYLUM

Although displacement of people is an age-old phenomenon, their acquisition of the judicial status of “refugee” and adoption of international legal rules concerning their protection occurred after World War II (WWII). As it does not seem reasonable to assert that states realized displacement at that very moment, it will be appropriate to seek the motives of this situation from the political atmosphere of the post-war period: their interest in controlling the population movements. In conclusion, the Convention Relating to the Status of Refugees<sup>4</sup> which is accepted as the fundamental instrument of international refugee law and which imposed rights and obligations both to refugees and states, was brought on the international scene by Europeans and with

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<sup>2</sup> Jean Allain, ‘The Jus Cogens Nature of Non-refoulement’, *International Journal of Refugee Law*, Vol. 13, No. 4, 2002, pp. 533-558.

<sup>3</sup> Frances Nicholson, ‘Implementation of the Immigration (Carriers’ Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?’, *International and Comparative Law Quarterly*, Vol. 46, No. 3, 1997, pp. 586-634.

<sup>4</sup> hereinafter: 1951 Convention

Eurocentric conceptualizations<sup>5</sup>. (Western) European states took pride in taking this political decision in the following decades because of economic reasons. Indeed, labor shortage was compensated in three ways at that period: migrants from ex-colonies, guest workers from Southern Europe and refugees from the Communist Bloc<sup>6</sup>. Nevertheless, towards the end of the 20<sup>th</sup> century, the decrease in the economic need for refugees in Europe coincided with the decrease of asylum applications from Eastern Europe and increase of applications from the "Third World Countries". Hence 1980's and 1990's were the period when European governments started thinking that they did not behave in a very far-sighted way while signing the 1951 Convention and they began to create mechanisms to find a way around international refugee law.

Traditionally, the burden put on states is to protect the one who arrives to their territory provided that they admit him or her as a "refugee". This fact becomes evident when the 1951 Convention is reviewed since most of the articles of the Convention regulate refugee protection. However, today's present asylum regime requires much more than this. Free access to apply for asylum for those who have managed to leave their own territory is just as essential as protection because the refugees can not be protected if they are not given the opportunity to arrive to the destination territory and apply for asylum. Consequently, this is why non-arrival policies, operating "as barriers for asylum-seekers for asylum seekers to access a jurisdiction where they could seek protection and receive it, if necessary" as noted by Noll and Vedsted-Hansen, is a crucial matter that should be discussed in the context of human rights law<sup>7</sup>.

When European Union's current attitude towards refugees is reviewed, numerous non-arrival mechanisms can be found such as visa procedures, carrier sanctions, liaison officers, fingerprinting, designation of airports as international (transit) zones, safe third countries, manifestly unfounded applications etc.<sup>8</sup>

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<sup>5</sup> Tevfik Odman, *Mülteci Hukuku*, (Ankara: AÜ. SBF. İnsan Hakları Merkezi Yayınları, 1995), p. 40.

<sup>6</sup> Aydan Bahadır, 'The Development of the EU Asylum Policy: Preventing the Access to Protection', 2004, <http://etd.lib.metu.edu.tr/upload/12605209/index.pdf> (Accession Date: 8 September 2008) pp.17-19; Stephen Castles and Mark J. Miller, *The Age of Migration: International Populations in the Modern World*, (New York: Palgrave Macmillian, 2003) pp. 68-93.

<sup>7</sup> Gregor Noll and Jens Vedsted-Hansen, 'Refugee and Asylum Policies' in Phillip Alston (ed.), *The EU and Human Rights*, (New York: Oxford University Press, 1999), pp. 359-410.

<sup>8</sup> Patrick Twomey and Frances Nicholson, 'Introduction' in Patrick Twomey and Frances Nicholson (eds.) *Refugee Rights and Realities: Evolving International Concepts and Regimes*,

## CARRIERS' LIABILITY AS AN EU POLICY

Carrier sanctions are defined as “fines (or other penalties) imposed by states on airline, train and shipping companies for bringing foreign nationals to their territory without required documentation”<sup>9</sup>.

The origins of carriers' liability, which is basically holding carriers responsible for the arrival of the passengers without proper documentation can be traced back to the British Act relating to aliens of 1793 which required masters of vessels to declare certain information about foreigners on board or face a certain amount of fine<sup>10</sup>. In 1902, American Passenger Act obliged steamship companies to return, at their own cost, inadmissible passengers<sup>11</sup>.

The wave of introduction of carriers' liability acts of the 1980's started with the Danish Law of 1983 and followed with the laws of Germany, UK and Belgium in 1987. In the following years, similar acts were adopted by other European states in a “copy and paste” manner<sup>12</sup>. Feller describes three elements shared by such laws and regulations as such:

α. Imposition of the duty of removal of any passenger with improper documentation from the country on the carrier

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(New York: Cambridge University Press, 1999), pp. 1-10; Jens Vedsted-Hansen ‘Non-admission Policies and the Right to Protection: Refugees? Choice versus States? Exclusion?’ in Patrick Twomey and Frances Nicholson (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (New York: Cambridge University Press, 1999), pp. 269-288; Nigel Haris, *Thinking the Unthinkable: The Immigration Myth Exposed*, (New York: I. B. Tauris, 2002), p. 41; Timothy Hatton, ‘Seeking Asylum in Europe’, *Economic Policy*, No. 38, 2004, pp. 5-62; Edward Newman ‘Refugees, International Security, and Human Vulnerability: Introduction and Survey’ in Edward Newman and Joanne van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, (Tokyo: United Nations University Press, 2003), pp. 3-31; Lisa Schuster, ‘A Sledgehammer to Crack a Nut: Deportation, Detention and Dispersal in Europe’, *Social Policy and Administration*, Vol. 39, No. 6, 2005, pp. 606-621.

<sup>9</sup> Matthew J. Gibney, ‘Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees’, *Global Migration Perspectives*, January 2005, <http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%202022.pdf> (Date of Accession: 8 September 2008)

<sup>10</sup> Frances Nicholson, ‘Implementation of the Immigration (Carriers' Liability) Act 1987.....’, pp. 586-634.

<sup>11</sup> Virginie Guiraudon, ‘Enlisting Third Parties in Border Control: A Comparative Study of its Causes and Consequences’, March 2003, <http://www.dcaf.ch/border/bsgenevaconf030313Guiraudon.pdf> (Accession Date: 17 March 2008)

<sup>12</sup> Segolene Barbou des Places, ‘EU Asylum Policy and Regulatory Competition’, *Journal of Public Policy*, Vol. 24, No. 1, 2004, pp. 75-98.

β. Obliging the carrier to pay the costs if the passenger in question is detained

χ. Compelling the carrier to pay fines for bringing the passenger in question.<sup>13</sup>

It is unquestionable that states have a legitimate interest in controlling borders in order to preclude the arrival of illegal immigrants, drug traffickers, terrorists since border control falls within the rights and jurisdiction of the sovereign states<sup>14</sup>. Indeed, as underscored by Collison, "control over the admission of aliens has historically been views as inherent in the very nature of sovereignty"<sup>15</sup>. Thus, theoretically, shifting the burden of determining asylum claims, initially a task of the state itself, to commercial carriers is not only problematic because carriers are inexperienced in refugee determination - which is obviously an area of special expertise- and they are not necessarily motivated by humanitarian considerations<sup>16</sup> but is also problematic in terms of states' sovereignty.

A reasonable answer that can be given to the question of how states that claim their sovereign feature incessantly during international disputes in general can be this willing to delegate their sovereign power to carrier companies is answered as "privatization of government immigration control function" by Sianni<sup>17</sup> or the "marketization of immigration risk" by van Munster<sup>18</sup>. Another possible answer for this is that carriers' liability a mechanism for states to escape their responsibility under human rights law by blocking the way of the refugees to access to remedies<sup>19</sup>.

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<sup>13</sup> Erica Feller, 'Carrier Sanctions and International Law'. *International Journal of Refugee Law*, Vol. 1, No. 1, 1989, pp. 48-66.

<sup>14</sup> *Ibid.*

<sup>15</sup> Sarah Collison, 'Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe', *Transaction of the Institution of British Geographers*, Vol. 21, No. 1, 1996, pp. 76-90.

<sup>16</sup> Erica Feller, 'Carrier Sanctions and International Law'. *International Journal of Refugee Law*, Vol. 1, No. 1, 1989, pp. 48-66.

<sup>17</sup> Areti Sianni, 'Interception Practices in Europe and Their Implications', *Refuge*, Vol. 21, No. 4, 2003, pp. 25-34.

<sup>18</sup> Rens van Munster, 'Reconfiguring Authority: Neo-Liberal Governmentality, Security and Immigration Control in the EU', 2005, [http://www.sam.sdu.dk/politics/nisa/papers/rv\\_munster.doc](http://www.sam.sdu.dk/politics/nisa/papers/rv_munster.doc) (Accession Date: 18 August 2008)

<sup>19</sup> This problem is addressed in a more detailed way below.

The appearance of the carriers' liability regime in EU law, which resulted in the introduction of extensive checking facilities belonging to carriers at airports as well as major ports of entry to the EU<sup>20</sup>, occurred with the article 26 of the Schengen Accord. The provision that found its place in the EU asylum acquis after the adoption of the Amsterdam Treaty is as follows:

1. Subject to the obligations arising out of their accession to the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, the Contracting Parties undertake to incorporate the following rules in their national legislation:

(a) If an alien is refused entry into the territory of one of the Contracting Parties the carrier which brought him to the external border by air, sea or land shall be obliged to assume responsibility for him again without delay. At the request of the border surveillance authorities the carrier must return the alien to the Third State from which he was transported, to the Third State which issued the travel document on which he traveled or to any other Third State to which he is guaranteed entry.

(b) The carrier shall be obliged to take all necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territory of the Contracting Parties.

2. The Contracting Parties undertake, subject to the obligations arising out of their accession to the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, and in accordance with their constitutional law, to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories.

3. Paragraph 1(b) and paragraph 2 shall also apply to carriers of groups by coach over international road links, with the exception of border traffic.

As it is seen in the second paragraph of the provision, the Schengen Accord explicitly requires the imposition of penalties' in line with the state obligations under the 1951 Convention; however States interpret this arbitrarily and their practice differ: For instance, France, Italy, Luxembourg and the Netherlands waive the fines if a person is admitted to their asylum procedure, whereas Denmark, Germany and the United Kingdom<sup>21</sup> (UK) penalize carriers regardless of protection concerns<sup>22</sup>. Thus the disparities among State practices

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<sup>20</sup> Areti Sianni, 'Interception Practices in Europe and Their Implications', pp. 25-34.

<sup>21</sup> It should be noted that UK has opted out Schengen Agreement.

<sup>22</sup> European Council on Refugees and Exiles, 'Defending Refugees' Access to Protection in Europe', 2007, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4766464e2> (Acce

give way to discrimination between two asylum-seekers entering the EU from two borders belonging to two different States, since carriers' attitude towards them could be expected to change depending on the border they are heading for.

It was very easy to justify the misinterpretations by adding a formulation to the directive supplementing the article 26 of the Schengen Treaty, requiring Member States to exempt carriers from facing the fine if the third country national is admitted to the territory in order to seek asylum. Indeed, this was the formulation that existed in the original proposal of the Council Directive on carrier sanctions<sup>23</sup>. Nevertheless, it was not accepted and in the preamble of the directive, the Member States preferred not to state more than the second paragraph of article 26 of Schengen Treaty:

Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.<sup>24</sup>

This approach of the EU underpins one of the fundamental criticisms to its asylum policy: "combining asylum with immigration" although the latter is about controlling entry, the former is an issue of protection<sup>25</sup>.

Furthermore, with the third article of the Dublin II Regulation<sup>26</sup>, all Member States are obliged to secure each asylum application which is lodged at the border. Thus it was admitted that each asylum-seeker has a right to have an asylum application at the border<sup>27</sup>. Nonetheless the recognition of the right to asylum does not change the position of carriers against the fines they pay in circumstances of undocumented passenger's asylum claim.

Finally, carriers are required to transmit external border authorities nine pieces of information about the passenger they are carrying to the EU border:

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ssion Date: 21.04.2008); Mehmet Özcan, *Avrupa Birliği Sığınma Hukuku: Ortak Bir Sığınma Hukukunun Ortaya Çıkışı*, (Ankara: USAK, 2005), pp. 43-44.

<sup>23</sup> Areti Sianni, 'Interception Practices in Europe and Their Implications', pp. 25-34.

<sup>24</sup> Council Directive 2001/51/EC of 28 June 2001 Supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, Preamble, at no. 3.

<sup>25</sup> Geoff Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?', *European Journal of International Law*, Vol. 15, No. 5, 2004, pp. 963-987.

<sup>26</sup> Council Regulation (EC) No. 343/2003.

<sup>27</sup> Pieter Boeles, 'What Rights Have Migrating Third-Country Nationals?' in Jaap W. DE ZWAAN and Flora Goudappel. (eds.), *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme*, (The Hague: TMC Asser Press, 2006), pp. 151-163.

the number and type of travel document used, nationality, full names, the date of birth, the border crossing point of entry into the territory of the Member States, code of transport, departure and arrival time of the transportation, total number of passengers carried on that transport, the initial point of embarkation<sup>28</sup>. The failure to comply results in the carrier's paying an additional fine from 3000 to 5000 euros.

### **CARRIERS' LIABILITY AND INTERNATIONAL REFUGEE LAW**

According to most of the publicists, the main aim of the adoption of such laws with respect to restrictive border regulations is to prevent irregular migration while some insists that the governments sought to reduce the pressure on the existing asylum systems by restricting would-be asylum seekers' access to their territory<sup>29</sup>. The "migration control" excuse seems reasonable for traditional immigration countries such as USA, Australia and Canada<sup>30</sup> that adopted the mechanism much earlier, but not for the European countries<sup>31</sup>. No matter for which aim the regulations function, they are proved to have resulted in a decline in the number of asylum applications<sup>32</sup>. Apart from other legal problems that it causes, carriers' liability seems to be a controversial regulation undermining the fundamental principles of the refugee regime.

When the nature of persecution that is faced by the refugees in their country of origin is taken into account, expecting them to reach proper documents for international travel seems absurd. Asylum-seekers are people that are

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<sup>28</sup> Council Directive 2004/82/EC of 29 April 2004 on the Obligation of Carriers to Communicate Passenger Data, Article 2(2).

<sup>29</sup> Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', *Refuge*, Vol. 21, No. 4, 2003, pp. 6-24; Karin de Vries, 'An Assessment of 'Protection in the Regions of Origin' in Relation to European Asylum Law', *European Journal of Migration and Law*, No. 9, 2007, pp. 83-103; Virginie Guiraudon, 'Enlisting Third Parties in Border Control: A Comparative Study of its Causes and Consequences', March 2003, <http://www.dcaf.ch/border/bsgenevaconf030313Guiraudon.pdf> (Accession Date: 17 March 2008); Sarah Collison, 'Visa Requirements, Carrier Sanctions,.....', pp. 76-90; Erica Feller, 'Carrier Sanctions and International Law', *International Journal of Refugee Law*, Vol. 1, No. 1, 1989, pp. 48-66.

<sup>30</sup> Carrier sanctions are imposed in USA firstly in 1952 with the Immigration and Nationality Act, in Australia with the Australian Immigration Act dated 1958 and finally in Canada with the Immigration Act of 1976. See Erica Feller, 'Carrier Sanctions and International Law', pp. 48-66.

<sup>31</sup> It is worth noting that the numbers arriving in Western Europe seem pretty modest taking into account that there is a global population of 45 million refugees and displaced persons in the world. See Sarah Collison, 'Visa Requirements, Carrier Sanctions,.....', pp. 76-90

<sup>32</sup> *Ibid.*

generally threatened or persecuted by the national authorities who are supposed to give them the necessary travel documents. Even if the future asylum-seeker obtains a visa, it will be dangerous for him/her to queue in the consulate of a foreign State waiting in order to obtain a visa. In addition, the asylum-seekers have an understandable reluctance to report their situation to carrier personnel since they are often fellow nationals<sup>33</sup>. In sum, having proper documentation is contrary to the nature of "fleeing from persecution".

In the international refugee law literature, carriers' liability regime is identified as a form of interception, a concept formulated by the United Nations High Commissioner for Refugees (UNHCR) as "all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land air or sea, and making their way to the country of prospective destination"<sup>34</sup>. Hence functioning as a deflection mechanism, carriers' liability precludes the asylum-seeker from accessing to the refugee status determination process and achieving refugee protection. That is why carriers' liability is contrary to the soul of international refugee law and so the 1951 Convention, which ironically forms the basic legal foundation of the EU asylum acquis<sup>35</sup>.

One of the major principles of international refugee law is non-refoulement, a rule forming part of the customary international law, established in Article 33 of the 1951 Convention:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The protection against refoulement applies to people arriving at the border that are refugees, people that are not yet granted the refugee status (asylum-seekers) or those have been denied refugee status or even to people who do

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<sup>33</sup> Erica Feller, 'Carrier Sanctions and International Law', pp. 48-66; UNHCR, 'Reconciling Migration Control and Refugee Protection in the European Union: A UNHCR Perspective', 2000, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b8f5ebb22> (Accession Date: 21 April 2008)

<sup>34</sup> UNCHR, EC/50/SC/CRP.17, 2000.

<sup>35</sup> 1951 Convention is so important for EU asylum acquis that ratifying it is admitted to be a condition of EU membership. Timothy Hatton, 'Seeking Asylum in Europe', *Economic Policy*, No. 38, 2004, pp. 5-62.

not meet the criteria of “refugee” defined in the article 1A of the 1951 Convention. It is an obligation for states to avoid taking any measure such as interception mechanisms which result in direct or indirect (*de facto*) refoulement<sup>36</sup>. For EU Member states that do not distinguish refugees from other aliens by penalizing carriers in the circumstance of the undocumented passengers’ seeking asylum, *de facto* refoulement is undoubtedly in question as a breach of international refugee law and EU asylum acquis.

In addition, it constitutes an infringement of the European Convention on Human Rights as the European Court of Human Rights interprets refoulement as a breach of article 3 of the Convention, prohibition of torture<sup>37</sup>. Moreover it is concluded in various decisions of the Court that scope of the principle of non-refoulement in the non-derogable article 3 of the European Convention on Human Rights is wider than that of the 1951 Convention<sup>38</sup> since it does not permit any derogation from the principle.

#### **OTHER CONSEQUENCES OF THE REGIME**

Another feature of carriers’ liability that requires criticism is its discriminatory aspects on both the carriers and the carried. From the carriers’ perspective, the formulation is itself discriminatory since the regime does not apply to all means of transport. As it is emphasized in the article 26 of the Schengen Accord, liable carriers are only airline and bus companies. For instance, railways are exempted from the carriers’ liability regime and at this point it should be taken into account that they are mostly in the hands of public sector<sup>39</sup>.

From the passengers’ perspective, it is not the formulation but the implementation of the regime is discriminatory. Since it is the carriers’ duty to

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<sup>36</sup> UNHCR, *Human Rights and Refugee Protection Self Study*, Module 5, Vol.2, (Geneva: Office of UNHCR, 2006), pp. 59-60.

<sup>37</sup> “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>38</sup> *Chahal v. UK*, 1996, no. 79; *Tomasi v. France*, 1992, no. 115; *Ireland v. UK*, 1978, no. 163. For the comparisons of the scopes of provisions of various legal sources prohibiting refoulement (article 33 of the 1951 Convention, article 3 of the European Convention on Human Rights, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6 and 7 of the International Covenant on Civil and Political Rights, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, please see UNHCR, *Human Rights and Refugee Protection Self Study*, pp. 60-72.

<sup>39</sup> Rens van Munster, ‘Reconfiguring Authority: Neo-Liberal Governmentality, Security and Immigration Control in the EU’, January 2005, [http://www.sam.sdu.dk/politics/nisa/papers/rv\\_munster.doc](http://www.sam.sdu.dk/politics/nisa/papers/rv_munster.doc), 18 August 2008.

remove the undocumented traveler, the costs of overnight detentions has to be paid by them if there is no available flight that day. This fact obliges inspectors to make accelerated inspections in order to parallel flight departure times, and hence to reduce the possibility of overnight departures. One of the methods of accelerating inspection is the elimination of primary inspection. Inspectors walk through the primary lines and select some passengers who appear to them as "high-risk" and examine their travel documents whereas the others are not controlled<sup>40</sup>.

Another strategy to parallel inspection work with flight departures is to urge the suspected passenger to withdraw his application to enter the territory. This practice delineates the passenger's right to have an exclusion hearing: "In accelerating inspections, encounters between inspectors and foreign nationals can involve extremely rushed advisements of rights and pressures on foreign nationals to decide "right now" whether to withdraw their applications to enter or request a hearing."<sup>41</sup>

Another consequence of carriers' liability regime that is worth mentioning is the criminalization of asylum-seekers. Guiraudon asserts that the regime obliges the asylum-seekers either to acquire forged travel documents or to bypass legal ways for entry with the help of smugglers<sup>42</sup>. Actually, choosing illegal and dangerous routes to travel to Europe is a consequence that is common to all of the regimes intercepting migrants. Statistics indicate that intensified border controls in order to prevent illegal migration ironically triggers increase in the number of illegal migrants<sup>43</sup>. It can be concluded that apart from the human smuggler, this situation helps no one, neither the state nor the asylum-seeker. Furthermore, the asylum-seekers' using forged documents worsens his position to acquire refugee status. Jean-François Durieux, the Deputy Director of the European Bureau of UNHCR explains:

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<sup>40</sup> Janet A. Gilboy, 'Implications of "Third-Party" Involvement in Enforcement: The INS, Illegal Travelers, and International Airlines', *Law & Society Review*, Vol. 31, No. 3, 1997, pp. 505-529.

<sup>41</sup> *Ibid.*

<sup>42</sup> Virginie Guiraudon, 'Enlisting Third Parties in Border Control: A Comparative Study of its Causes and Consequences', March 2003, <http://www.dcaf.ch/border/bsgenevaconf030313Guiraudon.pdf> (Accession Date: 17 March 2008)

<sup>43</sup> Thomas Spijkerboer, 'The Human Costs of Border Control', *European Journal of Migration and Law*, No. 9, 2007, pp. 127-139.

Incidences of inadequate or false documentation a fortiori, the wilful destruction of identify and travel documents, do complicate the asylum process and the task of determining refugee status.

The identity of applicants may be difficult if not impossible to establish. It may be unclear if some other State has in fact accorded residence or protection. Removal of those who effectively have protection elsewhere or removal of non-refugees may lead to frustration.<sup>44</sup>

Besides, it is often asserted by scholars and experts that the carriers' liability regime applied to airlines breaches article 13<sup>45</sup>, along with annex 9 of the 1944 Convention on Civil Aviation which does not impose a legal duty on the airline to enforce the passenger's compliance with the entry formalities of the country of destination<sup>46</sup>.

#### RIGHT TO RECOURSE OF THE INTERCEPTED PASSENGERS

States delegation of their administrative competence to private entities is generally perceived as the weakening of the intercepted asylum-seekers' possibility for remedy since carrier companies, as private entities are not under the same legal constraints as the States<sup>47</sup>. For instance, the 1951 Convention does not address to the obligations of the private parties but of the States. The opposite can be insisted upon: the acts of the private companies can be attributed to states because they are the ones acting in official capacity<sup>48</sup> as *de*

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<sup>44</sup> International Roads Transport Union, *Round Table on Carriers' Liability Related to Illegal Migration*, 30 November 2001, [http://www.iru.org/index/cmsfilesystemaction?file=en\\_events\\_2001/Illegal2001.pdf](http://www.iru.org/index/cmsfilesystemaction?file=en_events_2001/Illegal2001.pdf) (Date of Accession: 22 April 2008)

<sup>45</sup> "The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State."

<sup>46</sup> Erica Feller, 'Carrier Sanctions and International Law', pp. 48-66; Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987.....', pp. 586-634; Mehmet Özcan, *Avrupa Birliği Sığınma Hukuku: Ortak Bir Sığınma Hukukunun Ortaya Çıkışı*, p. 45.

<sup>47</sup> Thomas Gammeltoft-Hansen, 'Filtering Out the Risky Migrant Migration Control, Risk Theory and the EU', *AMID Working Paper Series*, No. 52, 2006, [http://www.amid.dk/pub/papers/AMID\\_52-2006\\_Thomas\\_Gammeltoft-Hansen.pdf](http://www.amid.dk/pub/papers/AMID_52-2006_Thomas_Gammeltoft-Hansen.pdf) (Accession Date 18 August 2008); European Council on Refugees and Exiles, *Defending Refugees' Access to Protection in Europe*, 2007, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4766464e2> (Accession Date: 21 April 2008)

<sup>48</sup> Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987.....', pp. 586-634.

*facto* state officials. In addition, they are acting under the instructions of a State which makes the act imputable to the State<sup>49</sup>. Moreover, one can not claim that the State has no fault relating to the act. Since the State has interest in the act of the carrier (immigration or border control), by applying risk theory, the culpable responsibility of the State can be argued. Another possible way to hold the State responsible is to claim the legislation on carriers' liability, as an act of the legislative contrary to international law. To conclude, the problem with the right to recourse in the refugee context does not stem from the imputability of the act but it stems from the fact that the state of the asylum-seeker's country of origin will not declare diplomatic protection to seek remedy<sup>50</sup>. This is a result of the fundamental weakness of international law, "limited access of individuals to international adjudication"<sup>51</sup>.

On the other hand, the European Union, does not, at least theoretically, close the gates totally. Since with the Treaty of Amsterdam, the European Court of Justice (ECJ) has acquired the power of reviewing cases concerning asylum, its future role in asylum matters is often remarked in the literature<sup>52</sup> and even defined as "the first international refugee tribunal" by Gilbert while mentioning the fact that ECJ is not empowered to hear asylum cases like other EU issues that can go before the ECJ<sup>53</sup>.

European Charter of Fundamental Rights will open up new opportunities for the asylum seekers' right to remedy will in EU when it becomes binding for the EU member States. By claiming their right to asylum, the asylum-seekers can have a chance to ameliorate the carrier liability regime of EU since article 18 of the Charter which grants right to asylum as such:

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<sup>49</sup> Anthony Cassese, *International Law*, (New York: Oxford University Press, 2001), p. 189

<sup>50</sup> Some publicists such as Allain, Goodwin-Gill have been asserting the fact that non-refoulement is one of *jus cogens* norms and thus any State breaching it can be held responsible: Ruwantissa I. R. Abeyratne, 'Recipient States' Treatment of Inadmissible Aliens and Refugees', *International Journal of Politics, Culture and Society*, Vol. 12, No. 4, 1999, pp. 613-632. By contrast, UNHCR is not very clear about the principle of non-refoulement's *jus cogens* character: UNCHR, *Human Rights and Refugee Protection Self Study*, pp. 13-14. In our point of view, one should wait for resorting to aggravated responsibility mechanism until international community becomes sure about non-refoulement's being peremptory norm.

<sup>51</sup> Jean Allain, 'The Jus Cogens Nature of Non-refoulement', pp. 533-558.

<sup>52</sup> Satvinder S. Juss, 'The Decline and Decay of European Asylum Policy', *Oxford Journal of Legal Studies*, Vol. 25, No. 4, 2005, pp. 749-792, at pp. 787-788.

<sup>53</sup> Geoff Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?', *European Journal of International Law*, Vol. 15, No. 5, 2004, pp. 963-987; Gregor Noll and Jens Vedsted-Hansen, 'Refugee and Asylum Policies' in Phillip Alston (ed.), *The EU and Human Rights*, (New York: Oxford University Press, 1999), pp. 359-410.

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Furthermore, article 19/2 of the Charter which is on protection on the event of removal, expulsion or extradition, can be reminded to EU authorities in the risk of refoulement. The provision reads:

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Another mechanism to prove the illegality of the carriers' liability regime will be enforceable when EU accesses to European Convention on Human Rights (ECHR). Non-communitarians experiencing refoulement will be able to bring their case to European Court of Human Rights (whose jurisprudence shows clearly that refoulement equals to torture) against EU unless they reach remedy from the European Court of Justice.

It is worth noting that necessary provisions about the two issues mentioned above – European Charter of Fundamental Rights' gaining binding force upon member States and EU's accession to ECHR – are included in the Treaty of Lisbon which is foreseen to enter in force in 2009. Nonetheless, the Treaty's rejection by the Irish voters in a referendum and by the Polish President put its ratification at stake<sup>54</sup>. From the perspective of European Refugee Law, these developments may be read as a good opportunity thrown away.

## **CONCLUSION**

In the period of Turkey's accession to EU, it became an obligation for Turkish researchers like us not only to learn but also to question all aspects of EU policies and legal institutions which include those regarding asylum. Looking from the window of carriers' liability throughout the paper, we will now reveal several cracks in the EU structure and their possible connections to Turkey.

A crack in the EU structure regards uniformity in the application of rules. As seen above, EU member states lack uniform application of the carriers' liability regime towards asylum-seekers between Member States. This crack widens with the fact that certain EU institutions, which have competence over asylum

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<sup>54</sup> BBC NEWS, 'Q&A: Lisbon Treaty', 1 July 2008, <http://news.bbc.co.uk/2/hi/europe/6901353.stm> (Accession Date: 3 August 2008)

issues, are reluctant to initiate a formulation in order to reconstitute a uniform attitude towards asylum-seekers. Furthermore, lack of uniformity has an implication regarding integration. As being defined as "an integration project", EU member states seem far from integration in terms of asylum issues. One lesson that may be learnt is instead of concerning about the potential integration of candidate states, EU should integrate its own member states, at least in applying the rules.

A second crack that can be drawn out of the carriers' liability example concerns human rights discourse of EU. The carriers' liability regime is obviously contrary to the nature of international human rights law, particularly international refugee law which forms a substantial part of it. With this regime, the likelihood of the would-be refugee's flight from persecution is substantially reduced, and this means leaving people to torture and possibly to death. Before imposing certain human rights obligations to the candidate states, EU should take action to stop violating human rights within its own system and should "keep its hands clean" to be perceived as "sincere" about human rights concerns.

A third crack regards the lawfulness of the regime. At the expense of casting a shadow on their sovereignty, EU member states preferred to keep the "unwanted alien" away by delegating their power and duty of immigration control to the commercial carriers via the carriers' liability regime. While doing that they did not even respect their own international obligations such as not to refoule asylum-seekers, lest they respected the EU asylum acquis which implies a serious contradiction within the EU law, itself.

A last (but not the least) point that should be emphasized concerns Turkey. With the possible accession to EU, Turkey will be the end portion of the EU territory and this means that it will be Turkey whose gates will be forced to reach the European haven. Therefore, it will be Turkey that will be expected to apply the border regulations such as the carrier liability regime harsher than most of the member states. At that point, Turkey should be the one to ask itself questions about the legality of the regime. Current Turkish asylum policy, with its reservations about geographical limitation or its authorization the police to make refugee status determination, is certainly not good or humane; however it is at least "lawful". Assuming that Turkey becomes a member of EU, its asylum policy will be neither good nor lawful.