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Negotiating Asylum

The EU Acquis, Extraterritorial Protection and the Common Market of Deflection

Gregor Noll

Martinus Nijhoff Publishers

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The EU Acquis, Extraterritorial Protection and the Common Market of Deflection

by

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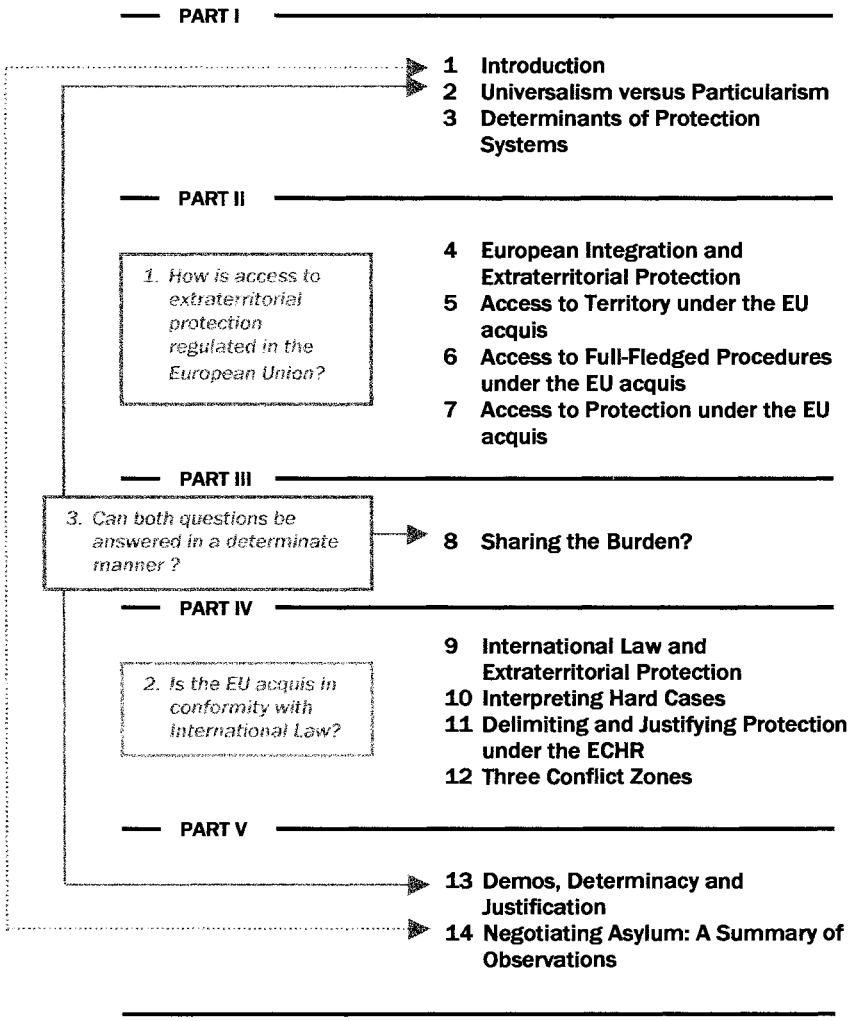
Structure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Abbreviations

AAB	Alien Appeals Board
AJIL	American Journal of International Law
ATV	Airport Transit Visa
BGBl	Bundesgesetzblatt
BiH	Republic of Bosnia and Herzegovina
BMI	Bundesministerium des Innern
BVerwG	Bundesverwaltungsgericht
BVerwGE	Entscheidungssammlung des Bundesverwaltungsgerichts
BYIL	British Yearbook of International Law
CAHAR	Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons
CAT	Convention against Torture
CCI	Common Consular Instruction
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CMLR	Common Market Law Review
CFSP	Common Foreign and Security Policy
DC	Dublin Convention
DRC	Danish Refugee Council
ECR	European Court Reports
EEA	European Economic Area

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EC	European Community
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EPC	European Political Cooperation
EU	European Union
EZAR	Entscheidungssammlung zum Ausländer- und Asylrecht (Germany)
FC	Fourth Convention
GC	Convention on the Status of Refugees
GYIL	German Yearbook of International Law
HEP	Humanitarian Evacuation Programme
HLWG	High Level Working Group on Asylum and Migration
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMPD	International Centre for Migration Policy Development
ICRC	International Committee of the Red Cross
IGC	Inter-governmental Conference
IGCARMP	Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia
IHL	International Humanitarian Law
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILPA	Immigration Law Practitioners' Association
ILR	International Law Reports
JHA	Justice and Home Affairs

LNTS	League of Nations Treaty Series
MPG	Migration Policy Group
MUA	Manifestly unfounded applications
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NJIL	Nordic Journal of International Law
OJ	Official Journal
OSCE	Organisation for Security and Co-operation in Europe
Rev. trim. dr. h.	Revue trimestrielle des droits de l'homme
RGBl	Reichsgesetzblatt
SC	Schengen Convention
SCO	Safe countries of origin
SICJ	Statute of the International Court of Justice
SIB	State Immigration Board
SIS	Schengen Information System
STC	Safe third countries
TEC	Treaty establishing the European Community as amended by the Treaty of Amsterdam
TEC/Maastricht	Treaty establishing the European Community as amended by the Treaty of Maastricht
TEU	Treaty on European Union as amended by the Treaty of Amsterdam
TEU/Maastricht	Treaty on European Union as worded by the Treaty of Maastricht
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Doc. No.	United Nations Document Number
UNC	Charter of the United Nations
UNHCR	United Nations High Commissioner for Refugees
UNCHR EXCOM	Executive Committee Of The High Commissioner's Programme
UNTS	United Nations Treaty Series

Vol.	Volume
VTC	Vienna Convention on the Law of Treaties
WGI	Working Group on Immigration
YILC	Yearbook of the International Law Commission
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik

1 Introduction

1.1 Reminiscences from a Continuing Past

1.1.1 Protecting Communities I

ON 7 APRIL 1933, the German government enacted a law prescribing that all civil servants of 'non-Aryan' descent were to be transferred into retirement.[1] The concept of non-Aryan descent was defined in an Ordinance of 11 April 1933 to apply to all persons who had a parent or grandparent of Jewish confession.[2] Two years later, this definition was

---

[1] Gesetz zur Wiederherstellung des Berufsbeamtentums [Law on the Restoration of the Career Civil Servant Profession], 7 April 1933, RGBl. I, 1933 No. 34, p. 175, Section 3: 'Beamte, die nicht arischer Abstammung sind, sind in den Ruhestand [...] zu versetzen...' ['Civil servants not being of Aryan descent are to be transferred into retirement...'. Translation by this author].

[2] Erste Verordnung zur Durchführung des Gesetzes zur Wiederherstellung des Berufsbeamtentums [First Ordinance on the Implementation of the Law on the Restauration of the Career Civil Servant Profession], 11 April 1933, RGBl. I, 1933 No. 37, p. 195. Art. 2 (1): 'Als nicht arisch gilt, wer von nicht arischen, insbesondere jüdischen Eltern oder Grosseltern abstammt. Es genügt, wenn ein Elternteil oder ein Grosselternteil nicht arisch ist. Dies ist insbesondere dann anzunehmen, wenn ein Elternteil oder ein Grosselternteil der jüdischen Religion angehört hat.' ['A non-Aryan is a person, who descends from non-Aryan, inter alia Jewish, parents or grandparents. It suffices if one parent or one grandparent is non-Aryan. This has to be presumed inter alia in the case of one parent or grandparent being of Jewish faith.' Translation by this author].

elaborated in another law, which prohibited marriage and extramarital intercourse between Jews and persons of German descent.[3] As indicated by the very name of the 1935 law, 'Act on the Protection of German blood and German honour', the rationale of all these measures was claimed to be the protection of one community from the detrimental influence of another.[4]

These acts represented the first legal measures in a comprehensive process of definition, marginalisation, expropriation, forced emigration and deportation of the German Jewry, culminating in the extermination phase from 1941–5.[5] The process unfolded in spite of diplomatic protestations by other states and claims of a *Daseinsrecht* by the Jewish population in Germany[6], diminishing the latter from 499 800 in 1933 to an estimated 20–25 000 at the end of the Second World War.[7]

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[3] Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law on the Protection of German Blood and German Honour], 15 September 1935, RGBl. I, 1933 No. 100, p. 1146. Section 1 and 2.

[4] This is not contradicted by the fact that both communities did not exist preceding the law and needed to be constructed by it.

[5] R. Hilberg, *Die Vernichtung der europäischen Juden* (1982, Fischer, Frankfurt am Main), p. 57.

[6] 'Every organised group replied to National Socialism with resounding affirmations of the right of Jews to be German, to live in and love Germany. *Daseinsrecht*, the right to maintain a Jewish presence in Germany, was construed as a legal right, a moral necessity and a religious imperative by all Jewish organisations from Orthodox to Reform, right to left, Zionist and non-Zionist.' L. S. Davidowicz, *The War Against the Jews, 1933–45* (1987, Harmondsworth, London), p. 220. The insistence on a 'right to remain' for the victims of the Balkan conflict in the 1990s resounds fatally of this 'right to exist and to maintain presence'. There is a difference, though, whether this right is claimed by the victims of persecution, as was the case in the 1930s, or by outsiders, who may be in pursuit of their own interests, as was the case in the 1990s.

[7] W. D. Rubinstein, *The Myth of Rescue. Why the Democracies could not have saved more Jews from the Nazis* (1997, Routledge, London), pp. 18 and 19, based on calculations in *Jewish Immigrants of the Nazi Period in the U.S.A.* Vol. 6: Essays on History, Persecution and Emigration of German Jews, , H. A. Strauss ed. (New York, 1987). See also Hilberg, 1982, Vol. 3, p. 1116, for a confirmation of post-war numbers. It should be recalled that the named statistics only relate to German Jews. The majority of Jewish victims of the German extermination policies were provenient from occupied territories in Central and Eastern Europe. The total number of Jewish extermination victims is currently estimated at 5.7–6 million. Rubinstein, 1997, p. 221, note 8.

1.1.2 Protecting Communities II

On 31 August 1938, Switzerland terminated the Swiss-German agreement abolishing visa requirements for nationals of both countries.[8] This step was preceded by a number of interventions on the part of the Swiss Government, expressing discontent with the increasing number of illegal border crossings of Jewish refugees and the inertia of German authorities in this regard.[9] On one occasion a Swiss representative stated that 'Switzerland, which has as little use for these Jews as has Germany, will herself take measures to protect Switzerland from being swamped by Jews with the connivance of the Viennese police'.[10] In the deliberations between the governments following the termination of visa-free travel, the Swiss side was prepared to accept a compromise. Provided that the German authorities marked the passports of German Jews and prevented the exit of those lacking a Swiss visa, the Swiss government would limit visa requirements to the German Jewish population. On 29 September, both sides agreed as follows:

> The German Government will see to it that all passports for travel or sojourn abroad held by Jews who are Reich subjects (section 5 of the First Decree issued under the Reich Citizenship Law of November 14, 1935 — RGBl I, p. 1 333) are provided within the shortest possible time with a mark designating the holder as a Jew.
>
> The Swiss Government will permit Jews who are subjects of the Reich and whose passports are marked as described in No. 1, or must be so marked according to the German regulations, to enter Switzerland if the appropriate Swiss Mission has entered on the

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[8] Agreement of 9 January 1926 regarding the reciprocal abolition of visa requirements. Unpublished, referred to in the Agreement of 29 September 1938, see note 11 below.

[9] A full account of these activities based on documents emanating from the Swiss authorities is given in *Beilage zum Bericht des Bundesrats an die Bundesversammlung über die Flüchtlingspolitik der Schweiz seit 1933 bis zur Gegenwart*, Bundesblatt der Schweizerischen Eidgenossenschaft, Jg. 109, II Band, Addendum to Document 7347. Disregarding details, these sources confirm the information contained in the German documents referred to below.

[10] Report of 24 June 1938 by the German Legation in Berne, Doc. No. 7024/E522333, referred to in *Documents on German Foreign Policy 1918-1945, Series D (1937-1945)* Vol. V, (1953, Her Majesty's Stationery Office, London), p. 896, note 2. The position of the Swiss government was voiced by its representative Heinrich Rothmund, Head of the Swiss Federal Police.

> passport an "assurance permitting sojourn in Switzerland or transit through Switzerland".
>
> The German agencies in question which are charged with passport inspection and border patrol at the German-Swiss border will be instructed to prevent the exit to Switzerland of Jews who are subjects of the Reich and whose passports do not show the "assurance permitting sojourn in Switzerland or transit through Switzerland".[11]

On 11 November 1938, one day after the *Reichskristallnacht* pogrom[12], Switzerland and Germany exchanged notes ratifying the quoted agreement. Anticipating its entry into force, a German ordinance of 5 October 1938 stipulated that German Jews had to turn in their passports to the authorities for revalidation. The passports thus received were to be provided with a symbol identifying the bearer as a Jew.[13] The symbol, chosen by the Minister of the Interior, was a stamp featuring the letter 'J'.[14]

1.1.3 Protecting Communities III

On 21 June 1993, the Swedish government granted a large group of Bosnian asylum-seekers permanent residence permits on humanitarian grounds, as there were 'no indications that they would be able to returnto their country within the near future'.[15] Many of these asylum-seekers had

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[11] Agreement of 29 September 1938 (translation), enclosure to Doc. 7025/E522443-45, R 20829, Letter of the Reichsführer SS and Chief of German Police to the Foreign Ministry, 1953, Volume V, p. 987. This agreement, classified as confidential, was neither published in the German Reichsgesetzblatt nor in the Swiss Amtliche Sammlung des Bundesrechts.

[12] *Reichskristallnacht* (night of shattered glass) is a euphemistic term used for the violent events of 9–10 November 1938, initiated at the order of the German Minister for popular enlightenment and propaganda, Joseph Goebbels. 91 Jews were killed during nation-wide pogroms, and another 244 died in the Buchenwald concentration camp in the following months, M. Gilbert, *The Dent Atlas of the Holocaust* (1993, Dent, London), pp. 27 and 28.

[13] Verordnung über Reisepässe von Juden vom 5. Oktober 1938 [Ordinance on travel passports of Jews of 5 October 1938], RGBl. I, 1342. Section 1 (3).

[14] Circular of the Foreign Ministry, 11 October 1938, Reproduced in 1953, Volume V, Doc. No. 644, pp. 898-900, p. 899.

[15] Regeringens Proposition 1993/94:51, *Överföring och mottagande av flyktingar från f.d. Jugoslavien m.m.* (1994), p. 2.

been kept waiting for a considerable time for a final decision in their case and were greatly relieved by the news. In Europe, only the Netherlands granted permanent residence permits to fleeing Bosnians at that time.[16]

Simultaneously, the government decided to impose visa requirements for citizens of Bosnia-Herzegovina because the lack of such a requirement would 'entail substantial difficulties to regulate immigration'.[17] The latter decision had an unambiguous effect. The number of Bosnian asylum-seekers arriving in Sweden fell dramatically. The average monthly figure was barely 1 500 arrivals, compared to 7 000 a year earlier.[18] While 25 110 asylum requests had been filed with the Swedish Immigrant Board by Bosnians in 1993, the corresponding figure for 1994 was down to 2 649. Apart from the imposition of visa requirements, no other factors had contributed to this decrease in numbers. Domestic legislation remained unaltered, and the conflict in the region of origin would continue to produce substantial numbers of refugees for years to come.

The situation bore some resemblance to a trade-off. To protect the group of Bosnians already on Swedish territory, future arrivals were drastically diminished. In 1992–3, the Swedish government argued, a considerable number of persons already had found haven in Croatia and other countries before moving on to Sweden.[19] To alleviate detrimental effects in hard cases, the Swedish government established a visa office in Zagreb, where entry permits were granted to Bosnians belonging to vulnerable groups.

The Swedish visa decision was not unique.[20] By 1993, visa requirements for citizens of Bosnia-Herzegovina had been introduced, domino-fashion,

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[16] G. Brochmann, *Bosniske flyktninger i Norden. Tre veie til beskyttelse* (1995, Nordiske Komparative studier om mottak av flyktninger, Oslo), p. 30.

[17] Socialförsäkringutskottets betänkande 1993/94:SfU6, *Överföring och mottagande av flyktingar från f.d. Jugoslavien m.m.* [Transfer and reception of refugees from Former Yugoslavia et al.] (1994), p. 9.

[18] The Swedish Ministry of Labour, *Immigrant and Asylum Policy* (1995, The Printing Office of the Cabinets and Ministers, Stockholm), p. 23.

[19] The Swedish Ministry of Culture, *Immigrant and Asylum Policy* (1994, The Printing Office of the Cabinets and Ministers, Stockholm), p. 14.

[20] On 26 June 1993, Denmark introduced visa requirements for citizens of Bosnia-Herzegovina, Serbia-Montenegro and Macedonia. Precisely as the Swedish government had done, the Danish administration argued that most of the previous arrivals had moved on to Denmark from safe havens in other countries. The drop in numbers was as dramatic as in Sweden. Brochmann, 1995, p. 16.

throughout Europe. As the main receiving country in the region of conflict, Croatia had decided to close its borders to Bosnian refugees as early as July 1992.[21] This had decisive effects on the availability of protection at large. Just as in 1938, the trap had closed.

1.1.4 The Ambiguity of Hindsight

Notwithstanding their incommensurability, the historical sequences expounded above reflect different steps in the escalation of protective conflicts. These steps merit further analysis.

The 1933 case represents an inter-state conflict, where a group is defined into existence and gradually excluded from a nation-state community. This exclusion is but a consequence of a claimed necessity to protect another group, in the historical case, Germans of 'Aryan' descent. To be sure, the protective need, as well as the group to be protected from, were the products of propaganda. Both communities—Aryans and non-Aryans—constitute artificial constructs, lacking any base in law or state practice before 1933. The German civil servants tasked with drafting the named laws encountered considerable technical difficulty when recasting the image of the Jewish 'enemy', as conjured up in the 1920s, in terms of an operational legal definition. It is hardly surprising that the borderlines between both groups and within the group of non-Aryans were drawn without logical consistency.[22] The distinction thus introduced lacks any rational base and is consequently endowed with the character of discrimination.

At a certain point, exclusion starts to internationalize. Having been depicted as a threat to the community of Aryan Germans, Jewish Germans became refugees. As refugees, they became a threat to other communities as well. By 1938, the outflow from Germany had grown to

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[21] M. Barutciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-94)', 8 *IJRL* 49(1995), p. 74 with further references. On 17 July 1992, Croatia already hosted a total of 334 000 refugees from Bosnia-Herzegovina, which made it one of the most affected recipient countries. Ibid.

[22] See Hilberg, 1982, pp. 70–84 on the contradictions inherent in the law and exacerbated in its implementation. In certain cases, Hitler decided personally on exceptions from the legal categorisations and upgraded non-Aryans to Aryans. This procedure was known as *Befreiung*—liberation. Hilberg, 1982, Vol. 1, p. 83.

such proportions that refugees were increasingly perceived as a threat by potential host communities. This is clear from the Swiss example, where the interests of German refugees were juxtaposed to those of the Swiss population.

The 1938 case was decisively different. Switzerland engaged neither in the drafting of discriminatory definitions nor in persecution. The steps taken by it in 1938 built on the basic distinction between citizens and non-citizens, firmly based in international law. The imposition of differentiated visa requirements was a reaction to an increasingly anomalous migratory situation caused by the persecution in Germany. Controlling migration by such means was not unusual at the time and is even more widespread today. Exclusion of citizens within nation-state communities is one matter, exclusion of non-citizens quite another.

Beyond that, a consensual appraisal seems remote. Two lines of argument offer themselves. One is that Switzerland could not possibly have received more German refugees and was under no obligation to do so. Switzerland had a right to control the entry and stay of aliens on its territory. Accordingly, it was perfectly rational to single out those who had a high propensity for becoming refugees and to control their entry by means of a visa requirement. In the given historical situation, this group of persons happened to be congruent with the German definition of Jews. Between 1933 and 1938, Switzerland had offered a haven to some 7 000 German Jews. Given the size of the country and its population, this share is not disproportional compared to the overall European refugee reception at the time.[23] The responsibility for discrimination and persecution lies with Germany alone, whose nationals the persons were.

The second line of argument concludes that Switzerland could have received more refugees. Other countries in the immediate vicinity of Germany had done so.[24] De facto, Switzerland replicated the discriminatory definition of Jews by singling them out along the lines of the German legislation for the purposes of migration control. Beyond the

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[23] During the same period, the U.K. received 52 000 German Jews, France 30 000, the Netherlands 30 000, Poland 25 000, Belgium 12 000, Portugal 10 000, Yugoslavia 7 000, Czechoslovakia 5 000, Italy 5 000, Sweden 3 200, Spain 3 000, Hungary 3 000, Denmark 2 000 and Norway 2 000. Gilbert, 1993, as reproduced in Rubinstein, 1997, p. 17.

[24] This argument could be based on the same statistics as the first one, pointing to the much higher intake by the Netherlands and Belgium during the same period. For both arguments, it is of no import that the haven in the Netherlands and in Belgium would be disrupted later by the German occupation during the war.

legitimate distinction between citizens and non-citizens, Switzerland opted for an illegitimate distinction between Germans and German Jews. Moreover, it ensured that German authorities would hinder emigration of the targeted group to a potential haven, namely Switzerland.[25] In 1938, sufficient information was available for the Swiss government to realize that German Jews would, at the least, continue to face harsh treatment in Germany. After all, the *Reichskristallnacht* coincided with the formal conclusion of the agreement. While Switzerland has no part in the responsibility for persecution and genocide, it bears a responsibility for barring admission to its victims.[26]

To avoid misunderstandings, it must be underscored that Switzerland is far from being the only country who used legal devices to fend off would-be refugees from Germany.[27] Neither is it the only country whose conduct vis-à-vis German refugees has been questioned (and subsequently defended). Historical research is deeply divided about the treatment of this group by potential countries of refuge.[28] Judging the conduct of these states entails the ever-present risk of ahistorical reasoning. But the point to

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[25] See the agreement of 29 September 1938, note 11 above, para. 3. It should be noted that the official German policy at the time was to promote the emigration of German Jews. (See e.g. Memorandum by the Director of the Political Department of 12 November 1938, Doc. No. 1125/321681-82, 1953, Volume V, p. 904. The agreement as well as the stamping of passports with the symbol 'J' actually barred emigration from Germany.

[26] For an outspokenly critical assessment of the Swiss refugee policy during the Nazi era in Germany, see Unabhängige Expertenkommission Schweiz—Zweiter Weltkrieg, Die Schweiz und die Flüchtlinge zur Zeit des Nationalsozialismus, December 1999, available at <http://www.uek.ch/dindex.htm> (accessed on 11 December 1999). The report was commissioned by the Swiss federal parliament and drafted by an independent group of experts.

[27] The Swedish National Board of Health and Welfare (*Socialstyrelsen*) sent out a circular in 1938 to the effect that holders of German passport stamped with a 'J' were not to be admitted to Sweden, save for cases in possession of a residence permit or a 'border recommendation' (*gränsrekommendation*). Border recommendations were only available in cases where return to Germany was deemed unproblematic. See Statens Offentliga Utredningar (SOU) 1967:18, p. 160. For a detailed account, see H. Lindberg, *Svensk flyktingpolitik under internationellt tryck 1936-1941* (1973, Allmänna Förlaget, Stockholm), pp. 123–80.

[28] For a defense of potential destination countries, see Rubinstein, 1997, pp. 15–62, arguing that a reluctance to flee and emigration restrictions by Nazi Germany rather than immigration restrictions by potential destination states inhibited the escape of the German Jews. For an opposed view, claiming that less restrictionist immigration policies could have saved more, see M. M. Marrus, *The Holocaust in History* (1987, Weidenfeld & Nicolson, London), pp. 164–5.

be made here is a different one. In the 1938 case, the original conflict—the exclusion and persecution of German Jews—had attained a new dimension. Apart from opposing German Aryans to German Jews, it now involved a juxtaposition of German refugees with the Swiss population, as well as a juxtaposition of the Swiss and German governments.

The 1993 case reiterates some of the patterns prominent in the 1938 sequence of events. In both cases, the root cause of flight was a massive violation of human rights and genocide in the making. In 1993 as well as in 1938, the imposition of barriers to continued flight centred on protection of the recipient society from migration beyond its 'absorptive capacity'. The legitimacy of blocking access has been questioned in both cases. But the 1993 case also indicates that the protective dilemma is not merely a clash of two communities but rather an amalgam of multiple clashes. The chain of juxtapositions already enumerated above is extended by two further conflicts. We recall that the Bosnian protection seekers already present in Sweden were granted permanent status at the very moment that flight for their compatriots was barred. By this double move, one segment of the group of victims was juxtaposed to another. Furthermore, the interests of potential countries of refuge may collide. When the first recipient countries had decided to impose visa regulations, others quickly felt compelled to follow suit. Had they not done so, they would have faced a proportionally larger share of refugees to protect. Thus exclusion within nation-state communities triggers opposition between refugee communities and other nation-state communities, between host countries and countries of origin, between victims leaving early and victims leaving late or not at all, as well as among host countries.

Their historical idiosyncrasies apart, all cases portrayed above possess two common elements. First, the protection of communities is used as a central legitimising argument. While the protection argument was manifestly abused in the 1933 case, the answer is not so evident in the 1938 and 1993 cases. Second, the instrument of law—domestic legislation as well as international agreements—was used to attain the protective goal in all three cases. While law can be used in a critical manner as a benchmark against which state action is assessed, it simultaneously represents the vehicle of such action.

Leaving the 1933 case for a moment, several dissimilarities between the 1938 and 1993 cases are worthy of further consideration. In 1993, the international community possessed well-elaborated knowledge of

historical experience; the risks of denying haven were known from the extermination of the European Jews and a number of consecutive refugee crises around the world. The international community was well aware of what was going on in Former Yugoslavia, and the risks for those compelled to remain in the territories of conflict could be calculated to a sufficient extent. Precisely as the 1938 case attained a different aura in the light of the extermination period beginning three years later, the 1993 case appears all the more problematic in the light of the massacres following the fall of the Safe Zone of Srebrenica.[29] Second, the international community had a superior position vis-à-vis the perpetrators of persecution, and—as became clear in 1995—its political and military capacity could impose an end to fighting and the continued generation of large-scale displacement. Briefly, the options were rapid deployment of intervention forces, refugee reception or both. There were no such prospects in 1938—the state engaging in persecution possessed such a strong position that leading European governments opted for a policy of appeasement instead of confrontation. Contrary to the situation in 1993, there were no prospects for successful intervention into the root causes. Third, and probably most important for our context, international law had changed since 1945. A corpus of human rights has been moulded into the form of binding treaty law since World War II, and specialized instruments and institutions have been created to address situations of flight across international borders.

It is not for this work to make moral judgements. Rather, the point of this section has been to introduce the creation, protection and deflection[30]

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[29] In July 1995, as the Vojska 'Republike Srpske' (VRS—Army of the 'Serbian Republic') overran the Srebrenica enclave, soldiers of the Armija Bosne i Hercegovine (ABH—Army of Bosnia-Herzegovina), other draft-age males and some women and children attempted to flee through the forest towards ABH-controlled territory. 'Those who reached it reported systematic ambushes by the VRS on the groups of soldiers and civilians, and the capture of large numbers of people, including civilians. There was strong circumstantial evidence that many of the 3 000 people who were reported to have fallen into the hands of the VRS and another 5 000 people who were also unaccounted for had been deliberately and arbitrarily killed by VRS forces or paramilitaries from Serbia. [...] A small number of the missing from Srebrenica were later discovered to be in detention but the vast majority remained unaccounted for at the end of the year.' Amnesty International. *Amnesty International Report 1996.* (1996, Amnesty International Publications, London), pp. 96–7.

[30] For the purposes of this work, deflection means any measure inhibiting lasting forms of access to a territory.

of refugees, through three historical precedents, in order to prepare the ground for a legal analysis. This introduction allows for a number of conclusions to be drawn. First, the protection of communities is a common denominator for all three processes. This actualizes those rules dealing with the protection of individuals and communities not amounting to nation states—human rights—as well as the rules dealing with the protection of nation state communities—often denominated 'state sovereignty'. Second, the issue of refugee protection must be analysed not merely in terms of domestic protection categories but also with regard to means of migration control, of which visa requirements are but one example. Thirdly, with the benefit of hindsight, it is clear that such forms of regulation may have fatal consequences for those whose access is blocked. These consequences can turn out to be irreparable at a later stage; when extermination started in 1941, the war as well as the German authorities had blocked emigration, and a liberalisation of admission would have had very limited effect.[31] Thus, there are important values at stake, which motivate a careful analysis of the legal framework governing such regulations. Fourthly, the relationship between persecution, conflict, refuge, and intervention is clearly a complex one, providing no self-evident answer to the question of exactly *how much* protection a state owes to persecuted non-nationals. The relationship between refugee protection and migration control remains as problematical today as it was in 1938 or 1993. The question to be pursued in the following is how it is framed in international law.

1.2 Identifying the Problem

What is the optimum level of inclusion? Provided that this level can be identified, how is it most faithfully implemented in law?

There is a linkage between these fairly abstract questions and the concrete reality of seeking refuge abroad. To start with, refugees are persons who have been excluded de facto from the legal protection of their home communities. Finding a haven elsewhere means but their re-

[31] One could claim that the extermination policies conducted by Germany from 1941–5 could not have been reasonably predicted by potential states of refuge in 1938. However, the historical experience of extermination cannot be ignored by contemporary decision-makers: discriminatory policies bear a potential for genocide.

inclusion under another form of legal protection, outside the country of origin. In turn, the state of which such extraterritorial protection is requested has to consider where to draw the line: to whom shall it grant, to whom deny this protection? To be sure, there are two questions of exclusion and inclusion, one situated in the country of origin, another in the host country. It is the latter that will be dealt with in this book.

Against this background, the question 'what is the optimum level of inclusion' can be adapted to the issue of extraterritorial protection and specified. This work is seized with three basic questions:

I. How is access to extraterritorial protection regulated in the European Union?

II. Is the EU acquis in conformity with international law?

III. Can both questions be answered in a determinate manner?

Grappling with these questions presupposes clarity on their precise content as well as on the path to be pursued in answering them. In the following sub-sections, the delimitation of the topic shall be expounded and justified; methodological considerations and elaboration of the structure of our further inquiry will follow.

1.3 Delimiting the Problem

This sub-section deals with the first of the three basic questions, namely how access to extraterritorial protection is regulated in the European Union. Why speak of *access* to protection? Why choose the saturated concept of *extraterritorial protection* when others simply speak of asylum? Which norms are covered by the term *regulated* as used in the basic question? And, finally, how is the geographical delimitation to the *European Union* motivated?

1.3.1 'Access'

Conceiving the problem as one of access to protection instead of, say, a right to protection extends the scope of this work over a broad variety of norms. What is the common denominator of these norms?

Generally speaking, differences in protection are created by means of thresholds. Within the context of state protection, a decisive threshold exists between non-citizens and citizens. This becomes clear in constitutional law as well as in international human rights law, both of which accord a more favourable position to state citizens.[32] Another threshold of focal interest severs those within state jurisdiction from those outside it. The latter threshold is usually linked to a person's presence on state territory. Again, international human rights law may serve as an illustration, as its major treaty instruments extend a basic form of protection to all persons within the jurisdiction of State Parties.

As a corollary of their territorial supremacy, states are entitled to control the composition of their populations[33], which means nothing less than delimiting the group to which protection is extended. This prerogative entails a right to control borders, understood in a literal and a metaphorical sense—covering physical borders as well as administrative thresholds—severing citizens from non-citizens, participants from non-participants, beneficiaries from non-beneficiaries and tolerated from non-tolerated. The means by which such controls are exercised range from naturalisation to forcible removal.

A classical starting point for inquiries into asylum law has been the question 'who is a refugee?' Asking this question means inquiring into a difference. This difference simply severs beneficiaries of asylum or other

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[32] See e.g. Art. 26 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 [hereinafter ICCPR], limiting participatory rights to citizens, while all other rights are enjoyed by 'everyone' under the jurisdiction of a State Party. The same form of distinction can be found inter alia in Art. 20 of the Swedish Constitution, limiting the rights of foreigners within the realm in relation to those enjoyed by Swedish nationals. However, it must be recalled that states are obliged to treat aliens in accordance with 'ordinary standards of civilization', and that these standards may in single cases exceed those applied to the treatment of citizens. Since World War II, the development of human rights law has continuously limited the number of such cases. See A. Verdross and B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, 3 ed. (1984, Duncker & Humblot, Berlin), pp. 801–5. For a comprehensive overview, see R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984, Manchester University Press, Manchester).

[33] In its jurisdiction on Art. 3 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 [hereinafter ECHR], the European Court of Human Rights has repeatedly spelt out that states are entitled to control the entry of aliens on their territory. See e.g. European Court of Human Rights, *Nsona vs. the Netherlands*, Judgment of 28 November 1996, Reports 1996-V, No. 22, para. 92.

forms of extraterritorial protection from non-beneficiaries. Answering this question with legal authority means establishing a difference. This difference is but a specific threshold, which a person seeking protection must pass. Simply put, a refugee definition is a norm of qualification established by law and used by states when allocating extraterritorial protection.

Definitional issues, however, are merely one factor determining an individual's possibilities of receiving extraterritorial protection. To alleviate pressure on their protection systems, industrialized host states use a wide array of other thresholds diminishing numerical and qualitative access to legal protection. The most prominent among them are measures of migration control which inhibit potential protection seekers from leaving their home country or from filing a protection claim in a given host state. As an example, the country of destination may deny an entry permit to the potential asylum seeker and thereby inhibit access to its territorial protection. Thus relevant parts of the law regulating the granting of entry permits fall within the scope of our inquiry.

Such thresholds need not explicitly deal with extraterritorial protection. Yet precisely like the definition of beneficiaries, they impact prospects of being granted such protection. The interaction of these norms actually calls to mind a filtration process. The group of potential claimants is reduced successively: blocking exit from the home country for some, inhibiting territorial access to the potential host state for others, while letting a limited number of individuals pass through to claim the right. Clearly, the granting of extraterritorial protection to a happy few means little more than successfully passing the final filter.

In the following, the term 'filter' will be used for all legal devices explicitly or implicitly connected with the regulation of the personal and material scope of extraterritorial protection.

Including such filters within the scope of this work will permit the analysis of all legal norms with an impact on an individual's prospects of receiving extraterritorial protection as an interacting totality. By contrast, framing the problem as solely turning on 'the right to protection' tends to lose sight of the preconditions for claiming that right; it is the aggregate effect of filters that ultimately determines access to extraterritorial protection.

1.3.2 'Extraterritorial Protection'

The term 'asylum' would appear to be a natural choice for reflecting the type of protection at stake in this work. However, this term has undergone a shift in connotation in later years that may give rise to misconceptions. At the 1950 Bath session of the Institut de Droit International, asylum was defined as the protection accorded by a state to an individual who comes to seek it:

> Dans les présentes Résolutions le terme "asile" désigne la protection qu' un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la chercher.[34]

The charm of this definition lies in its openness. It covers the various types of protection granted under international law as well as under national law or the discretion of states, regardless of whether they are termed 'asylum' or merely 'protection from deportation'. Its scope comprises beneficiaries of the Convention relating to the Status of Refugees (henceforth 1951 Refugee Convention)[35] as well as protective provisions in a variety of human rights instruments, without being confined to their restrictions. The term 'protection' connects elegantly to human rights law, which mirrors a linkage of increasing importance in the refugee discourse.[36]

However, this definition conflicts with the dominant understanding of the term 'asylum' in the contemporary European context. The term 'asylum' is increasingly limited to denote protection granted under the 1951 Refugee Convention. Article 1 of the 1991 Dublin Convention documents this move towards specification:

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[34] Institut de Droit International, L'Asile en Droit International Public, adopted 11 September 1950, quoted in A. Grahl Madsen, *The Status of Refugees in International Law*, Part II (1972, A.W. Sijthoff, Leiden), p. 3.

[35] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137. In the following, reference to the 1951 Refugee Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

[36] See, e.g., G. Melander, 'The Relationship between Human Rights, Humanitarian Law and Refugee Law', in Göran Rystad (ed.), *Encountering Strangers* (1997, Lund University Press, Lund), p. 32.

> For the purpose of this Convention: [...]
>
> b) Application for asylum means: a request whereby an alien seeks from a Member State protection under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol; ... [37]

A congruent understanding can be traced in domestic law in Europe. To name but one example, Swedish law reserves the term 'asylum' to residence permits granted on the basis of the Swedish adaptation of the refugee definition contained in the 1951 Refugee Convention. Residence permits granted on other grounds are not termed 'asylum' even if they are protection-related.[38]

With regard to this terminological nicety, the 1951 Refugee Convention must be regarded as neutral. The term 'asylum' is not used in its operative articles, and its sole occurrence in the preamble does not allow for any conclusion on whether it supports an expanded or a specified definition.

Although the definition of asylum elaborated by the Institut de Droit International is attractive in its openness, it would be unwise to choose terminology running counter to the current practices of those states whose law and practice is under scrutiny here. As mirrored in Article 1 of the Dublin Convention, the term 'asylum' will be understood throughout this work as denoting protection under the 1951 Refugee Convention.

But the 1951 Refugee Convention is limited in its scope, and state obligations to protect aliens seeking refuge may also flow from other legal instruments such as the ICCPR, the CAT and the ECHR. Moreover, a number of host states afford protection under domestic legislation, with or without a clear linkage to international instruments. These forms of refuge have been termed 'subsidiary protection' in EU Council

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[37] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990, OJ (1997) C 254/1 [hereinafter Dublin Convention].

[38] Utlänningslagen [Aliens Act], SFS 1989:529, as amended by SFS 1996:1379, Chapter 3 Sections 1 and 2.

documents.[39] Following the understanding prevailing in that document, this term would cover refuge granted to 'individuals who do not qualify for refugee status under the Geneva Convention, but who for one reason or another are, or may be, in need of protection'.

A further wildcard in this context is the concept of temporary protection, which surfaced in the early 1990s as a response to the protection needs triggered by the conflict in Former Yugoslavia. So far, the group of its beneficiaries has been exemplified rather than defined on the level of international law.[40] As this concept is said to affect both persons who fall under the 1951 Refugee Convention and persons who do not[41], it shall be understood as partly consumed by the joint categories of asylum and subsidiary protection for the time being. However, where temporary protection is aimed at beneficiaries who would *not* be eligible for asylum or subsidiary protection, it is outside the framework of this inquiry.

To conclude, the scope of this work covers two forms of protection:

- asylum, as understood in Article 1 of the Dublin Convention, and
- subsidiary protection, understood as other forms of protection than asylum, based on binding instruments of international law other than the 1951 Refugee Convention.

To the extent the beneficiaries of temporary protection would be eligible for asylum or subsidiary protection, temporary protection is covered as well.

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[39] Council of the European Union, Note from the Danish Delegation to the Asylum and Migration Working Parties, Subsidiary Protection, ASIM 52, Doc. No. 6764/97, 17 March 1997. It must be doubted whether it is accurate to term such protection as subsidiary in relation to the 1951 Refugee Convention, as there is no clear hierarchical relationship between human rights law and refugee law. However, we see no need to propose a new terminology here.

[40] Domestic legislation in Europe provides no basis for singling out a common core of beneficiaries for the purposes of international law.

[41] In the 1994 General Conclusions on International Protection, Member States of UNHCR's Executive Committee noted 'that the beneficiaries of temporary protection may include both persons who qualify as refugees under the terms of the 1951 Convention and the 1967 Protocol and others who may not so qualify, and that in providing temporary protection States and UNHCR should not diminish the protection afforded to refugees under those instruments'. UNHCR EXCOM, General Conclusion on International Protection. No. 74 (XL V), 1994, para. t).

Clarity in presentation requires an overarching term embracing both asylum and subsidiary protection. For now, there is no obvious candidate to be extracted from the language used by actors of international law. To denote both forms of protection, we take the liberty of using the term 'extraterritorial protection' in the following. While the word 'protection' alludes to the continuation of human rights protection during and after flight, the word 'extraterritorial' expresses the exceptional character of such protection in that it takes place outside the country of origin. To be sure, calling such protection 'extraterritorial' means adopting the perspective of the individual affected.[42]

Due to its overarching character, extraterritorial protection does not necessarily entail a legal status equivalent to the one laid down in the 1951 Refugee Convention. On the contrary: even the most rudimentary form of protection, such as a temporary stay of deportation on protection-related grounds, is covered by the term.[43]

1.3.3 'Regulated'

The phrase 'regulated in the European Union' contains normative, geographical and institutional dimensions. Starting with the first, 'regulating' simply translates to the activity of steering by means of legal norms. Only such norms will be taken into account which

1. possess binding force,
2. emanate from international law or the law of the European Union, and

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[42] The term 'extraterritorial protection' runs the risk of being confused with the term 'extraterritorial asylum', where the latter denotes protection granted by a state outside its territory, e.g. on its diplomatic premises. See M. García-Mora, *International Law and Asylum as a Human Right* (1956, Public Affairs Press, Washington), p. 1. The difference of perspective stands clear: while 'extraterritorial asylum' reflects the perspective of the state granting such asylum, 'extraterritorial protection' mirrors the situation of the individual protection seeker whose own country denies her protection. Moreover, the risk of confusion is diminished by the fact that García-Moras term is not widely used in the contemporary discourse on protection.

[43] By this, it should be clear that extraterritorial protection is a descriptive rather than a normative concept. It does not necessarily imply the granting of the full range of human rights owed to an alien. Its core element is non-refoulement.

3. have a bearing on access to extraterritorial protection within the European Union.[44]

Where necessary, domestic law shall be used to clarify the scope and content of international law as well as the law of the European Union. A comparative presentation of relevant domestic law in all Member States would exceed the format of this work.[45]

The two former criteria, concerned with binding force as well as pedigree, beg a vast array of further questions that flow not solely from the need to justify the delimitation chosen here but mainly from the need to define the terms of reference used in the ensuing research. The preceding sub-sections on 'access' and 'extraterritorial protection' attempted to reconcile both needs. Given the magnitude of questions such as 'what is law' or 'what is binding law', it goes without saying that such an approach would entail problems. Therefore, this sub-section shall be confined to motivating the delimitation to law.

This is a work on law, using the language of law. In the political discourse underlying issues related to asylum, protection and immigration, legal arguments enjoy the privilege of a decreased argumentative burden.[46] That alone justifies efforts to identify the content of law in this area. Concurrently, this privilege motivates bona fide participants in this discourse to aspire to a strict division between legal and non-legal arguments. To wit, the privileged position of law would

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[44] The terms 'access' and 'extraterritorial protection' contained in the third criterion have already been expounded in the preceding sub-sections.

[45] The present work can draw on already existing sources in that regard. On the institutional side, both the Council of the EU and the IGCARMP compile updated overviews of domestic legislation in regular intervals, mostly based on questionnaires sent out and returned by governments co-operating in each forum. The European Parliament has recently presented information on domestic asylum procedures in its working paper on asylum in Member States: European Parliament, *Asylum in the EU Member States* (2000, The European Parliament, Brussels). Among NGO's, the Danish Refugee Council (DRC) collates updated overviews on legal and social conditions of refugees and asylum seekers in Europe. On the academic side, a thorough and impressive comparison of the refugee definition in domestic law and practice has been carried out in a project directed by Jean-Yves Carlier: *Who is a Refugee? A Comparative Case Law Study*, J. Y. Carlier, D. Vanheule, K. Hullmann and C. P. Galiano eds (1997, Kluwer Law International, The Hague). Further publications comparing single aspects of domestic legislations exist and will be referred to contextually below.

[46] Simplified, a legal argument enjoys a trump status in relation to a competing political argument. See chapter 1.5 below.

quickly erode if any political argument could usurp legal status. Delimiting law from non-law is a precondition for the identification and preservation of law. From the outset, this works in both ways—it can be beneficial for a protection seeker and for restrictive destination states alike.

By the same token, it is suggested to focus this work on binding norms within law. This requires a further distinction between binding legal norms and other norms not possessing binding force although they are situated within legal discourse.[47] As an example of the latter, one may refer to a recommendation spelt out by a group of states assembled in some international forum. Such an instrument is regularly drafted in legal language, more often than not emulating the format of binding law. States, courts and doctrinal writers use it as support when arguing positions. This may explain why the contested concept of 'soft law' has been conceived to denote the norms contained in such instruments.[48] The decisive difference, however, is that they do not create obligations by themselves. This puts them in a different bracket than instruments that do, and it allows us to treat them in a different manner.

As will emerge below, this work is seized in particular with the dilemmas connected to the determinacy of law.[49] We shall see that determinacy hinges on a gradual reduction of the number of norms competing for domination. A conservative position on the sources of law, excluding non-binding norms, offers the best prospects for confronting the problem of indeterminacy. It limits choices ab initio and must be regarded as the strongest counter-position law has to offer when testing post-modern scepticism about its determinacy.

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[47] A discussion of whether non-binding norms situated within legal discourse should properly be called legal norms is omitted here.

[48] On the phenomenon of soft law in international law, see J. Sztucki, 'Reflections on international "soft law"', in N. Jareborg (ed.), *De lege* (1999, Iustus, Uppsala). On the phenomenon of soft law within EC law, see K. C. Wellens, 'Soft Law in European Community Law', 1989 *CMLR* 267 (1989). For further discussion, see chapters 1.4.1.2, 1.4.2.4 and 1.4.2.6 below.

[49] See chapter 1.5.1 on the triple dilemma below.

1.3.4 'In the European Union'

Apart from the normative delimitation, the first basic question contains a geographical and an institutional delimitation as well. To reiterate, the third criterion delimited the scope to such norms as have a bearing on extraterritorial protection *in the European Union*, while the second criterion included *the law of the European Union* among the legal systems to be scrutinized.

While Western European states are still accessed by important numbers of protection seekers, of which a substantial share is allowed to stay, the same may be said for countries in other regions of the world. Indeed, if this work had been seized with the latter phenomenon alone, it might have proven sufficient to analyse the way in which single Member States handle protection demands by aliens. The focus of inquiry would have been on the tension between international and domestic law. The legal relationship to be dealt with would stand between the state and the individual protection seeker. Other states would only emerge as peripheral actors in this relation.

This is not so within the European Union. Since the inception of the Single European Act, the Member States have jointly embarked on serious attempts to realize an area of free movement of persons by way of international and supranational co-operation. This brings another relationship into the protection issue, namely that among Member States. Why is this so? Clearly, opening internal borders would also mean improving the potential of protection seekers to move between Member States, and it was feared that this mobility would allow them to seek the best offer of protection, given the substantial differences in domestic legal systems. It would further mean that external border control would become a matter of common concern, following the logic of the weakest link. If one country failed to control its borders, the problems potentially arising therefrom would not only affect itself but also the other Member States. Against the background of the continuing arrival of protection seekers in the territories of Member States, these reflections led to the integration of immigration and extraterritorial protection in a number of co-operative frameworks set up among Member States. Whatever its value, the *acquis* of such co-operative agreements has grown to a substantial number of norms and enforcement mechanisms. Thus, the

European Union offers a hitherto singular reformulation of the conflict between migration control and refugee protection.

To sum up, the specific interest this work takes in the European Union flows from the combination of two factors. First, there is a continued demand for extraterritorial protection in its territories. Secondly, the regulation of movements of persons to and between Member States is presently undergoing a major restructuring. The basic conflict between migration control and extraterritorial protection, well known from the area of unilateralism, is transformed into the setting of close multilateral co-operation. Two legal relationships interact: that between the individual protection seeker and a specific Member State and that between the specific Member State and other Member States within the European Union.[50]

To do full justice to this double bind of Member States, consisting of protection demands and the imperatives of the common market, both international law and the law of the European Union must be involved in the ensuing deliberations. One can conceive of a multitude of outcomes flowing from a synoptic analysis of the two legal systems: they can coexist with each other, overlap with each other, complement each other, modify each other, or simply conflict with each other.[51]

Finally, we would like to introduce a temporal delimitation as well as a prudent geographical extension. We have deemed it reasonable to scrutinise the development of European integration in the field of asylum and migration from the year 1985 onward. This year marked the beginning of closer co-operation related to freedom of movement within the Union whose hallmarks were a White Paper by the Commission and the Schengen Agreement. Reaching back to earlier developments would not necessarily facilitate our analysis or alter its outcome.

Our presentation will focus primarily on the present Member States. However, we shall attempt to extend our perspective to include those candidate countries whose accession negotiations started first: Cyprus, the

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[50] Beyond the scope of this work, other relationships would merit scrutiny: those between the group of Member States, the group of transit states and the group of countries of origin.

[51] As will be seen, each of the named legal systems is open for receiving normative influences from the other. Compare Art. 6 TEU, opening up the law of the European Union for the normative content of the ECHR. In turn, norms contained in the law of the European Union could crystallize into regional international law.

Czech Republic, Estonia, Hungary, Poland and Slovenia. The reason for doing so is pragmatic. First, one may state that, in reality, the EU acquis is already extended to the candidate countries by means of the pre-accession process. Second, there is a value in tracking how the patterns of obligations under international law will shift with the extension of membership. Third, involving the candidate countries shall allow us to analyse the effect of certain legislative tools used by the Union and its Member States on neighbouring countries.

1.4 Identifying Law

This brings us to the second of the three basic questions, inquiring into the conformity of the EU acquis with international law. Answering this question presupposes two things—clarity on what the concepts 'EU acquis' and 'international law' imply, and what it means when the two are in conflict.

Before understanding what the EU acquis and international law prescribe, we need to clarify what the terms 'EU acquis' and 'international law' stand for. There is good reason to be rigidly clear when dealing with both terms. After all, the preceding section enunciated the need for a conceptualisation of law well prepared to meet the evolving scepticism about its determinacy. This conforms with the methodological principle of testing the strongest manifestations of a position; faced with doubts about determinacy, a strict concept of legal 'bindingness' must be regarded as such a strong manifestation of a concept of law. It offers the greatest likelihood of reducing complexity and thus eliminating indeterminacy.

Against this background, the present section is endowed with multiple tasks. First, the clarification of concepts begun in the first section needs to be continued with regard to the terms 'international law' and 'law of the European Union' respectively. Second, an identification of legal sources along the strict concept of bindingness expounded above shall be pursued. In consecutive order, we will deal with issues surrounding the identification of the sources of international law and the law of the European Union.

But there is a third task to be catered for as well. What is a conflict and how is it resolved? Both issues are at the core of our question whether the EU acquis conforms with international law. Let us embark on a number of clarifications.

Following Lindahl, the term 'conflict' shall refer to a situation where it is impossible to realise two legal norms jointly.[52] For our purposes, it is fully sufficient to distinguish two conflict situations—disaffirmation and compliance conflict. With the term disaffirmation, we shall refer to a situation where two norms of a different deontic mode stand opposed.[53] As an example, we could imagine that a norm of international law *prohibits* states to remove protection seekers, while another norm *allows* states to effectuate removal. With the term 'compliance conflict', we shall refer to a situation where two norms sharing the same deontic mode stand opposed.[54] To exemplify, we could imagine that one norm *prescribes* that a state refrain from removing a protection seeker, while another norm *prescribes* that the very state effectuate removal. As we shall see in later chapters, both disaffirmations and compliance conflicts are of relevance for this work.

Nevertheless, what seems to be a conflict at first sight does not need to be upon closer examination. Generally speaking, legal systems use three types of techniques to dissolve prima facie conflicts between norms:

- normative hierarchies
- interpretation and proportionality arguments
- justiciability advantages

Normative hierarchies and justiciability advantages can be dealt with to a large extent in the present section. Interpretation and proportionality arguments are rather complex subjects to which we will return at a later stage.

With regard to normative hierarchies, let us suppose that we detect a norm of the acquis standing against a norm of international law. Let us also suppose that any norm of international law is simply superior to any norm of the law of the European Union (as we shall see, this is not the case). This hierarchy between the two systems of norms would dissolve the prima facie conflict and bring about conformity. Therefore, it is not

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[52] L. Lindahl, 'Conflicts in Systems of Legal Norms: A Logical Point of View', in P. W. Brouwer, T. Hol, A. Soeteman, W. G. van der Velden and A. H. de Wild (eds), *Coherence and Conflict in Law* (1992, Kluwer Law and Taxations Publishers, Deventer), p. 39.

[53] Lindahl, 1992, p. 42.

[54] Lindahl, 1992, p. 45. Compliance conflicts involve solely mandatory norms.

enough to delimit the sources of law. We also have to explore the existence of normative hierarchies between norm systems and, for that matter, within them.[55]

It is conceivable that neither normative hierarchies nor interpretation and proportionality arguments dissolve a given normative conflict. The last resort of conflict resolution is to endow an institution with the task of 'finding the law'. This could be a court or a treaty monitoring body. This form of conflict resolution goes under the name of justiciability. Basically, it is a very simple concept. In the absence of justiciability, the interests of the stronger party to a conflict will prevail in practice, while the legal issue underlying the conflict remains indeterminate. By contrast, justiciability not only gives the weaker part a fair chance to obtain justice, but also creates determinacy within the legal system itself. As we shall see, some norms are justiciable while others are not. However, justiciability is not a mere on-off concept—there are also different degrees of justiciability. What body is endowed with the task of severing normative conflicts and exactly what are its competences? Who is entitled to turn to that body and under what preconditions? What effect does its decision have? Is it legally binding or not? Are sanctions linked to non-compliance with the decision? Even here, differences exist not only among different norm systems but also within them.

A special aspect of justiciability is the question whether a certain norm of international provenience may penetrate domestic legal orders, allowing a party to invoke it before domestic courts and dominating conflicting domestic norms. The capacity to do so is a notorious feature of certain norms of EC law, although not exclusive to it. The penetration of domestic legal systems cannot be determined abstractly without looking into the constitutional orders of the states included in the scrutiny. Therefore, our following presentation must by necessity remain incomplete, as we shall only focus on the supranational and international levels, while omitting the domestically created determinants for penetration.

In the final analysis, it is possible that certain conflicts between the EU acquis and international law may only find their resolution in the

[55] It is equally possible that one norm of international law could be invoked in favour of the protection seeker, while another norm of international law could be invoked in favour of the state. Such a conflict could be solved, amongst others, if the conflicting norms belong to different hierarchical levels within international law.

courtroom. Therefore, our subsequent scrutiny shall also include general observations on the degree to which norms contained in the EU acquis and in international law enjoy justiciability. It is self-evident that no complete account is intended. Rather, the following sub-sections should provide us with a basic understanding of similarities and dissimilarities of both legal systems, as far as they are relevant for the subject of this study.

1.4.1 International Law

1.4.1.1 The Concept of 'International Law'

Prior to World War I, international law was predominantly seized with regulating the conduct of states vis-à-vis other states. Certainly, such inter-state relations still feed popular perceptions of the core content of international law. However, given the significant role human rights law, humanitarian law and refugee law have attained ever since, the concept of international law needs to be extended to comprise certain norms governing the relationship between state and individual as well. To be sure, the latter category of norms can be found both in domestic law and in the law of the European Union. The distinguishing factor is that different procedures are followed for positing them. The appropriate procedures offered by international law are different from those used by the domestic legislator, by contracting individuals or, most relevant for the subject of this work, by international organisations.

Conceiving international law as a specific procedure for creating obligations saves us from negative definitions of considerable abstraction, which tend to be overtly inclusive.[56] The problem of characterising international law transmutes into the problem of defining its sources. This

[56] Compare the definition offered by *Seidl-Hohenveldern*: 'Das Völkerrecht ist die Summe der Normen, die die Verhaltensweisen festlegen, die zu einem *geordneten Zusammenleben* der Menschen dieser Erde notwendig und *nicht im innerstaatlichen Recht* der einzelnen souveränen Staaten geregelt sind.' ['Public International Law is the sum of norms determining such conduct necessary for the orderly coexistence of men and women of this world and which are not laid down in the domestic law of the single sovereign states.' Translation by this author], I. Seidl-Hohenveldern, *Völkerrecht*, 7 ed. (1992, Carl Heymanns Verlag KG, Köln/Berlin/Bonn/München), p. 1. This wording would also include the law of the European Union, which makes it unattractive for the purposes of this work.

is adequate for our purposes, as one of the guiding interests of this particular exercise is to carve out the difference between international law and the law of the European Union.

Before entering into details, a few words should be devoted to the task of this exploration. The doctrine of sources is, of course, part of the ongoing dispute about law. Sources cannot *per se* provide a neutral basis: Fastenrath has been able to show that the very source metaphor is grounded in a logical-positivistic understanding of law.[57] But the debate on sources contains more contentious ground: is bindingness based in the will of an actor or in the perception by other actors? Is the number of sources finite or not? Should sources be regarded as part of the legal system or as metalegal norms? However, beyond foundational disputes, a look at both state practice and learned discourse reveals a high degree of convergence about the standard modes by which law is produced. This convergence offers itself as a pragmatic point of entry into our subject matter and will therefore be taken as axiomatic for the time being. Within this axiom, the term 'source' merely designates a procedure of positing norms, which has been recognized by the actors of a legal system. As the reader will note, this represents another specification—away from the doctrine on sources to the creation of norms.[58]

This formal approach to the issue of sources has often been backed up by reference to Hart's rule of recognition, referring 'to general characteristics to be found in primary rules before their very existence may be established in an authoritative way'.[59] The rules of change, the rules of

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[57] U. Fastenrath, *Lücken im Völkerrecht* (1991, Duncker & Humblot, Berlin), pp. 84–5.

[58] But see G. M. Danilenko, *Law-Making in the International Community* (1993, Martinus Nijhoff Publishers, Dordrecht/Boston/London), p. 24, who distinguishes between sources of law, establishing 'common rules of conduct' and sources of obligations, establishing 'subjective legal obligations recognized by international law'. This allows him to sever the sources named in Art. 38 CICJ from 'obligation-creating procedures established by a treaty'. However, a treaty may very well contain both 'common rules of conduct' and 'subjective legal obligations' in Danilenko's sense. This makes Danilenko's distinction less fundamental than he wishes it to be. Moreover, as we do not need to establish the content of the source concept as such (if at all possible), but seek to single out the provenience of legal obligation under international law, there is no reason to adopt this distinction here.

[59] K. C. Wellens, 'Diversity in secondary rules and the unity of international law: some reflections on current trends', in L. M. Barnhoorn and K. C. Wellens (eds), *Diversity in secondary rules and the unity of international law* (1995, Martinus Nijhoff Publishers, The Hague), p. 7.

adjudication, and the rule of recognition represent a triad of 'secondary rules'. Secondary rules 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined'.[60] Hart himself has suggested that international law lacks a rule of recognition.[61] However, a number of international lawyers disagree on this assessment, pointing to the doctrine of formal sources as secondary rules.[62] It should be emphasized, though, that usage of the term 'rule of recognition' does not always imply wholesale acceptance of Hart's terminology or theory. Further, it is by no means clear that Hart's division of law into primary and secondary rules corresponds to the division of international law into primary norms and secondary norms. Hart's terminology is far more specific than the one used in international law or in the law of the European Union, where secondary law simply characterizes norms derived from primary law. Finally, there has been considerable debate on whether sources of international law actually represent part of the legal system or not.[63] Adopting Hart's terminology would mean taking sides in that conflict. Therefore, as already pointed out, this work will limit itself to speak of sources as a procedure for positing norms which has been recognized by the actors of a legal system.

1.4.1.2 Sources of International Law

Generally, the making of international law is not bound to follow a specific form. Norms can be produced by a variety of procedures. Apart from divergences on technicalities, a core of such procedures seems to enjoy near-universal acceptance by states. Treaty law, custom, general principles of law and unilateral declarations are all primary sources of international law, directly creating rights and obligations for the actors involved.

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[60] H. A. Hart, *The Concept of Law* (1961, Oxford University Press, Oxford), p. 92.

[61] Hart, 1961, p. 209, pp. 228–31.

[62] F. Kratochwil, 'Is International Law "Proper" Law?', LXIX *Archiv für Rechts- und Sozialphilosophie* 12 (1983), p. 26 et seq.; J. I. Charney, 'Universal International Law', 87 *AJIL* 529 (1993), p. 533. See also Danilenko, 1993, p. 28, note 46 with further references to N.J. Onuf, G.J.H. van Hoof and Th. Franck.

[63] Fastenrath, 1991, p. 85 with further references.

For treaty law, customary law, and general principles of law Article 38 (1) (a)–(c) of the Statute of the International Court of Justice offers a handy and oft-quoted specification. Although its addressee is formally limited to the ICJ, the catalogue of sources contained in this norm has been widely used by the actors of international law.[64]

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b) international custom, as evidence of a general practice accepted as law;
>
> c) the general principles of law recognized by civilized nations;[65]

These three procedures are usually categorized as multilateral methods of creating norms. Beyond them, norms may also emanate from unilateral declarations. This method has been expounded as follows by the ICJ in the 1974 Nuclear Tests Cases:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations [...] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly and with an intent to be bound, even though not made within the context of international negotiations, is binding.[66]

Moreover, it is important to note that unilateral declarations in the narrow sense must be distinguished from other declarations that merely trigger or annul obligations regulated in primary law. Such unilateral

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[64] For an extensive discussion, see Danilenko, 1993, pp. 32–6, with further references to the invocation of the quoted provision as a catalogue of the formal sources of international law by states in notes 71 and 72.

[65] Statute of the International Court of Justice, 26 June 1945, 1 UNTS XVI [hereinafter SICJ], Art. 38 (1) (a)–(c).

[66] *Australia v. France* and *New Zealand v. France*, ICJ Reports 1974, pp. 267 and 472.

declarations, in fact, create norms without relying on a procedural framework offered within other parts of primary law.[67] Whether this norm-creating method is truly unilateral in the sense that its bindingness does not depend on the actions or omissions of other states is of little importance for our context.[68] Suffice it to note that this method of creating obligations has been recognized in state practice.[69]

The output of these four procedures can be conveniently termed primary law, which allows for an analogy with the law of the European Union. By contrast, decisions of international organisations or judgements issued by international courts or tribunals need a base in primary law to be binding upon the actors of international law. This makes such decisions or judgements secondary law. By way of example, a judgement by an authorized international court in a case it has been seized with[70] or a resolution by the UN Security Council[71] may entail a binding effect. Their bindingness is derived from a source under Article 38 (a)–(c), namely the treaty law of the UN Charter and the European Convention on Human Rights and Fundamental Freedoms (ECHR) respectively. The proper foundation of this bindingness is to be found in the named treaties, endowing the organ with competence for mandatory decisions.

By contrast to a number of domestic legal systems, international law does not contain a numerus clausus, that is, an exhaustive enumeration of norm-creating methods. Consequently, apart from treaties, customary law, general principles of law and unilateral declarations, there may be other ways and means to bind states under international law. Hence, sources beyond those named have been proposed to possess the capacity

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[67] This dependence on a primary law framework makes treaty ratification fall outside the narrow concept of unilateral declaration. To be valid, a ratification depends on a normative framework codified in Articles 2 (1) (b) and 14 Vienna Convention on the Law of Treaties, 24 May 1969, 1155 UNTS 331 [hereinafter VTC].

[68] See Fastenrath, 1991, pp. 105 and 106 for a discussion of alternative foundations of bindingness (auto-limitation of States as opposed to the protection of good faith).

[69] See Verdross and Simma, 1984, p. 431, para 671, quoting examples from the area of disarmament and the use of nuclear weapons.

[70] Art. 59 SICJ, Art. 46 (1) ECHR.

[71] Art. 46 (1) ECHR.

to bind states.[72] Concluding on a rather complex and extended discussion, none of these propositions has won the necessary support by the actors of international law.[73] Prima facie, there is no reason for the present work to break new ground in this respect.

The preceding discussion of sources leaves us with a residue of legal phenomena relevant for the determination of international law, which clearly do not fulfil the prerequisites for sources as procedures to create norms. These phenomena comprise inter alia: judicial decisions and doctrinal writings as 'subsidiary means for the determination of rules of law'[74], various forms of 'evidence' for a certain custom, 'subsequent practice' as referred to in Article 31 (3) (b) of the Vienna Treaty Convention[75], or supplementary means of interpretation in the sense of Article 32 VTC. In the context of refugee protection, norms emanating from the Executive Committee of the High Commissioner's Programme, intended to guide states in their interpretation of international refugee law, belong to that category.[76] For reasons of convenience, such norms have often been termed 'soft law'. The difference between such phenomena and the four sources dealt with above is evident: while the latter are binding in themselves, the former may only contribute to determine the content of binding norms. Certainly, subsidiary means for the determination of rules of law, supplementary means of interpretation, and 'soft law' may single out normative contents in a manner reminiscent of sources proper, but they do not confer binding force upon these contents. In line with its principled distinction between binding and non-binding norms, this work acknowledges their relevance, but insists that they not be termed sources of law.

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[72] Large part of those discussions focused on certain Resolutions of the UN General Assembly as a possible source of international law. From the academic angle, consensus was proposed as another formal source of law. For a comprehensive discussion, see Fastenrath, 1991, pp. 110–8.

[73] Verdross and Simma, 1984, p. 409.

[74] Art. 38 (d) SICJ.

[75] Vienna Convention on the Law of Treaties, 24 May 1969, 1155 UNTS 331.

[76] J. Sztucki, 'The Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme', 1 *IJRL* 285 (1989); U. Brandl, 'Soft Law as a Source of International and European Refugee Law', in J. Y. Carlier and D. Vanheule (eds), *Europe and Refugees—A Challenge?* (1997, Kluwer Law International, The Hague).

1.4.1.3 Normative Hierarchies within International Law

The horizontal structure of the international legal order, the absence of a numerus clausus in law-making, and the equality of states all suggest the absence of clear, unequivocal normative hierarchies among the sources of international law. A look into the preparatory works of the ICJ Statute has clarified that the consecutive enumeration of sources contained in its Article 38 (1) (a)–(c) does not reflect a hierarchy of sources.[77] The absence of a predetermined hierarchy of sources in international law is no longer questioned these days.[78]

Nevertheless, in a precipitate analogy to the law of the European Union, would it not be self-evident to accord primary law the right of way before secondary law? It is true that primary law prevails over secondary law emanating from the same source; that is, a binding resolution of the Security Council is subordinate to a stipulation of the Charter of the United Nations (henceforth UNC).[79] Different is the case where secondary law is competing with a norm beyond its foundational instrument. There is no rule of thumb. Instead, a solution must take into account third party interests and make recourse to the parties' intentions when stipulating the conflicting norms.[80]

Quite another matter is the establishment of hierarchies of norms. Wherever necessary, conflicts within primary law have to be solved by applying the rules of lex posterior derogat legi priori, lex superior derogat legi inferiori and lex specialis derogat legi generali.

The predominance of lex superior is illustrated by the status accorded to jus cogens as defined in Article 53 of the VTC. It flows inter alia from Articles 53 and 64 VTC that jus cogens derogates norms of international

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[77] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997, Routledge, London), p. 56, stating that the drafting history of the SICJ does not suggest that there is an order of application inherent in Art. 38 SICJ.

[78] Negating the hierarchical structure of international law: K. Zemanek, 'The Legal Foundations of the International System, General Course on Public International Law', *Recueil des Cours 1997, Tome 266* (1998), p. 132, and W. Czaplinski and G. M. Danilenko, 'Conflicts of Norms in International Law', 21 *NJIL* (1990), pp. 6–8, both with further references. Further on hierarchies within as well as between the various sources, Verdross and Simma, 1984, pp. 412–6.

[79] Charter of the United Nations, 26 June 1945, 1 UNTS XVI. Verdross and Simma, 1984, p. 415.

[80] Ibid.

law not possessing that status.[81] However, the identification of jus cogens has proven problematic, limiting the practical value of the concept.[82] To be sure, jus cogens is neither a source of law nor does it give prevalence to specific sources. Rather, it is a quality attached to a specific norm, whatever its source may be.[83]

The practical application of the remaining two collision rules is marred by similar doubts. Both the lex posterior rule and the lex specialis rule presuppose that the two competing norms essentially deal with the same subject matter. But exactly what degree of congruence is required? And how do we distinguish the general from the specific? For all three collision rules, the crucial question remains *how to determine the relationship* between competing norms. This problem is not exclusive to international law but affects the law of the European Union and domestic law in an equivalent manner.

1.4.1.4 International Law and Justiciability Advantages

Clearing our minds on the issue of justiciability of international law presupposes answers to three questions. First, does international law offer its own implementation mechanisms? Are there any institutions, treaty monitoring bodies or courts that directly secure the justiciability of international law? Second, what is the standing of international law norms in domestic law? Third, to what extent can such norms be invoked by individuals before domestic courts?

Quite obviously, international law cannot compete with the implementation mechanisms usually offered within domestic legal systems. There is no all-embracing grid of justiciability on the international level. However, important exceptions to this rule can be made out. Certain human rights instruments offer individuals the option of filing complaints with specific monitoring bodies. These bodies are endowed with competence to look into the matter and to take a stand on

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[81] See Arts 53 and 64 VTC.

[82] To name but one example, Higgins has shown that the resort to arguments of jus cogens can be superfluous in a number of cases, as the underlying normative conflicts can be solved with lesser means, i.e. a careful customary law argumentation. R. Higgins, *Problems and Process. International Law and How We Use It* (1993, Clarendon Press, Oxford), pp. 21–2.

[83] Yearbook of the International Law Commission, 1966 II, p. 248.

the proper application of the invoked human rights norm to the facts of the case. In our context, three bodies are of specific relevance: the Human Rights Committee in Geneva, monitoring the International Covenant on Civil and Political Rights (ICCPR); the CAT Committee in Geneva, monitoring the Convention Against Torture (CAT); and the European Court of Human Rights (EctHR) in Strasbourg, monitoring the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Generally, the control density as well as the control intensity of protective rights in international law is low. First of all, not all instruments relevant in our context are coupled to a monitoring mechanism. The 1951 Refugee Convention, without doubt the prime protective instrument in the area we are seized with, does not offer any mechanism for individual complaints on an international level. Second, where monitoring mechanisms are coupled to protective instruments, the Contracting Parties are often left with the choice to 'opt in' to monitoring. States bound by the ICCPR and by CAT do not automatically authorise their monitoring bodies to receive individual complaints. This has to be done in an additional step which far from all Contracting Parties take. Thirdly, neither the Human Rights Committee (monitoring the implementation of the ICCPR) nor the CAT Committee (monitoring the implementation of CAT) are authorised to issue decisions that are legally binding for the respondent states.

Compared to the Human Rights Committee and the CAT Committee, the ECtHR is much closer to a full-fledged court in domestic legal systems. The jurisdiction of the ECtHR extends to all matters concerning the interpretation and application of the ECHR and its protocols.[84] States bound by the ECHR automatically accept the monitoring function of the ECtHR.[85] Moreover, the ECtHR is authorised to issue binding judgements rather than recommendatory decisions.[86] As we will see later in this work, it has played a decisive role in the development of extraterritorial protection; in recent years, the CAT Committee has seconded this trend.

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[84] Art. 32 ECHR.

[85] Art. 34 ECHR. Before the reform of the control machinery effectuated by the 11th Protocol to the ECHR, the admissibility of individual complaints hinged on a declaration by the respondent Contracting Party, recognizing the competence of the monitoring bodies to receive such petitions.

[86] Art. 46 ECHR.

Let us then turn to the two remaining questions and elucidate the relationship of international law and domestic law. In this context, it is important to recall that international law imposes obligations but generally leaves the choice of how to implement them domestically to states.

As a consequence, international law is dependent on its reception in the municipal legal order. Technically, a variety of receptive methods exist, spanning from monist to dualist solutions, and international law has no bearing on states' choices in this regard. Thus, it is only by virtue of a general or specific stipulation in municipal law that norms of international law gain entry into the internal legal domain of a state. Another facet of this freedom of implementation enjoyed by states is that international law does not require its own primacy in domestic legal systems.[87] As we shall see below, both features distinguish international law from EC law.

With regard to the second question, the following may be adduced. In line with the traditional conception of international law as inter-state law, the addressees of its norms are mainly states. The vast majority of norms of international law are not intended to accord rights or to create obligations for individuals. However, the number of important exceptions to this rule has multiplied in recent decades, in the shape of, inter alia, norms governing the conduct of international organisations, norms establishing the responsibility of individuals under international law, and norms according human rights to individuals. Where it can be shown that the intention of the parties was to create rights and obligations for individuals, such norms can be invoked directly before domestic courts and authorities. Some legal systems have systematized this qualification of norms. To name an example, United States law distinguishes between self-executing and non-self executing treaties. While the former can be directly invoked before a U.S. Court even in the absence of further implementing legislation, the latter cannot. In the course of the further inquiry, it shall emerge that EC law also recognizes this distinction but has systematized and exploited it to a much larger extent than international law.

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[87] However, conflicting domestic legislation cannot be used as an excuse for non-compliance with international law. But the point made here is that international law does not prescribe that domestic law generally accords its norms a given place in the domestic hierarchy of norms.

1.4.2 The Law of the European Union

1.4.2.1 Terminology

When we referred to the EU acquis on asylum and immigration earlier, we actually referred to norms stemming from the 'law of the European Union'. This term has been proposed[88] to embrace, first, the law of the European Communities and, second, the law of the European Union. While it is well established to refer to the first as 'EC law', the second has been labelled 'Union law'.[89]

Although this triangular terminology does not eliminate a residual risk of confusion, it appears to be the tidiest alternative on offer. The term 'law of European integration' is unattractive, as the Union hardly possesses a monopoly on regional integration.[90] Likewise, the term 'European Law' is unduly inclusive with regard to the mismatch between the geographical extension of the continent and the membership of European states in the EU. Therefore, this work opts for the proposed triangular model, where the overarching concept 'law of the European Union' consists of both EC law and Union law, mirroring the division into the supranational First Pillar on one hand, and the intergovernmental Second Pillar and Third Pillar on the other.

EC law has attained growing importance for the present subject, as the Treaty of Amsterdam moved the issues of visa, asylum, immigration and other policies related to free movement of persons from Union law, namely the intergovernmental Third Pillar, to EC law under the supranational First Pillar. This seems to suggest that Union law is no longer relevant for the material questions this work is seized with. However, excluding Union law and its sources from further scrutiny would disregard that the *acquis communitaire* related to these policies and adopted before the entry into force of the Treaty of Amsterdam still

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[88] M. Schweitzer, *Staatsrecht III—Staatsrecht, Völkerrecht, Europarecht,* 5th ed. (1995, Müller, Heidelberg), p. 9.

[89] M. Pechstein and C. Koenig, *Die Europäische Union. Die Verträge von Maastricht und Amsterdam,* 2 ed. (1998, Mohr Siebeck, Tübingen), pp. 4–9.

[90] By way of example, the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), the European Economic Area (EEA), the Nordic Council and the Benelux Economic Union all pursue important integrational goals in the European context, involving groups of states not congruent with the circle of Members of the European Union.

retains its quality as Union law. To understand the *acquis* conceived pre-Amsterdam in the framework of the Third Pillar, it is still mandatory to clear our minds on its sources. As we shall see, Union law conceived post-Amsterdam possesses limited relevance for the subject of this work.

1.4.2.2 Primary and Secondary Law of the European Union

Within the law of the European Union, the distinction between primary and secondary law is well established and plays an important role in its doctrine of sources. The term 'primary law' denotes those norms flowing from the foundational instruments of EC law and Union law respectively.[91] To wit, these instruments concurrently represent a source of obligation under international law (namely treaty law in the sense of Article 2 (1) (a) VTC) and under the law of the European Union (namely as primary EC law).

The term 'secondary law' denotes those norms stipulated by the organs in accordance with the procedures set out in the foundational instruments. Thus, secondary EC law is derived from primary EC law, and secondary Union law finds its origin in primary Union law. The Council Regulation (EC) No. 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States provides an excellent example of secondary EC law.[92] A regulation is defined as a binding instrument of law in Article 249 TEC.[93] The competence to enact a regulation in the pertinent issue was laid down in Article 100 (c) TEC/Maastricht. Accordingly, the binding nature of this regulation is derived from the TEC. As we shall see, this alone is a sufficient justification under the framework of EC law.

For a justification under international law, the following argument can be adduced. By ratifying the TEC and approving its Article 249, State Parties have agreed to be bound among themselves by the outcomes of a

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[91] For a detailed account, see chapters 1.4.2.2 and 1.4.2.6 on primary and secondary law within EC law and Union law respectively.

[92] Council Regulation (EC) No. 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ (1995) L 234/13.

[93] At the time of its enactment, this regulation was based on Art. 189 TEC/Maastricht, which has now been replaced by the identically worded Art. 249 TEC.

specific legislative mechanism, producing mandatory norms in a manner deviating from the procedures commonly used in international law. As there is no numerus clausus in international law, State Parties are free to create bindingness in the manner described by Article 249 TEC. It will emerge in the next sub-section that a justification under international law is not necessary to make EC law valid. This is different for secondary Union law: for the time being, a sound chain of justification under international law is a prerequisite for its validity. In the following sections, the underlying reasons for these differences will be further explored.

1.4.2.3 EC Law and Union Law: Conceptual Questions

At first sight, it may appear tempting to treat the law of the European Union as a regional variety of international law. Giving in to that temptation would liberate us from a further exploration of its sources and establish an overarching analytical framework for legal norms. As we will see, however, the peculiarities of EC law shall prohibit such a reduction. Secondly, one might hope to treat the law of the European Union as a singular whole, operating with the same doctrine of sources, the same methods of solving normative conflicts, and the same methods of implementation. This hope shall also come to naught. Such a treatment would create rather than solve analytical problems, as the differences between EC law and Union law are fundamental in nature.

To start with, EC law can no longer be framed as a regional variety of international law. The decisive difference lies in an unparalleled transfer of state sovereignty from the Member States to the organisational structure of the EC. Successively, this transfer has provided the grounds for stipulating norms, defining the group of addressees, implementing them in domestic arenas, adjudicating alleged breaches and sanctioning them—all in a manner exceeding the explanatory framework of ordinary international law.[94] By consequence, EC law has been conceived as neither international law nor domestic law, but a legal order sui generis in the oft-

[94] In contemporary debate, attempts to explain EC law as international law seem rare. The most recent 'traditionalist' source referred to by Pechstein and Koenig dates from 1977. See Pechstein and Koenig, 1998, p. 108, note 3.

quoted case law of the European Court of Justice (hereinafter ECJ).[95] This has allowed the Court to claim the independence of EC law in relation to other legal systems.[96]

The pivotal element of this legal order is twofold. First, it enjoys supremacy over domestic law, irrespective of whether the latter is statutory[97] or constitutional[98] in nature. Second, under certain conditions, EC law can be invoked before domestic courts without any intermediary act of incorporation. These conditions are set out in the doctrines of *direct applicability* and *direct effect*, which will be dealt with further below.

Given the sui generis character of EC law, where does that leave Union law? Two positions offer themselves.[99] The first one insists that Union law, due to its intergovernmental rather than supranational character, must be regarded as international law. The following arguments support this contention. Strikingly, the forms of Community legislation under Article 249 TEC are not made available in Article 34 TEU. Moreover, the competence of the ECJ for the majority of legal instruments under the TEU is largely excluded. Finally, the dominance of unanimity decision-making constitutes a decisive difference in comparison to EC law.

Proponents of the second position, however, point to the close interlinkage of Union law with the Community framework when

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[95] '[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, [...]', Case 26/62, *Van Gend en Loos vs. Nederlandse Administratie der Belastingen*, [1963], ECR 1, p. 12. 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.' Case 6/64, *Costa vs. ENEL*, [1964], ECR 585, p. 593.

[96] The ECJ has qualified the TEC as an 'independent source of law' vis-à-vis domestic law inter alia in Case 6/64, *Costa vs. ENEL*, [1964], ECR 585, p. 593 and in Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, [1972] CMLR 255.

[97] Supra.

[98] '[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.' Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, [1972] CMLR 255.

[99] For a comprehensive exploration of both positions in the context of the Third Pillar, see M. Schieffer, *Die Zusammenarbeit der EU-Mitgliedstaaten in den Bereichen Asyl und Einwanderung* (1998, Nomos, Baden-Baden), pp. 157–66. The following presentation is based on Schieffer in that regard.

motivating its sui generis character, different from both EC law and international law. This position is defended inter alia by the European Commission and some doctrinal sources. It rests mainly on the identity of the organs serving both the Communities and the Union, the right to initiative accorded to the European Commission and the involvement of the European Parliament, and the option to cover operative costs under the Third Pillar through the budget of the Communities.

The second position has been pointedly described as drawing on anticipated developments rather than on present realities.[100] Therefore, for the time being, the TEU must be regarded as a 'divided treaty'[101], encompassing EC law in the First Pillar and international treaty law in the Second and Third Pillar. The decisive feature of EC law is to be found in the promotional role of the ECJ and the doctrines developed by it. Presently, their *portée* is by and large limited to the First Pillar. The modifications of the TEU by the Treaty of Amsterdam did not alter this state of affairs.[102] For these reasons, Union law will be regarded as international law in the following. This does not preclude some deviations from the characteristics of international law. Nonetheless, such deviations are based on the TEU and can be justified as created by international treaty law.

Yet the problem of this sub-section was not to identify the true character of EC law and Union law as an end in itself, but only inasmuch as this permitted the determination of their sources. By way of conclusion, EC law is different from regional international law to a degree prohibiting simple and exclusive recourse to the doctrines of international law when identifying the content of the former. Taking an intermediary position, Union law does not defy the analytical framework offered by international law in the same principled manner. In all, the law of the European Union can be reduced neither to international law nor to EC law. This suggests that EC law and Union law should be analysed separately.

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[100] Schieffer, 1998, pp. 163–4.

[101] Schieffer, 1998, p. 165.

[102] Amsterdam brought a few changes, which mitigate the differences between EC law and Union law to a very limited extent. By virtue of a declaration based on Art. 35 TEU, Member States may accept the jurisdiction of the ECJ in the area of police and judicial co-operation in criminal matters. Moreover, the Union has been endowed with a limited competency to conclude international treaties (Art. 24 TEU).

1.4.2.4 EC Law: Sources and Normative Hierarchies

It has already emerged that EC law possesses features that stand out in a comparison with international law. While the position of international law in domestic law is dependent on the domestic norm hierarchy, EC law enjoys supremacy. Its sui generis character also manifests itself in a specific structure of sources; the binding quality of its norms need not be justified externally, that is, vis-à-vis international or domestic law. Put briefly, EC law is a self-contained legal order. Its doctrine of sources deviates considerably from international law.

The *primary law* of the EC encompasses the foundational treaties of the three Communities including addenda, annexes and protocols, later modifications by treaties of international law[103] as well as customary EC law and the General Principles of law.[104] To the extent the TEU has a bearing on EC law, it belongs to primary EC law as well.[105] Primary EC law is posited at the top of the EC norm hierarchy, and secondary law must necessarily comply with it.[106] The superior position of written primary law is endorsed in Article 46 TEU, setting out the procedure by which foundational treaties are to be amended. It flows from this article that primary law can only be overridden by new primary law.

Secondary law is also confined to the limits set out by the *General Principles of Law*. Hierarchically, these principles are on the same footing as primary law.[107] Just as their namesake in international law, such principles were originally devised to fill normative lacunae; this gives them an open-ended texture. However, the precise content of the General Principles need not necessarily be identical with their namesake in international law. This follows already from the fact that the Member States are but a fraction of the group of 'civilized nations' relevant for identifying General Principles under Article 38 (c) VTC.

Within EC law, the concept of General Principles of Law has been developed by the ECJ, drawing primarily on the general principles

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[103] M. Schweitzer and W. Hummer, *Europarecht*, 4th ed. (1993, Alfred Metzner-Luchterhand Verlag, Neuwied), pp. 14–5.

[104] T. Oppermann, *Europarecht*, 2nd ed. (1999, Verlag C.H. Beck, München), p. 182.

[105] Pechstein and Koenig, 1998, pp. 54–62.

[106] See Art. 5 TEC: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'. As stipulated in Art. 230 TEC, the ECJ exercises a control function in this regard.

[107] Oppermann, 1999, p. 191.

common to the legal systems of the Member States.[108] Such principles are identified by evaluating a comparison of domestic law. As this evaluation is not necessarily bound to a minimum common denominator[109], it leaves ample room for discretion. The ECJ has already set out a number of General Principles, but nothing suggests that this process has come to an end. In the future, further principles may surface, identified along the lines suggested by the ECJ.

Within the framework of General Principles, the ECJ has addressed the delicate issue of the protection of basic rights. In particular, the ECJ has emphasized in the *Hauer* case

> that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.[110]

As EC law enjoys supremacy over domestic constitutional law, the latter cannot protect against the former. It follows that a sufficient standard of basic right protection must be integrated into EC law to prevent a downgrading of legal protection.[111] As Weiler has shown in his exegesis of the ECJ judgement in the *Hauer* case[112], the court derived such protective rights in three distinct steps. First, it looked at the level of international law, which led it to the First Protocol of the ECHR. In the opinion of the Court, this did not yield a sufficiently specific result. Second, it tested the challenged domestic norm against the constitutional rules and practices of

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[108] Case 36/75, *Rutili*, [1975] ECR 1219, p.1232.

[109] Pechstein and Koenig, 1998, p. 111.

[110] Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*, Judgment of the Court of 13 December 1979, [1979] ECR 3727, para. 15.

[111] *Nold Case*, 14.5.1974, aff. 4/73, Rec. 508.

[112] J. H. Weiler, *The Constitution of Europe. "Do the new clothes have an emperor?" and other essays on European integration* (1999, Cambridge University Press, Cambridge), pp. 112–6.

the Member States. Here, it could have adopted a simple maximalist approach, sifting through the Member States' constitutions and picking the farthest-going domestic right as a model for the whole Union. However, as Weiler underscores, the Court did not do that. Rather, it used the constitutional backdrop for culling the 'ideas' inherent in the right to property[113], which was at stake in *Hauer*. In a third step, it conducts its own proportionality test, in which the challenged norm is weighed against the Community interest. Thus, the yardstick in proportionality reasoning is not the general interest of the single Member State, but of the Community as a whole, which may entail quite different results.[114]

Since the Treaty of Maastricht, a certain group of individual rights has been formally endorsed in Article 6 (2) TEU:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Compared to the status quo ante, this accords the protection of individuals a place in primary law and extends it into Union law. However, Article 6 (2) TEU is not coextensive with the concept of General Principles at large. Where such principles are derived from other sources than the ECHR or the constitutional traditions of the Member States, they would not fall under the scope of Article 6 (2) TEU. This means that the concept of General Principles is far from being rendered obsolete by the quoted provision.

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[113] Weiler, 1999, p. 114.

[114] Quite obviously, this relativistic method runs counter to any concept of 'absolute' rights. While the described method works for the right to property (which may be legitimately limited), it is far more problematic for, say, the prohibition of torture, inhuman or degrading treatment (Art. 3 ECHR). This prohibition leaves no space for legitimate infringements, identified by weighing the interests at stake. However, one could argue that the Court would stop after the first step, and declare Art. 3 ECHR to be sufficiently specific to deliver guidance.

The primary law of the EC also features its own *customary law*. However, only few examples have been named for its manifestations, and these are of no import to the subject of this study.[115]

Agreements between the EC and third countries and so-called *mixed agreements*[116] have been declared to form an inherent part of the EC legal order.[117] Inasmuch as they bind the EC institutions, they are superior to secondary law.[118] For agreements between the EC and third countries, this has been expressly recognized in Article 300 (7) TEC.

Positioned below primary law we find *secondary EC law*. There are three types of binding instruments—regulations, directives, and decisions —available exclusively to Community legislators. This is clear from Article 249 TEC—a provision that could be said to represent the toolbox of secondary EC law:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> [...]

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[115] M. Schweitzer and W. Hummer, 1993, p. 18, naming two examples from practices within the Council.

[116] Mixed agreements are 'agreements which include among their Contracting Parties not only one or more of the European Communities but also one or more of their Member States [footnote omitted]'. A. Rosas, 'Mixed Union—Mixed Agreements', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (1998, Martinus Nijhoff Publishers, The Hague), p. 125. For a typology of mixed agreements, see Rosas, 1998, pp. 128–33.

[117] Case 131/73, *Haegemann*, ECR 459.

[118] G. Isaac, *Droit communitaire général*, 3 ed. (1992, Masson, Paris), p. 135.

While decisions under EC law possess some similarities with decisions of the Security Council under Chapter VII of the UNC[119], there is hardly an equivalent to regulations and directives under international law. Conferring abstract and general normative powers upon the institutions of the Communities and diminishing the sovereign powers in the field where these institutions have made use of them[120], they must be dealt with as sources of a specific nature lacking parallels in international law.

But secondary law also features *non-binding instruments*. Article 249 TEC entitles the Community legislator to make recommendations and to offer opinions but adds that they shall not have binding force. Therefore, they fall outside our narrow concept of what constitutes a source of law, based on the bindingness of norms. The same is true for so-called atypical instruments; that is, types of instruments issued by Community institutions, although they are not codified in the TEC.[121] However, it is of utmost importance to recall that the precise nature of secondary law instruments is not determined by their name, but by their substance. The ECJ has declared atypical instruments to be mandatory, when it has found that their content revealed an intention to be bound. Thus, formally non-binding declarations have transmuted into binding instruments following a thorough analysis of their content by the ECJ.[122]

The case law of the ECJ is all too often named as a source of EC law. It is true that the ECJ has been endowed with the power to interpret the TEC and certain acts related to it.[123] All the more, one must object that obligations derive not from interpretation, but from sources prior to them. Clearly, the ECJ does not create obligations but, where need be, specifies them. Moreover, it is not feasible to accord the case law of the ECJ a fixed place in the hierarchy of norms. The place of such norms depends, of course, on whether the Court is charged with interpreting primary law or secondary law, or whether it sets out to identify General

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[119] Both are solely binding upon their addressees and do not stipulate general norms.

[120] In areas where the Communities have used their discretionary power to legislate, the Member States are no longer competent to do so. This was enunciated in the *ERTA Case*. Case 22-70, *Commission of the European Communities v. Council of the European Communities. European Agreement on Road Transport*, Judgement of the Court of 31 March 1971, [1971] ECR 263, p. 263, para. 31.

[121] These acts are often termed as resolutions, conclusions, declarations or communications.

[122] *ERTA Case*, paras 34–55. For further references, see Isaac, 1992, p. 130.

[123] Art. 234 TEC.

Principles of Law. Therefore, we see no need to include case law as a specific entry in the present account of sources.

In the course of this sub-section, it has emerged that EC law is more hierarchically structured than international law. International law is a flat legal order: the amount of lex superior is limited, and a majority of normative conflicts must be solved by other means. EC law, in turn, is characterised by a hierarchical opposition of primary law, general principles of law and external agreements to secondary law. Due to the role of the ECJ and the sheer quantity of secondary legislation, the dynamics of this legal order rely to a much greater degree on the argument of lex superior.

1.4.2.5 EC Law and Justiciability Advantages

When analysing justiciability advantages within the framework of EC law, we shall draw on the same questions asked earlier with regard to international law. First, does EC law offer its own implementation mechanism? Second, what is the standing of EC law norms in domestic law? Third, to what extent can such norms be invoked by individuals before domestic courts?

Indeed EC law possesses a potent implementation mechanism in the ECJ, whose task is to 'ensure that in the interpretation and application of [the TEC] the law is observed'.[124] As an international implementation mechanism, the ECJ is unparalleled in its powers.[125] Its jurisdiction stretches over a vast number of primary and secondary acts[126]; its capacity to issue binding judgements[127], to mete out penalties[128], to suspend the application of challenged acts[129] and to decide interim measures[130] is considerable. The TEC also prescribes that domestic courts may request preliminary rulings from the ECJ on questions within the jurisdiction of

[124] Art. 220 TEC.

[125] The jurisdiction of the ECJ is extolled in Arts 220–45 TEC.

[126] See e.g. Art. 234 TEC.

[127] Art. 228 (1) TEC.

[128] Art. 228 (2) TEC.

[129] Art. 242 TEC.

[130] Art. 243 TEC.

the latter[131], thus linking EC law to domestic adjudication within Member States. Without going into further detail, one can safely state that the monitoring mechanisms offered by international law are far from approximating the privileged position the ECJ retains with regard to EC law.

What, then, characterises the relationship of EC law to the domestic law of the Member States? It has already emerged that the two major characteristics of EC law are its supremacy and its specific capacity of penetrating into the domestic legal orders of the Member States.[132] Compared to the relationship between international law and domestic law, this represents a double advantage. First, there is a clear normative hierarchy in favour of EC law, which international law lacks. Second, the direct applicability and direct effect of certain EC law norms add important justiciability advantages to the doctrine of supremacy. These advantages are much more far-reaching than those available under international law.

The development of the supremacy doctrine originated with the *Costa v ENEL* case[133] and was further refined in the *Van Gend en Loos* case, where the ECJ pointed to the risk of legal disharmony between Member States and, ultimately, discrimination, if EC law were not given prevalence when invoked before domestic courts.[134] Deriving the supremacy of EC law from the TEC has been rightly described as depending on 'a "constitutional" rather than international law interpretation'.[135] In spite of the outspoken initial resistance by certain governments[136], the supremacy of EC law now seems to enjoy sufficient support by the Member States. Being the masters of the treaties, they refrained from altering the structure of supranational constitutionalism thus created by the Court. The successive amendments of the foundational treaties had provided ample

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[131] Art. 234 TEC.

[132] This description originates with Guy Isaac, who attests EC law 'une force spécifique de pénetration dans l'ordre juridique interne des États members', Isaac, 1992, p. 151.

[133] Case 6/64, *Costa (Flaminio) v ENEL*, [1964] ECR 585.

[134] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.

[135] J. Weiler, 'The Community System: the Dual Character of Supranationalism', 1 *YBEL* 267 (1981), p. 275.

[136] Compare the positions taken by Belgium, Germany and the Netherlands in van Gend en Loos, and the overview in P. Craig and G. de Búrca, *EC Law. Texts, Cases and Materials* (1995, Clarendon Press, Oxford), pp. 252–82.

opportunity to do so.[137] This goes to show that the Member States have, by and large, accepted the doctrines of supremacy and direct effect. EC law thus enjoys a fixed position in the domestic legal orders of the Member States. Differently from international law, its impact does not hinge on implementing domestic law. This answers the second question.

Regarding the third question, and specifying our earlier findings somewhat, it must be recalled that far from all norms of EC law can be successfully invoked by individuals before a domestic court. In primary law, a treaty provision may have direct effect provided that it is clear, unconditional, containing no reservation on part of the Member State, and not dependent on any national implementing measure.[138] With regard to secondary law, Article 246 TEC explicitly states that regulations 'shall be [...] directly applicable in Member States'. The ECJ has affirmed that regulations possess direct effect and can be applied in the domestic law of a Member State without any form of incorporation. Going beyond that, Member States are even proscribed from taking incorporative measures that alter, obstruct or obscure the nature of the regulation, as this may cause distortions in their uniform application.[139]

Somewhat more surprisingly, the ECJ has also considered the possibility that directives may have direct effect. Eager to deny states the opportunity to profit from their failure to implement directives, the ECJ has held in several cases that directives imposing clear, unconditional, sufficiently precise and complete obligations entail direct effect, if the Member State has failed to implement them within the prescribed period.[140]

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[137] Apparently, under the negotiations preceding the conclusion of the Treaty of Amsterdam, certain Member States proposed a procedure, under which rulings of the ECJ could be set aside by a qualified majority of Member States. This proposal was not pursued further.

[138] However, doctrinal writers have noted that the Court itself stretches this rule by severing provisions and endowing some of its parts with direct effect. Craig and de Búrca, 1995, p. 158.

[139] Case 39/72, *Commission v. Italy*, 7.2.1973, [1973] ECR 101; *Variola*, 10.10.1973, aff. 34/73, ECR 981.

[140] Van Duyn, Ratti and Becker represent landmark cases for the unfolding of this interpretation. Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337; Case 148/78, *Pubblico Ministero v. Tullio Ratti*, [1979] ECR 1629; Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, [1982] ECR 53.

Since the *Grad* case, it has been clear that the direct effect of decisions also extends to the creation of rights for third parties.[141]

Provisions in international agreements concluded by the EC with third states have direct effect when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[142]

Nonetheless, these limitations to the doctrine of direct effect do not alter our earlier conclusion. EC law offers both an unparalleled implementing mechanism and a dominant position vis-à-vis domestic law, thus providing good opportunities for individuals to achieve effective implementation of their rights. However, as we will see in later chapters, this favourable assessment is subject to important qualifications in the area of asylum and migration.

1.4.2.6 *Union law: Sources, Normative Hierarchies and Justiciability Advantages*

The EC forms an international organisation, endowed with legal personality and the capacity to assume responsibility as a legal subject. The opposite is true for the EU. There is no doubt that the Union cannot enjoy rights and attract obligations, has no legal responsibility and, as a matter of consequence, is not an international organisation in the legal sense.[143] Instead, it is the states parties to the TEU who are taking the role as legislators and to whom acts and omissions within the Union frame-

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[141] Case 9-70, *Franz Grad v Finanzamt Traunstein. Reference for a preliminary ruling: Finanzgericht München—Germany*, Judgment of the Court of 6 October 1970, [1970] ECR 825.

[142] Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

[143] For a comprehensive argumentation supporting this position, see Pechstein and Koenig, 1998, pp. 29–43 with further references. But see J. Klabbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (2000, Martinus Nijhoff Publishers, The Hague), who first opposes the will theory (negating the Union international personality) with the objective theory (affirming the Union's international personality), then declares both theories to be insufficient and concludes that the Union possesses what he terms a 'presumptive personality'.

work are attributable.[144]

The dependent character of Union law is reflected in its doctrine of sources. Most strikingly, the supranational elements of EC law—supremacy and direct effect—are absent in it. Thus, Union law needs to be implemented precisely in the same manner as international law. The intergovernmental framework of Union law is best grasped as international law, from which each norm of Union law derives its validity. As we shall see, the doctrine of sources governing international law applies to Union law as well. However, in comparison to international law at large, Union law possesses rather developed hierarchical features.

First and foremost, Union law either emanates directly from the TEU (primary law) or is derived from it (secondary law). To date, other sources of law have not been made use of by the Union legislator. The primary law of the Union now consists of Articles 1 to 7 and 11 to 53 TEU.[145] Clearly enough, as the TEU is a treaty under international law, it is binding in its totality. In line with the normative hierarchy of international law[146], primary Union law is superior to secondary Union law.[147] Those fundamental rights constituting general principles of Community law as well as the rights enshrined in the ECHR have been codified as part of primary Union law in Article 6 (2) TEU and share this preferred position.

However, Article 6 (2) TEU must not be misunderstood to introduce general principles of law as known from EC law into the legal framework of the Union. Rather, the provision refers to a method by which the fundamental rights in question are to be identified—it happens to be the method used by the ECJ when extracting general principles of law from the constitutional traditions of Member States. Furthermore, within Union law, the rights thus identified are not protected as general principles of law but as primary law.

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[144] Or, to use a term from German doctrine, states are the 'final subjects of attributability' (*Zurechnungsendsubjekte*) within Union law. Pechstein and Koenig, 1998, p. 30 and pp. 78–80.

[145] Arts A–F and Arts J–S TEU/Maastricht.

[146] Verdross and Simma, 1984, p. 415.

[147] After Amsterdam, this is explicitly confirmed in Art. 35 TEU, allowing the ECJ to assess the validity of secondary acts in the JHA field. There is no corresponding authority for the ECJ in the CFSP field.

Secondary Union law is law created through the institutions of the Union. Within the corpus of secondary Union law, binding and non-binding instruments coexist. For the identification of those parts representing sources of law in the strict sense, we have to single out the binding instruments. The pivotal element in this process is whether and to what extent the TEU confers binding force on secondary acts.

Given that the presently existing asylum *acquis* was adopted before the Treaty of Amsterdam entered into force, large parts of it consist of secondary Union law. As already pointed out, our interest for Union law is historical—after Amsterdam the asylum acquis will be developed further as EC law, and not as Union law. Within the framework of competencies in the area of Justice and Home Affairs, the pre-Amsterdam acquis in the asylum area made use of the instruments offered by Article K.3 TEU/Maastricht or consisted of so-called atypical instruments.

Article K.3 TEU/Maastricht had three instruments on offer: joint positions, joint actions and recommendations to adopt international agreements established in the Council.[148] While the latter recommendation is a non-binding instrument[149], the agreements, if adopted by Member States, certainly produce legal obligations.[150] Clearly, joint positions are to be regarded as a source of legal obligations as well, as they oblige Member States to defend a joint position within international organisations and at international conferences.[151] Beyond that, opinions differ with regard to the binding character of joint positions and joint actions.[152] One position focuses on the fact that joint positions and joint actions are explicitly conceived as binding instruments under the Second Pillar, obliging Member States to act in accordance with them both on a domestic and on an international level.[153] It is maintained that joint positions and joint actions adopted under the Third Pillar must be regarded as having the same mandatory force. Opponents of this reading, however, simply turn its core argument around. They emphasize that the terms 'joint action'

[148] The instrument of framework decisions was added by the Treaty of Amsterdam, which makes it irrelevant for the topic of this work. See Art. 34 TEU.

[149] Schieffer, 1998, p. 171.

[150] Such agreements cannot modify primary Union law, though, inasmuch as they do not follow the amendment procedure in Art. 48 TEU.

[151] Art. K.5 TEU/Maastricht.

[152] For a detailed discussion, see Schieffer, 1998, pp. 172–5.

[153] Arts J.2 (2) and J.3 (4) TEU/Maastricht.

and 'joint position' do not denote binding instruments in the language of international law. Therefore, it was necessary to endow these instruments with mandatory power under the Second Pillar. The absence of such stipulations under the Third Pillar only allows for the conclusion that Member States did not wish these instruments to be binding in the way they are under the Second Pillar.

In a way, this conflict mirrors opposing conceptions of Union law: some see it as being more proximate to EC law; others perceive and construe it as international law. While the former position militates for an extended binding force, the latter entails a limitation of bindingness to the stipulations of Article K.5 TEU/Maastricht. Taking the former position, however, must also of necessity entail that joint positions and joint actions be binding *solely* as Union law—an order sui generis which is not as far developed as EC law. Even if one frames Union law as a sui generis order, it is by no means clear that the legal doctrines of supremacy and direct effect developed for EC law by the ECJ can be transposed to it.[154]

In the light of these considerations and in line with our perception of Union law as international law, we conclude that *Joint Positions are not binding beyond the obligation to defend their content at international conferences*, and that *Joint Actions are not binding at large*.

But Article K.3 TEU/Maastricht was no exhaustive toolbox. In practice, the Council also adopted decisions, conclusions and recommendations which can be regarded as representing an 'appropriate form' in the meaning of Article K.3 (2) (a) TEU/Maastricht to promote the ends of the Union.[155] Lacking any contrary indication in primary law, these instruments must be regarded as non-binding, which deprives them from the quality of a source of law.[156]

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[154] A comparison to the present state of affairs under the Amsterdam Treaty indicates the cautiousness of Member States in this regard. Interestingly, the stipulations on framework decisions and other decisions in Art. 34 (b) and (c) TEU explicitly exclude direct effect. The remaining two forms of measures set out in this article, namely joint positions and recommendations to adopt Conventions established in the Council are not prone to produce direct effect. However, this analogy should not be carried to far, as the material content of Title VI has been diminished by the transferral of issues related to free movement to the First Pillar.

[155] Schieffer, 1998, p. 171.

[156] But see E. Guild and J. Niessen, *The Developing Immigration and Asylum Policies of the European Union* (1996, Kluwer Law International, The Hague), p. 36, holding that their status is 'unclear' and that they entail obligations 'in some cases'. No arguments are given in support of this assessment.

Are there sources other than primary and secondary law? As Union law is regional international law, the relevance of custom, general principles of law and unilateral acts must not be precluded. In practice, there are no indications that the Union legislator has made use of the latter sources.

With regard to justiciability advantages, Union law is a far cry from EC law. Before the entry into force of the Treaty of Amsterdam, the ECJ had no jurisdiction in matters pertaining to the Third Pillar.[157] Although this has changed, these changes are irrelevant for our topic, as asylum and migration issues have been concurrently moved from the Third to the First Pillar and subordinated to a tailor-made regime of justiciability.[158]

1.4.2.7 A Normative Hierarchy between EC Law, Union Law and International Law?

From the outset, there is no hierarchical relationship between EC law and international law. As Union law is a regionally and institutionally confined part of international law, EC law is not subordinated to Union law. Nor is Union law inferior to EC law. The relationship between both legal orders is horizontal, not vertical.[159]

However, this does not necessarily imply the emergence of numerous normative conflicts. Firstly, the evolution of such conflicts is limited by a strict delimitation of competencies between the First pillar on one hand, and the Second and Third Pillars on the other. Secondly, the imperative of coherence enshrined in Article 3 TEU compels both the EC and the EU to adjust their legislative acts so as not to interfere with each other.

Thirdly, Member States have regulated some of the areas where Union law and EC law meet. Although these provisions stipulate hierarchies, they do so only within a narrow framework and thus do not allow for a hierarchical structuring of both legal orders at large. We shall provide two examples in the following.

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[157] See Art. L TEU/Maastricht. The exception contained in Art. K.3 (2) (c) was never made use of in the area of asylum and immigration.

[158] See chapter 4.2.5 below.

[159] Pechstein and Koenig, 1998, p. 113.

On a general level, Article 47 TEU secures the integrity of EC law vis-à-vis Union law by stating:

> Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.

This denies Union law the possibility of altering, amending or abolishing not only present, but also future primary EC law. For specific policy areas, procedures have been made available to ensure coherence and to avoid normative conflicts. By way of example, Article 301 TEC subordinates EC measures to decisions on economic sanctions against third states taken within the Second Pillar.

The exploration of the law of the European Union has also addressed one of the most decisive hierarchical problems for our topic. This concerns the relationship between international law beyond Union law, on one hand, and the law of the European Union on the other. The sensitivity of this issue is illustrated by the debate on the role of the ECHR in the law of the European Union. Art. 6 (2) TEU brings the norms enshrined in the ECHR within the reach of the Luxembourg Court, while the Strasbourg Court considers itself to have jurisdiction in cases where Member States implement the law of the European Union. There is an impending risk of divergent interpretations of the ECHR by the two courts.[160]

This much is clear—the named legal systems are not hierarchically related to each other. The relationship between international law and community law cannot be established in a generally valid, linear fashion.

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[160] Compare Dec. 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] ECR I-1759 and Case No. 24833/94, *Matthews vs. U.K*, Judgment of 18 February 1999, ECtHR.

Extending the scope of his analysis to include domestic law as well, Bethlehem resorts to the metaphor of a net when describing how the three legal systems are associated with each other:

> A characterisation which hinges on a linear conception of the interaction between various systems of law seems also to misperceive the complex, multi-directional interaction that must perforce apply in circumstances in which rules and principles from more than one system address, even if only indirectly and in a complementary manner, the same subjects and subject-matter. Just as a web, or net, is made up of numerous strands criss-crossing at various points while, at the same time, going in different directions, so is the relationship between international law, community law and national law; interacting constantly even though the focus may be slightly different.[161]

Bethlehem goes further and rejects a description of these systems as distinct or separate from one another as 'entirely artificial'.[162] Be this as it may, it is certainly appropriate to stress the non-linearity in their interaction. This leaves us with an approach based on case-by-case analysis. Accordingly, in the absence of a predetermined hierarchy, any clash between instruments of international refugee law and international human rights law with the law of the European Union must be solved on just such a case-by-case basis.

1.4.3 Intermediary Conclusion

This section was intended to clarify the second basic question, concerning conflicts between the EU acquis and international law. After this elucidation, matters are no longer as simple as they appeared at the outset. The handy binary opposition of the EU acquis with international law has given way to a triangular relationship between EC law, Union law and international law. There is no facile hierarchy between the three norm

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[161] D. Bethlehem, 'International Law, European Community Law, National Law: Three Systems in Search of a Framework. Systemic Relativity in the Interaction of Law in the European Union', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (1998, Martinus Nijhoff Publishers, The Hague), p. 195.

[162] Bethlehem, 1998, p. 194.

systems, none of which overrides the others. This alone leaves us with nine different configurations of normative conflict between the three legal systems.[163] If we extend our perspective to the distinction between primary and secondary law, the number of conflict configurations that do not find a hierarchical solution increases to 20.[164] True enough, collision rules promise a certain order. However, as we have seen, their effective application relies on the construction of a nexus between competing norms—a construction that all too easily can be challenged by sceptics. Taken together, this goes to show that normative hierarchies play a fairly limited role in resolving potential legal conflicts; typically, solutions need to be sought horizontally rather than vertically. As a consequence, the subsequent inquiry will focus on the other two resolutive mechanisms—interpretation and proportionality arguments—as well as justiciability advantages.

While we will have to return to interpretation and proportionality arguments in later chapters, a few conclusions can already be drawn on justiciability advantages. EC law stands out among the three normative systems. Compared to the others, it ensures far-reaching justiciability through its capacity to penetrate deeply into domestic legal orders. Through the ECJ, it is endowed with a powerful guardian, which is seamlessly linked to the domestic law of Member States. Generally, Union law does not share this potent justiciability advantage with EC law.

However, the potential of international law should not be underestimated. In the area of human rights, international law offers competitive justiciability mechanisms as well. For those rights enshrined

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[163] Norms pertaining to each system can conflict with other norms within the same system, or with norms from other systems. By way of example, a norm pertaining to the corpus of EC law can conflict with another EC law norm, with a norm of Union law, or with a norm of international law.

[164] Each of the three norm system falls apart into primary and secondary law, allowing for 36 configurations. After weeding out duplicates, we retain 24 configurations. Within the law of the European Union, a configuration opposing a primary law norm with a secondary law norm within the same norm system does not represent a conflict, as the normative hierarchy between primary and secondary law immediately secures dominance to the primary law norm. Within international law, the same is true for secondary law competing with primary law emanating from its foundational instrument. Beyond that constellation, there is no rule of thumb. Therefore, we can deduce four further configurations within the law of European Union from the 24. This leaves us with 20 configurations of conflict, which cannot be solved by means of a normative hierarchy alone.

in the ECHR, the ECtHR offers the option of individual redress. Such action may result in a decision binding the respondent State Party. Both the CAT and the ICCPR are monitored by bodies that may be seized by individuals. In contradistinction to the ECtHR, neither the CAT Committee nor the Human Rights Committee issues binding decisions. Other instruments, such as the 1951 Refugee Convention, lack options for individual redress.

Finally, with regard to the ECHR, we have also noted that certain norms of international law concurrently have a place in the law of European Union and thus participate in the justiciability advantages available within the latter. Within EC law, the legality of secondary EC law must be measured against the human rights enshrined in the ECHR. Apart from justiciability in Strasbourg, this opens up an additional avenue to the Luxembourg court as well. However, as the ECtHR and the ECJ are principally on the same footing, this also entails the risk of contradictions between the case law of both courts, resulting in indeterminacy on a higher level. This may suffice here to illustrate that justiciability alone does not create determinacy—there has to be a comparative advantage of justiciability, allowing one norm or one interpretation to prevail over another in terms of implementation. If not, the problem of indeterminacy is merely shifted from a doctrinal to an institutional level.

1.5 Determining Law—Methodological Considerations

This section deals with the third and last basic question. While to determine the optimum level of inclusion and its faithful implementation in law is to place a non-legal query first and to premise the question of implementation on the answer, this order is reversed in the sequence of questions underlying this work:

I. How is access to extraterritorial protection regulated in the European Union?

II. Is the EU acquis in conformity with international law?

III. Can both questions be answered in a determinate manner?

Why this reversal? A philosopher might start out with a moral analysis of the optimum of inclusion. Not so the lawyer: among the raw material used, the law maintains a preferred position. This brings about a different way of asking questions on inclusion and exclusion. For the lawyer, the balance between inclusion and exclusion is first and foremost struck in the law, not in moral philosophy. Thus, tentatively, it makes sense to inquire into existing norms first, for the time being without focusing overly on their moral or political aspects.

At the same time, it should be readily acknowledged that moral and political aspects are present in the legal material, albeit in an indirect manner. After all, a law steering protection stems from a political conflict on inclusion and exclusion. The outcome of this conflict is present in the law and its interpretation, whether veiled in the 'letter' of its provisions or their 'spirit'. Moulding a political decision into law means changing the way it is used in discourse. The need to argue for the quality of its moral or political content is significantly reduced.[165] Instead, it can be 'invoked', which involves an element of authority, or, put differently, a presumption of correctness. The lawyer accedes to the political decision only through the norms into which it is moulded. On the whole, law is a reduction of complexity, based on the premise that it can produce one single, correct outcome. This entails a number of problems.

1.5.1 A Triple Dilemma

But can a lawyer remain faithful to the law? The limits of description appear wherever interpretation becomes necessary. Faithful description presupposes the opening up of conflicting interpretations in law. This consideration flows from the subjective dependency of interpretation: doing away with conflicts for the sake of a uniform, contradiction-free presentation of the matter is not to mirror existing law, but to take sides in a moral-political controversy, turning description into prescription. On the other hand, it appears that an excessive openness vis-à-vis interpretative conflict is self-cancelling. A description of lex lata elaborating each and every conflict would get stuck at a very early stage. There is

[165] This flows from the repartition of labour between rational morality and law in society. See J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992, Suhrkamp, Frankfurt am Main), pp. 146–51.

some irony in the conclusion: faithful description preserves the complexity[166] inherent in the dilemma of interpretation and runs counter to law's promise of determinacy. Taken to its extreme, description annihilates itself.

Obviously, this risk can only be countered by making choices—that is, by introducing normativity. When interpreting a legal norm, the lawyer adds prescription, carrying the reduction of complexity already attained by written law further. Arguing for a certain legal interpretation in a reasonable manner means linking a specific norm to a larger whole. This whole could be the usage of language beyond that norm, the telos of the law, or the ideology prevailing in the stipulation of a certain law. This is where the political conflict underlying the norm resurfaces. However, argumentation is not limited to the level of politics relevant for stipulating the very norm to be interpreted. As exemplified by referring to an ideology underpinning a certain norm, abstraction can be carried much further.

An important benchmark in the competition for the best argument is the degree of complexity it can reduce in a coherent manner.[167] Given that coherent argumentation sooner or later turns circular, it has been argued that larger circles, or tighter networks[168], are to be preferred. This explains the drive for incorporating as many argumentative elements as possible. Thus, there is a dynamic inherent in legal argumentation promoting its

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[166] 'Als komplex wollen wir eine zusammenhängende Menge von Elementen bezeichnen, wenn auf Grund immanenter Beschränkungen der Verknüpfungskapazität der Elemente nicht mehr jedes Element jederzeit mit jedem anderen verknüpft werden kann.' N. Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (1984, Suhrkamp, Frankfurt am Main), p. 46.

[167] See R. Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion', in A. Aarnio, R. Alexy, A. Peczenik, W. Rabinowicz and J. Wolenski (eds), *On Coherence Theory of Law* (1998, Juristförlaget i Lund, Lund), p. 42, enumerating three elements of coherence (consistency, complexity and connection). Regarding complexity, Alexy states that this criterion 'demands that a coherent set of propositions should comprise as many and as different propositions as possible'. This suggests that the quality of legal argumentation hinges on its capacity to reach out as far as possible into the realm of complexity in an organising manner. It should be observed that Alexy's usage of the term complexity is not congruent with Luhmann's.

[168] W. Rabinowicz, 'Peczenik's Passionate Reason', in A. Aarnio, R. Alexy, A. Peczenik, W. Rabinowicz and J. Wolenski (eds), *On Coherence Theory of Law* (1998, Juristförlaget i Lund, Lund), p. 18, and A. Peczenik, 'Second Thoughts on Coherence and Juristic Knowledge', in A. Aarnio, R. Alexy, A. Peczenik, W. Rabinowicz and J. Wolenski (eds), *On Coherence Theory of Law* (1998, Juristförlaget i Lund, Lund), p. 55.

ever-wider reach. This dynamic may indeed assist in solving interpretative problems; where weighing one argument against a competing argument reveals superiority in terms of reducing complexity, interpretation leads to determinacy. However, where the competing arguments attain roughly the same weight, interpretation may have attained a reduction of complexity in that less weighty arguments are discarded, but the remaining conflict appears more profound than ever. Thus, the reduction of choices is bought at the expense of deepening the conflict, making determinacy more remote than before interpretation.

The quest for an ever more comprehensive argumentation brings in legal science. Both time and qualification set limits to how far a practising lawyer—be it a judge, an attorney or a legal adviser—can go in extending a legal argument. A doctrinal writer may simply furnish further elements strengthening the mesh of argumentation used by a lawyer. But a doctrinal writer may also integrate a specific legal problem into a theory of law. This is attractive, as it promises the double benefit of concurrently solving a legal problem and explaining law. However, grand theories do find grand competitors sooner or later. Even in legal theory, the extension of legal arguments leads to the deepening of conflict rather than to their solution.

Interpretative conflicts are to the detriment of law's authority: where argumentation sees the number of elements distant from the letter of the law increase, its specific authority as a *legal* argument decreases.[169] Fully in line with the aspiration to depoliticized determinacy, law is perceived as technically good if it provides approximations to ready-made answers. The greater supportive argumentation necessary for extracting a solution from the letter of the law, the less law's authority can be transferred to the solution thus reached. Where interpretative argumentation has attained a complexity equivalent to the one reduced in the original political discourse preceding the positing of law, the specific meaning of law is lost. In that sense, the letter of the law is a centre of authority. An extensive argumentation automatically distances itself from this centre of authority.

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[169] This phenomenon is somewhat different from the interplay of ascending and descending arguments in international law described by M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989, Lakimiessliiton Kustannus, Helsinki), pp. 40–51. Koskenniemi sketches international law as osciallating between two argumentative poles of apology (power) and utopia (law), ultimately incapable of producing determinate outcomes. What we are seized with here is rather the relationship of determinacy and law's authority.

Thus, the reduction of complexity attained by comprehensive argumentation is also bought at the price of depreciating the mythical force of law. The unwillingness of some courts to expose the theoretical underpinnings of their legal argumentation may be related to this anticipated loss of authority.[170] Another pertinent example is Article 1 of the Universal Declaration of Human Rights (henceforth UDHR)[171], enunciating the philosophical foundations of the human rights catalogue enshrined in the instrument.[172] A number of actors involved in its drafting as well as later commentators held that this enunciation would weaken rather than strengthen the Declaration.[173]

Considering these various entrapments, we may conclude that law's determinacy is threatened in a threefold manner. To wit,

- description preserves law's complexity,
- prescription deepens legal conflicts, and
- complex argumentation depreciates the authority of a legal argument.

This threat shall be referred to as the triple dilemma in the following.

1.5.2 Structuring Conflicts

How does the triple dilemma of legal argumentation impact this work? What consequences does it entail for choosing and structuring material?

Returning to the basic questions on refugee protection in the European Union, we find that they consist of two interrelated elements—law's content and law's determinacy. These elements concurrently beg for description and prescription, thus exposing our inquiry to the risk of the

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[170] Elsewhere in this work, we shall revert to the non-exploited theoretical potential in the reasoning of the European Court of Human Rights. See chapters 10.1.1 and 11 below.

[171] Universal Declaration of Human Rights, G.A. Res. 217 (III) of 10 December 1948 [hereinafter UDHR].

[172] Art. 1 UDHR reads: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

[173] For a comprehensive account on the drafting of this provision, see T. Lindholm, 'Article 1', in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (1999, Martinus Nijhoff Publishers, The Hague), p. 41.

preservation of complexity by description, the deepening of conflict by prescription and the loss of authority by extensive theoretical argumentation—in short, the triple dilemma. To be sure, as this work is a form of legal reasoning, it is itself exposed to the same dilemmas as the material it deals with. How do we administer this risk?

Initially, we have to discover the extent to which the triple dilemma poses a problem for our specific topic. While good reasons suggest that the triple dilemma implies a risk for law in general, it remains to be established exactly how relevant it is for the law of refugee protection in the European Union. It should be reiterated that law and legal research share the goal of reducing complexity in terms of solving conflicts. Applied to our context, a self-evident measure would be to structure conflict situations according to their degree of gravity.

This structure comprises three levels on a sliding scale of gravity. First-level conflicts can be solved by concrete legal-technical means. Their depth of opposition is low, which makes it fairly easy to overcome such conflicts. Typically, single norms clash with each other in this category, and actors typically resort to means of resolution offered by the legal system itself. In this category, the focus is on the law's content in a very practical sense. The impact of the triple dilemma on first-level conflicts is very limited. After all, we are dealing with comparatively simple cases.

Second-level conflicts feature an increased depth of opposition, and their resolution is more demanding. So is the abstraction necessary for succeeding, which forces actors to leave the legal-technical sphere in favour of legal theory. In this category, principles rather than single norms clash with each other. The argumentation is increasingly qualitative as elements of equity augment. The impact of the triple dilemma is on the rise in this category. This is the sphere of hard cases.

Third-level conflicts attain a maximal depth of opposition, provoking the question whether such conflicts can be resolved at all. Even abstraction reaches its maximum. In this category, theories, ideologies and foundational assumptions clash with each other, forcing actors to resort to a clearly metalegal level in their quest for a further reduction of complexity. The limited number of conflicts surviving the process of reduction at lower levels is fully exposed to the triple dilemma. We are now dealing with the upper class of hard cases. The remaining question is whether further reduction does away with the conflicts themselves or with the credibility of law as a device to resolve conflicts.

In addition, on the theoretical side, we find that content can be challenged by indeterminacy on the three levels indicated: the legal-technical level, the qualitative level and what we choose to call a metalegal level. Still, content and determinacy mutually presuppose each other: determinacy cannot be assessed without extensive study of law's content. But where such a study reveals the parity of deeply opposed options, content cannot be determined. Methodologically, it follows that the issues of content and determinacy should not be separated in the presentation of relevant material. So far, this is by no means deviating from a conventional approach to legal research, which usually weaves together description and (prescriptive) argumentation.

Where are the advantages then? The three-pronged structure does justice to the conflict-resolutive capacities within each category, thereby omitting unnecessary inflated argumentation. This narrows down the number of conflicts to be dealt with on the higher levels. Simultaneously, the structure underscores that each category of interpretative conflict demands adequate remedies—legal-technical arguments on the first level, qualitative arguments on the second and, if at all available, metalegal arguments on the third level. Finally, the structure allows for an extrapolation of persisting conflicts on the concrete and specific level of law back to the foundational assumptions feeding them and further to ultimate questions on law's determinacy.

1.5.3 The Legal-technical Level

A large number of legal conflicts, it is obvious, can already be solved at a legal-technical stage by applying collision norms[174] or formal means of interpretation.[175] It is fully conceivable that the various legislators have been able to strike an optimum balance in the positing of norms, and that a specific area of law is free from deep oppositions in interpretation. To find out about this, we have to embark on a rather conventional study of lex lata in order to track down the existence of deep oppositions in interpretation. This first step should already provide for a substantial limitation of conflicts that the present inquiry has to handle.

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[174] See chapter 1.4.1.3 above.

[175] Within international law, a formal methodology of interpretation is laid down in Arts 31 and 32 VTC. See chapter 9.3 below.

Obviously, this task entails that provisions stemming from international law, the law of European Union and—to the extent necessary for carving out interpretive divisions—domestic law of the Member States be presented and brought into relation with each other. Part II of this work shall cover the law of the European Union relevant for our topic, while Part IV will focus on the framework provided by international law. In that sense, Parts II and IV represent the empirical substance of this exercise, severing first-level conflicts, second-level conflicts and third-level conflicts. The solution of legal-technical conflicts will take place in Chapter 9 after a full presentation of relevant legal norms.

1.5.4 The Qualitative Level

Next, the remaining conflicts are exposed to a qualitative assessment in a quest for their resolution. This assessment aims at a further reduction of complexity by opposing qualitative arguments linked to the conflicting interpretations. To a certain extent, law can handle second-level conflicts. There is a formal approach: canons of interpretation prescribe a *procedure* to be followed for solving them. And there is a material approach giving prevalence to what is regarded the better argument. In singling out the better argument, lawyers often make use of proportionality arguments and coherence arguments. The former aspires to cede to a solution more proportional to the ends pursued by a legal norm, while the latter allows a solution to prevail that is more coherent with the legal system as such.[176]

As we shall see, both figures of reasoning occur with some frequency in case law and in doctrine. To be sure, establishing preference on grounds of proportionality or coherence is no mathematical exercise. It involves taking a position. However, the range of arguable positions is circumscribed by law, and the measure of subjectivity is limited e.g. by procedural rules of interpretation.

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[176] 'Kohärenz ist ein Maß für die Gültigkeit einer Aussage, das schwächer ist als die durch logische Ableitung gesicherte analytische Wahrheit, aber stärker als das Kriterium der Widerspruchsfreiheit.' Habermas, 1992, p. 258. ['Coherence is a gauge for the validity of a proposition, which is weaker than the analytical truth secured by logical deduction, but stronger than the criterion of non-contradictiousness.' Translation by this author.] As regards criteria of coherence, see R. Alexy and A. Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality', 3 *Ratio Juris* 130 (1990).

Our task shall be to identify second-level conflicts and to expose both the methods formally prescribed by international law and those actually used by international lawyers when solving them. This task will be mainly performed in Chapter 10 of this work.

1.5.5 The Metalegal Level

Third level-conflicts reach beyond the formalism represented by collision norms or canons of interpretation. Although one might wish to evict them from the realm of law and relegate them to the political sphere, they remain inextricably linked to law's meaning. At the outset, it is necessary to identify the foundational assumptions underlying persistent conflicts. This shall be done in Chapter 2 of this work. Next, we have to tackle the question whether anything can be done about foundational conflicts. Two positions offer themselves: either these conflicts can be resolved in a determinate manner by a sufficiently complex theory or they cannot. Let us deal with both in consecutive order.

A commonly used method to resolve foundational conflicts is by setting a given foundation prior to its competitors. This is most vividly exemplified in the conflict between liberals and communitarians, where the former posit the individual as prior to society, while the latter prefer a reversed order. In the area of human rights law, a paradigmatic example is the dispute on the various generations of human rights—while some lawyers uphold the foundational differences between these generations, others stress that such distinctions compromise the idea of human rights as a whole.[177] On a less abstract level, we frequently encounter disputes on which rights are more 'basic' than others, where justiciability, non-derogability or irreparability are used to establish priorities.

At first sight, the convincing power of the priority argument relies on the degree to which it can consume and absorb an opposed foundation. By way of example, a certain class of utilitarians claim that pursuing

[177] It is little helpful that state actors have declared the indivisibility of all human rights, while maintaining monitoring systems reflecting considerable differences in treatment of these generations of rights. Consider, e.g., the indivisibility rhetoric of the 1993 Vienna Declaration with the institutional bias in treaty monitoring, giving preference to first-generation rights. The Vienna Declaration and Programme of Action, Adopted 25 June 1993 by the World Conference on Human Rights, UN Doc. A/CONF.157/23, 12 July 1993 [hereinafter Vienna Declaration], para. 5.

particularistic goals will eventually lead to the common good. That is, where individual needs are served, societal needs will automatically profit; this argument consumes the cause of their communitarian opponents. Ethically inspired foundationalists do the same when they contend that democracies fight fewer wars or provide better economic performance. This means nothing less than that an order primarily built on the ethical value of egalitarianism also yields better instrumental results than its primarily instrumental competitors. Of course, setting foundations as prior provides important advantages, strips competing goods of their foundational character and relegates them to second rank. Thus, there is a case for challenging the outcome of any priority argument, and its capacity to construct ultimate justifications may turn out to be a chimera.

Let us exemplify. An interesting attempt to bypass the bipolar stalemate has been brought to the fore by Habermas, in his claim that the public and private spheres are 'co-original'.[178] This implies that individual human rights and the societal organisation of the state are not opposed to each other anymore. To put it somewhat disrespectfully, both foundations 'come first'. The extent to which this reconstruction of law and politics provides a response to the problem has to be established with regard to third level conflicts. Critics claim that Habermas still posits foundations when relying on a universalist rationality based on language and communication.[179] Were this true, his approach would be relegated to the sphere of priority arguments and contestable as such.

But is there a world beyond the low-intensity warfare of foundationalists? Both pragmatism and deconstructivism discard the necessity of an Archimedean point to which all normative arguments can be hooked, thus taking the second position. If this proved to be correct, the consequences for further reasoning on our topic would be radical. While it almost effortlessly solves the problem of ever deepening and irreconcilable dichotomies, this solution is bought at the price of axiomatic indeterminacy. In other words, both approaches accord foundational character to indeterminacy. It is clear that this hurts the assumption of law's primary function, namely to reduce complexity to determinate outcomes. Provided the proponents of indeterminacy are right, we need to consider possible consequences for the area of law in

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[178] Habermas, 1992, p. 138. See generally Habermas, 1992, pp. 135–51.

[179] C. Mouffe, 'Deconstruction, Pragmatism, and the Politics of Democracy', in C. Mouffe (ed.), *Deconstruction and Pragmatism* (1996, Routledge, London), p. 1.

question here. To be sure, the second position also falls victim to the last element of the triple dilemma: although it may provide a better explanation of the law, the indeterminacy not only augments the distance to the letter of the law, but puts law as a distinct social practice into question. This is one of the main concerns raised by critics of the indeterminacy position. Where law is deconstructed as politics and where solutions are transformed into new conflicts, both law and politics lose in value. Thus, a final consideration would be whether the proponents of indeterminacy have offerings on the pragmatic level, which trespass what can be attained by an orthodox reading of the law based on the idea of its determinacy.

In all, the quest for resolving third level conflicts flowing from the law of extraterritorial protection in the European Union leaves us with two questions. First, do determinate grand theories stand up to the pressure of the scepticism of indeterminists? Secondly, what are the consequences if the answer is 'no' and the indeterminacy position has a case? To ponder these questions shall be the task of the final chapter.

In conclusion, we are not spared the task of describing, interpreting and theorising on the law of refugee protection in Europe, when grappling with its content and determinacy. To what extent the existence of the triple dilemma hampers this process can only be established underway. Even here, it is reasonable to 'take law by its word' and to follow it in its quest for reducing complexity and producing determinacy, before assessing whether it succeeds in living up to its promises. Not doing so would mean losing the empirical ground for theoretical reflection.

1.6 The Structure of Inquiry

After identifying and delimiting problem, sources and method, what is the course of inquiry to be taken? Let us recall our task, before setting out a course. It was to answer the following basic questions:

I. How is access to extraterritorial protection regulated in the European Union?

II. Is the EU acquis in conformity with international law?

III. Can both questions be answered in a determinate manner?

In pursuing this task, we will opt for a simple structure consisting of three core groups of chapters. Each of these groups is related to one basic question. While Part II (Chapters 4 to 7) is seized with the first basic question on the content of the acquis, Part IV (Chapters 9 to 12) attempts to answer the second basic question on the conformity of the acquis with international law. The third basic question—centred on the issue of determinacy—is introduced in Part I (Chapter 2), further developed in Part III (Chapter 8) and concluded in Part V (Chapter 13), thus forming a double bracket encompassing the central parts of this inquiry. For ease of understanding, Figure 1 offers a graphic representation of this structure.

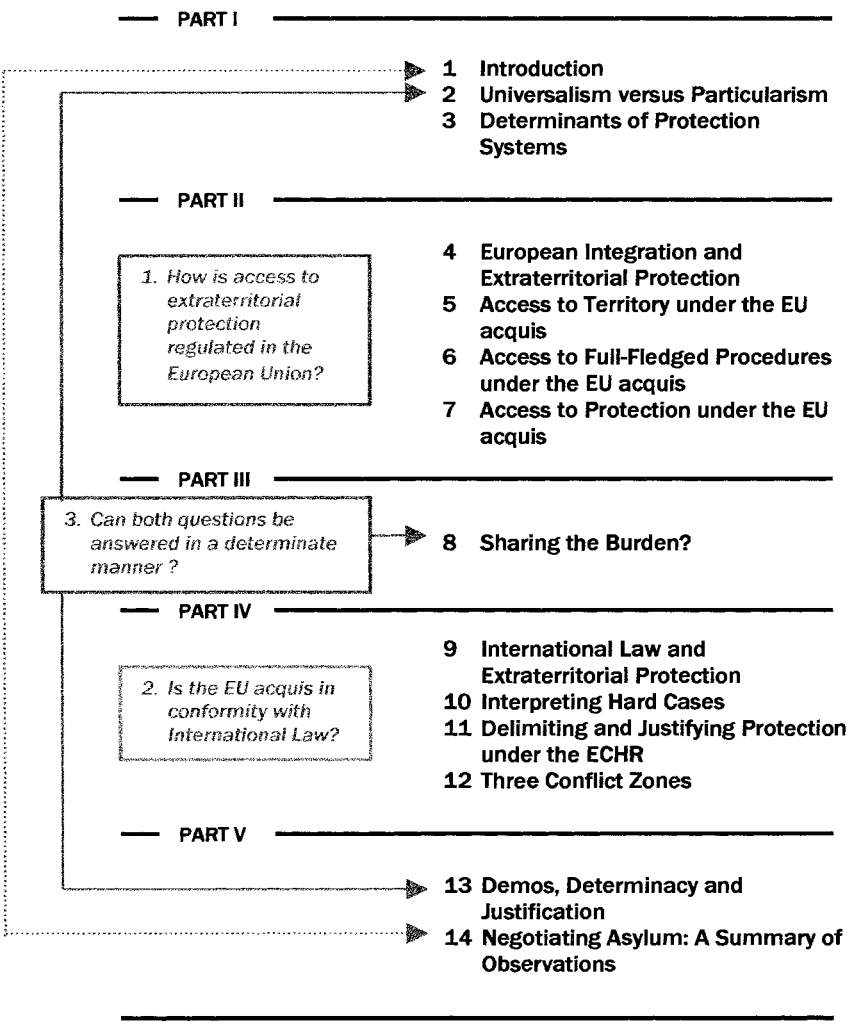

Figure 1: The Structure of Inquiry

Let us now explain this structure in detail. Part I has the task of introducing the problem of this inquiry and of providing the necessary tools for tackling it. The first chapter, of which this section forms part, formulates and delimits the specific questions fuelling our research undertaking *(Chapter 1—Introduction)*. The second chapter introduces the conceptual oppositions feeding the conflict between inclusion and exclusion in the practice of states as well as in international law *(Chapter 2—Universalism versus Particularism)*. The third chapter singles out determinants that have an impact on the capacity of a protection system in general and therewith on the legal norms governing it *(Chapter 3—Determinants of Protection Systems)*.

As noted earlier, Part II shall explore how access to extraterritorial protection is regulated in the European Union. In the course of its four chapters, the focus narrows from overall developments, such as flight movements and institutional responses, to single norms of the acquis. Chapter four presents the migrational environment and institutional superstructure impacting extraterritorial protection within the European Union *(Chapter 4—European Integration in the Area of Asylum and Migration)*. Chapters five, six and seven are dedicated to single norms within the EU acquis effecting, respectively, access to territory, to procedures, and to protection *(Chapter 5—Access to Territory under the EU acquis, Chapter 6—Access to Full-Fledged Procedures under the EU acquis, Chapter 7—Access to Protection under the EU acquis)*.

Part III consists of but a single chapter dedicated to the concept of burden sharing in international law as well as in the law of the European Union *(Chapter 8—Sharing the Burden?)*. Performing a pivotal role in the layout of this work, this chapter has been assigned three tasks: a) to present the last chip missing in the puzzle of the EU acquis—namely those norms impacting the sharing of protection responsibilities, b) to explain the multilateral dynamics determining the actual content of the acquis in game-theoretical terms, and c) to unfold an indeterminate conflict on interpretation linked to the issue of burden sharing. The last assignment prepares the ground for Part IV, which is exclusively seized with norm conflicts, as well as for Part V, which shall deal with the issue of determinacy.

Part IV explores the second basic question: 'Is the EU acquis in conformity with international law?' In the ninth chapter, the benchmarks for assessing conformity are collected. Relevant norms of international

law having a bearing on extraterritorial protection are identified, and a method of interpretation is expounded and employed to single out hard cases entailing interpretive conflicts *(Chapter 9—International Law and Extraterritorial Protection)*. Subsequently, these hard cases are subjected to a thorough interpretation along the lines of the methodology chosen earlier *(Chapter 10—Interpreting Hard Cases)*.

The following chapter is dedicated to finding and justifying the limits of extraterritorial protection under the ECHR, a task necessitated by the preceding analysis of hard cases, and complex enough to merit a chapter of its own *(Chapter 11—Delimiting and Justifying Protection under the ECHR)*. In a last step, and drawing on the results of earlier chapters, three normative conflicts between the EU acquis and international law are uncovered, involving access to territory, procedures and protection *(Chapter 12—Three Conflict Zones)*.

Some of these conflicts can be resolved, but others appear to be invulnerable to the power of interpretation or proportionality arguments. The latter class of conflicts compels us to revisit the question of determinacy, which brings us to Part V. Closing the bracket, the thirteenth chapter concludes on the determinacy problems emerging in the course of the study and discusses the options to justify foundational assumptions in law *(Chapter 13—Demos, Determinacy and Justification)*. Finally, the last chapter comes full circle by formulating conclusions in direct response to the three basic questions asked in the first chapter *(Chapter 14—Negotiating Asylum: A Summary of Observations)*.

2 Universalism versus Particularism

2.1 Choosing between Torture and Terrorism: Mr. Chahal vs. the U.K. Population

IN 1996, the European Court of Human Rights had to decide whether the United Kingdom would violate the ECHR by executing an order for deportation of Mr. Chahal to India. Mr. Chahal was a Sikh separatist, and the U.K. Home Secretary motivated the deportation decision by adducing that his 'continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism'.[180] Mr. Chahal's application for asylum was turned down in several instances and the deportation order was upheld after an advisory panel had considered the aspects of national security involved in the case. Mr. Chahal's solicitors then turned to the European Commission for Human Rights, which referred the case to the Court. The Court found by twelve votes to seven that the implementation of the deportation decision would infringe upon the prohibition of torture, inhuman or degrading treatment spelt out in Article 3 ECHR. The Court majority considered this prohibition

[180] ECtHR, *Chahal vs. the U.K.*, 15 November 1996, Reports 1996-V [henceforth Chahal], para. 25. The Chahal case is further analysed in chapter 12.2.2.3 below.

to be of an absolute character, making aspects of national security legally irrelevant to the case.[181] The Court minority, however, held that the United Kingdom could legitimately weigh the interest of national security against the individual's interest not to be ill-treated.[182]

The *Chahal* case represents a formidable extrapolation of the protection dilemma. Should Mr. Chahal be protected from ill-treatment in India at the price of exposing the population of the U.K. to his terrorist potential?[183] Granting for the moment that Mr. Chahal's continued presence indeed posed a danger to the population of the United Kingdom, and that he was indeed threatened by mistreatment in India, there is obviously more than one arguable answer to the question of principle—namely, whose interests shall be sacrificed. Put differently, the Court had to make a choice between two risks: torture and terrorism.

Far from all cases turning on extraterritorial protection contain such a dramatic opposition of interests as *Chahal*. Even in less poignant claims, however, an identically structured opposition between individual and host community can be made out. What are the ideological underpinnings of that structure?

Migration and asylum law are situated in the conflict zone between universalism and particularism, leaving lawyers with a choice between two foundational paradigms—one striving for the global realisation of human rights and another giving preference to the interests of a certain state population. The *Chahal* case is a very accurate reflection of this choice. The Court was offered a particularist reading by the U.K. government, and Mr. Chahal's counsel seconded it with a universalist reading. The Court minority embraced the former, while the Court majority opted for the latter. Leaving aside the determinacy won in casu *Chahal*, the tension between these foundational paradigms persists and merits further exploration.

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[181] *Chahal*, paras 79–82. See chapter 11 for a discussion of the 'absolute' character of the right enshrined in Art. 3 ECHR.

[182] *Chahal vs. the U.K.*, Joint Partly Dissenting Opinon of Judges Gölcüklü, Matscher, Freeland, Baka, Totchev, Bonnici and Levits, para. 1.

[183] It is not for this author to judge whether Mr. Chahal's qualification as a threat to national security was an adequate reflection of facts. At any rate, it does not affect the abstract tension between the interest of the individual protection seeker and the potential host community.

2.2 Universalism

To start with, refugee law is about the inclusion of an individual in a collective protection system. A protection seeker no longer enjoys the protection of her[184] home community and is thus compelled to seek such protection elsewhere. The claim to inclusion in a host community is a mere consequence of exclusion by the home community. It is premised on the idea that each individual is part of a global community, which has to secure a minimum level of protection, where the local community—i.e. the nation state—fails. This is a universalist reading, which sets the existential interest of the individual prior to that of a potential host community. The level of protection to be granted is specified in international human rights instruments, and states are not only singularly, but also collectively, the guarantors of their implementation. Simplifying, one could claim that, where one state fails, another one picks up its protection obligations. This conception seems to have inspired the Court majority in *Chahal*.

Historically, legal universalism dates back at least to the days of the Roman Empire, where a need was felt to overarch the legal plurality of occupied territories with a single jus commune. To wit, this form of universalism drew on factual inequality. It was not applicable to the legal relationships between Romans (which were subject to jus civile), but solely governed those between Romans and Non-Romans, or those amongst Non-Romans. To find a common denominator for the multitude of societies forming part of the Roman Empire, law was compelled to assume a high level of abstraction. Its underlying assumption was the 'sovereignty of the unqualified individual'.[185] By this abstraction, Roman

[184] In this work 'she' and 'her' refers to both sexes. Due to the lack of sufficiently detailed data, it is difficult to generalise about the percentage of female protection seekers and refugees. Data from refugee camps situated in the developing world suggest that 50.9 percent of the refugee population is female. UNHCR, *Refugees and Others of Concern to UNHCR, 1998 Statistical Overview* (1999, UNHCR, Geneva), pp. 32 and 36. Moreover, in 49 countries for which statistics were available, recognition rates for female protection seekers were significantly higher than for male protection seekers (47.6 percent opposed to 14.8 percent). Against this background, it seems appropriate to reflect the probability of a female majority among protection seekers and recognised refugees by using the female pronoun. For the sake of simplicity, this order is retained with regard to all groups of persons alluded to in the present work. By consequence, the personal pronoun used for unspecified police officers, judges or human smugglers is also 'she'.

[185] S. Tönnies, *Der Westliche Universalismus* (1995, Westdeutscher Verlag, Opladen), p. 70.

law gave universalism its decisive conceptual tool: the idea of equality. Later, this idea was combined with the concept of human rights, which gave universalism an enhanced potential for explaining and influencing societal relations. This combination is a distinct feature of enlightenment thinking at large and can be traced in the constitutional documents of the bourgeois revolutions.

Therefore, it is of little surprise to find a manifestation of the universalist foundations of refugee law with the German enlightenment philosopher Immanuel Kant. In his treatise 'On Eternal Peace', he sketched out a pacified world community, featuring republican constitutions within states, a public international law based upon legal federalism among states and, finally, an individual right to hospitality for any 'world citizen'.[186]

Kant formulates the latter right bluntly in the third operative article of his treatise:

> Das Weltbürgerrecht soll auf Bedingungen der allgemeinen Hospitalität eingeschränkt sein.[187]

The individual right to hospitality is based on two premises. As the Earth is formed as a globe, its inhabitants cannot disperse infinitely, but are compelled to meet sooner or later. Originally, nobody has a greater right to be at a certain place than anybody else. From these premises, Kant draws the weak conclusion[188] that each individual has a right of visit (*Besuchsrecht*), implying that she must not be treated in a hostile manner barely due to her arrival on the soil of another individual. The original inhabitant may, however, expel her, provided this can take place without exposing her to peril.[189] These cautious formulations must be seen against

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With the 'unqualified individual', Tönnies intends a person perceived without regard to her membership in a group and independent from her position in this group.

[186] I. Kant, *Zum ewigen Frieden: ein philosophischer Entwurf*, 1984 ed. (Theodor Valentiner and Rudolf Malter eds), (1795, Reclam, Stuttgart).

[187] Kant, 1795, p. 21. ['Cosmopolitan law shall be restricted to conditions of general hospitality.' Translation by W. Schwarz, *Principles of Lawful Poltics. Immanuel Kant's Draft Toward Eternal Peace* (1988, Scientia Verlag, Aalen), p. 83].

[188] R. Bauböck, 'Ethical Problems of Immigration Control and Citizenship', in R. Cohen (ed.), *The Cambridge Survey of World Migration* (1995, Cambridge University Press, Cambridge), p. 162.

[189] Kant, 1795, p. 21.

the background of European colonialism. Kant was careful to restrict the world citizen right in such a manner that it may not be abused for the domination or exploitation of host societies.[190]

This world citizen's right outlines the balance to be struck in positive law in a much later stage. The host society has a right to control the composition of its population, but this right finds its limits where the security of the expellee would be threatened. The latter limitation is indeed the nucleus of a norm that is regarded as the cornerstone of contemporary refugee law, namely the prohibition of *refoulement,* expressly codified in Article 33 of the 1951 Refugee Convention[191] and Article 3 CAT[192]. What remains extremely intriguing, though, is the element of free movement inherent in the Kantian right of visit: the world citizen is entitled to enjoy social contacts abroad. The ever stricter limitation of migration in our times stands out in stark contrast to this model liberty. At present, strict visa requirements prevent movements to other countries, where the individual could have invoked the modern counterpart to the protective element inherent in Kant's right of visit, namely the prohibition of *refoulement.*

Kant justifies the necessity of the world citizen's right with the fact that the effects of legal violations can no longer be limited to one part of the world:

> Da es nun mit der unter den Völkern der Erde einmal durchgängig überhand genommenen (engeren oder weiteren) Gemeinschaft so weit gekommen ist, dass die Rechtsverletzung an *einem* Platz der Erde an *allen* gefühlt wird: so ist die Idee eines Weltbürgerrechts keine phantastische und überspannte Vorstellungsart des Rechts, sondern einen notwendige Ergänzung des ungeschriebenen Kodex sowohl des Staats- als Völkerrechts zum öffentlichen Menschenrechte überhaupt und so zum ewigen Frieden, zu dem man sich in der kontinuierlichen Annäherung zu befinden nur unter dieser Bedingung schmeicheln darf.[193]

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[190] Höffe points out that the world citizen right has two countercurrent tasks, namely to protect the rights of arriving persons as well as of native populations. O. Höffe, *Vernunft und Recht* (1996, Suhrkamp, Frankfurt), pp. 127–8.

[191] See chapter 9.1.2.1 below.

[192] See chapter 9.1.2.2 below.

[193] Kant, 1795, p. 24. ['As the generally prevailing (more or less close) community among the peoples of the earth has now undeniably reached the point that the violation of right in *one* place of the earth is felt in *all* places, the idea of a cosmopolitan law is not a fantastic

Traditionally, this position has been interpreted as Kant's attempt to counter the atrocities of colonialism. Simultaneously, this passage is an early formulation of the responsibility incumbent on all states to secure human rights on a global level. The causality is clear: approximating eternal peace presupposes complementing constitutional law and public international law with the granting of a hospitality right to every world citizen. By granting an individual interest the status of a carefully delimited right, Kant promotes the public interest of peace. Setting the individual interest prior, the public interest is nevertheless consumed by it. In its Kantian form, universalism does not offer itself as a one-sided perception of the whole, but takes on the cloak of a ready-made balance between the universal and the particular. Contemporary universalists reproduce this technique when defending their position.[194]

In sum, the universalist idea is that equality overrides the closure of nation states. This idea finds many expressions in the various discourses relevant for the understanding of extraterritorial protection. In political theory, Rawls has asserted the dominance of the fundamental right over the distribution of material goods[195], which strikes against a limitation to the distribution of wealth solely within nation states, regardless of the position of outsiders. Soysal argues migrant rights flow from 'personhood': they are implemented by states, but draw legitimacy from a supranational discourse on universal human rights.[196] We shall return to a detailed presentation of certain contemporary universalist positions later in this chapter.

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and extravagant conception of right but a necessary complement of the unwritten code of both the law of the state and the law of nations for an encompassing public law and right of men and thus for eternal peace, which to approach continually one can flatter oneself only on this condition.' Translation by Schwarz, 1988, p. 87.]

[194] For a contemporary attempt to strike a balance predicated on Kant's treatise, see S. Chauvier, *Du Droit d'Être Étranger. Essai sur le concept kantien d'un droit cosmopolitique* (1996, L'Harmattan, Paris).

[195] J. Rawls, *A Theory of Justice* (1971, Harvard University Press, Cambridge, Mass,), pp. 62, 274–83.

[196] Y. Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (1994, University of Chicago Press, Chicago), ch. 8.

2.3 Particularism

A particularist would explain things differently. In its essence, a claim for protection is prima facie a claim for resources—be they material, political, social or other.[197] Obviously, a claim of inclusion juxtaposes the claimant with a bounded host community. And the very idea of a bounded community is to match community tasks with community resources.[198] Once this match has taken place, bounded communities are eager to avoid additional costs for a variety of reasons. One of these reasons has a bearing on human rights. Collective structures like states are a means to secure a certain standard of protection for citizens. Where protection presupposes the existence of a state, there are good reasons to protect the very existence of that state. Protecting its existence means inter alia restricting the access of new participants, so as not to destabilise the fiscal, social, political and physical resource base it rests upon.[199] Therefore, for the particularist, the universalist perspective is a dangerous one, which ultimately threatens to deteriorate the aggregate level of protection within a host community. It is precisely along these terms that Her Majesty's government proceeded in *Chahal*. The Court minority accepted this reasoning as an arguable approach under the ECHR. Ultimately, this community-centered argumentation leads the particularist to invoke an

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[197] The prima facie-character of this claim is derived from the fact that even temporally and materially minimised forms of integration trigger costs, which will be borne by the host community. However, it must be recalled that protection seeker also contribute to the *generation* of resources by putting their competence and labour at the disposal of host communities. It is quite another matter that some legislations inhibit them from doing so by denying access to labour markets. At any rate, universalists tend to underscore the contributing potential of migration, while particularists typically stress its consumption of resources. For the usage of economistic metaphors in refugee law discourse, see, e.g., D. A. Martin, 'The Refugee Concept: On Definitions, Politics and the Careful Use of a Scarce Resource', in H. Adelman, *Refugee Policy. Canada and the United States* (1991, York Lanes Press, North York), referring to asylum as a 'scarce resource'.

[198] 'Smaller units would be hampered by their limited resource base; wider units, although for the reverse reason, would be unable to generate a distributive consensus.' D. Miller, 'The Ethical Significance of Nationality', 98 *Ethics* 4 (1988), p. 661.

[199] 'Freedom, wherever it existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of the negative liberties, the freedom of movement; the borders of national territory or the walls of the city-state comprehended and protected a space in which men could move freely. [...] [E]ven under modern conditions, the elementary coincidence of freedom and limited space remains manifest.' H. Arendt, *On Revolution* (1963, Faber & Faber, London, p. 279.

existential threat to the state for justifying restrictionist measures against protection seekers.[200]

While the universalist perspective focuses on the existential threat facing the individual, the particularist perspective is eager to avoid existential threats facing communities. The particularist professes *one for all*, while the universalist endorses *all for one*. If the universalist orders the world along the concept of equality, the particularist insists on freedom—if necessary, a freedom from obligation and responsibility vis-à-vis individuals not part of the particularist community. Indeed, the price and risk of this freedom is the dimension of evil.[201]

This does not necessarily mean that the particularist could not care less about refugees. But according protection seekers a *claim* to inclusion would be at odds with the present system of bounded communities—i.e. nation states.[202] Let us illustrate particularist thinking through Michael Walzer, a renowned social scientist and one of the flagship names of communitarianism. Walzer suggests that the individual enjoyment of social goods at large is possible only through the intermediary of a community, which, in turn, presupposes some form of boundary between members and non-members:

> The theory of distributive justice begins, then, with an account of membership rights. It must vindicate at one and the same time the (limited) right of closure, without which there could be no communities at all, and the political inclusiveness of the existing communities. For it is only as members somewhere that men and women can hope to share in the other social goods—security, wealth, honor, office and power—that communal life makes possible.[203]

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[200] In the debate on the asylum provision of the German Constitution, Doehring has defended a limitative position, drawing on the right of states to protect themselves as part of international law. K. Doehring, 'Asylrecht und Staatsschutz', 26 *ZaöRV* (1966), p. 53 ff.

[201] R. Safranski, *Das Böse oder Das Drama der Freiheit* (1999, Fischer Taschenbuch Verlag GmbH, Frankfurt am Main), p. 193.

[202] For the issue of migration at large, Bauböck formulates the problem as follows: 'If, *prima facie*, citizenship is a resource that requires bounded political communities for its generation, how can there be a *prima facie* case for free access to such communities?' Bauböck, 1995, p. 551.

[203] M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (1983, Basic Books, New York), p. 63.

The linkage is clear: equality among members is bought at the price of excluding non-members.[204] While relationships among members are governed by an overarching standard of justice, the same is not true for the relationship between members and non-members:

> The distribution of membership is not pervasively subject to the constraints of justice. [...] At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence.[205]

In reaching this conclusion, Walzer compares states to neighbourhoods and private clubs. This analogy enticed him to the widely quoted statement 'if states were to become large neighbourhoods, it is likely that neighbourhoods will become little states'[206]. Now, states' freedom in distributing membership is not unrestricted. Walzer introduces an obligation to provide help to others who are in dire need, even if we have not established bonds with them, under the precondition that such help can be rendered without excessive costs to ourselves.[207] Consequently, Walzer denies that there is a general obligation to admit refugees, making exceptions for groups whose exodus the host nation caused, or to which it has ethnic or ideological bonds.[208] A number of scholars have taken issue with Walzer's argument; amongst others, Joseph Carens has crafted powerful counter-arguments, to which we shall revert at a later stage.[209]

Generalising beyond Walzer's specific position, we may frame the particularist argument as follows. For particularist systems to survive, it has to be accepted as inevitable that single individuals be put in limbo. Hence, assistance to non-community members is a matter of benevolence or, in Walzer's terms, mutual aid. Where the community is strong, the prospects for benevolence vis-à-vis non-members are good. Therefore, strengthening the state means creating the very preconditions for assisting refugees. Regarded thus, the opposition of universalism and particularism

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[204] We shall revert to this issue in chapter 13.1.3 below.

[205] Walzer, 1983, pp. 61–2.

[206] Walzer, 1983, p. 38.

[207] Walzer, 1983, pp. 33 and 45–6.

[208] Walzer, 1983, pp. 48–51.

[209] See chapter 2.6 below.

is theoretically sublated in the concept of protection. Both paradigms would ultimately aim at successively assisting the largest possible number of individuals in the most efficient way. Both claim to possess the key to securing its most widespread achievement—within and outside host communities. In the particularist paradigm, the price is victimisation the single refugee denied protection for the sake of this noble collective aim. Thus, the collective interest is set prior, and the interests of the individual are consumed by it. This is precisely a reversion of the universalist argument.

On an axiomatic level, universalism assumes that individuals' human rights must not be made conditional upon the existence of intermediary institutions such as states. Being a human is both necessary and sufficient for enjoying human rights. Particularists, on the other hand, set an inextricable linkage between rights and community prior: rights can only be enjoyed through the intermediary of a community, whose members grant them to each other. Thus, being a human is a necessary, but not sufficient, condition for the enjoyment of human rights. These axioms determine the distribution of the burden of proof: universalists claim that particularists need to prove the necessity of restriction, while particularists claim that universalists have to provide arguments for permitting expansion in providing access to protection seekers.

2.4 Human Rights versus Sovereignty

Against the background of the *Chahal* case, we have retraced and extrapolated the divide between a global implementation of human rights and the interests of a certain state as part of a larger conflict between universalism and particularism. Put bluntly, this opposes human rights with sovereignty.[210] In the words of Hedley Bull: '[c]arried to its logical

[210] It is also clear that the concepts of state sovereignty and human rights respectively could be dissected with the dichotomy of universalism and particularism. The development from absolute sovereignty to popular sovereignty mirrors a shift from a particularist model of power exercise to a universalist one. See further G. Noll, 'The Democratic Legitimacy of Refugee Law', 66 *NJIL* 429 (1997), pp. 439–51, retracing this development and performing a sublation of state sovereignty in the realisation of individual autonomy (with the benefit of hindsight, it can be stated that this sublation should have been complemented by one which subsumed individual autonomy in the concept of state sovereignty). Moreover, the confrontation of first generation rights with second and third generation rights or the opposition of negative rights with positive rights reflects the front line between particularists and universalists in human rights law.

extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organized as a society of sovereign states'.[211]

To be sure, international law not only limits, but also preserves states' sovereignty. The divide between particularism and universalism resurfaces in the UN Charter, which concurrently sets out the preservation of peace and the safeguarding of human rights among the organisation's goals enumerated in Article 1. Drawn further, the opposition of peace and human rights leads back to the opposition of a Hobbesian and a Kantian conception of international law. While the first is seized with seeking ways of mitigating a bellicose state of nature, the second seeks to create conditions for the liberation of man by natural reason.[212]

Does international law offer a hierarchical order between these paradigms? The goal of preserving international peace ultimately accepts states as an end in themselves and thus connects to the particularist perspective. In that respect, international law is relativist by nature, tolerating states regardless of their conduct, as long as they tolerate others by refraining from acts of aggression. Safeguarding international peace means reaffirming state sovereignty, regardless of how it is exercised internally. The individual-focused goal of safeguarding human rights may all too easy conflict with the preservation of peace. What if a state engages in genocide, which may only be halted by means of a military intervention? Fully in line with the argumentative pattern of consuming opposed paradigms, such situations have been redefined as a threat to peace, allowing the UN Security Council to pursue universalist goals under the cover of a particularist paradigm.[213] One should be careful not to draw hasty conclusions from this ostensible sublation. On a pragmatic level, the

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[211] H. Bull, *The Anarchial Society* (1977, Macmillan, London), p. 146.

[212] An excellent opposition of the Hobbesian and Kantian perspectives on international law can be found with A. Honneth, 'Is Universalism a Moral Trap? The Presuppositions and Limits of a Politics of Human Rights', in J. Bohman and M. Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (1997, The MIT Press, Cambridge, MA), pp. 155–78. See also C. Schmitt, *Der Begriff des Politischen* (1963, Berlin), p. 59, elaborating the possibility of dividing theories of the state and the political into those which assume humankind to be good and those which assume it to be evil.

[213] For the establishment of the Ad-hoc tribunals, the Security Council reconstructed the issue as a threat to peace, which could be alleviated by adjudicating the perpetrators of the crimes. See further D. Shraga and R. Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia', 5 *EJIL* 360 (1994).

need for redefinition stems solely from the fact that the Charter offers specific procedures for the preservation of peace under Chapter VII, while it contains no procedures for protecting human rights. In Article 1 UNC, as well as in the preamble, both goals stand side by side.

If there is any instrument of constitutional character in international law, it is the UN Charter. All the more, and quite understandably, its letter can reproduce, but not sever the Gordian knot of conflicting paradigms. And there are certainly reasons for that—one being the pedigree of the underlying conflict, which we shall retrace in the subsequent section.

2.5 Artefact versus Organism

The contemporary universalist narrative draws a picture of a world changing towards 'the better': the Westphalian system is being transgressed, the nation state finds itself dethroned as the primordial actor of international law, transboundary communities as well as the international rule of law proliferate around the globe.[214] The particularist is sceptical of all such teleological optimism, denounces it as wishful thinking, and insists on the importance of territorially organised power.[215] For a particularist, the nation state is as an ultimate guarantor of some

[214] The heyday of international legal optimism coincided with the post-Cold War emergence of various global governance narratives. A pertinent example is D. Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (1995, Polity Press, Cornwall), especially Chapter 12 on Cosmopolitan Democracy and the New World Order. From the angle of international law, a piece resounding with high-strung idealism can be found with P. Allot, 'Reconstituing Humanity—New International Law', 3 *EJIL* 219 (1992), calling for the formation of a 'new international society' from which state-societies would derive their social power (para. 40.3) and a new breed of international lawyers as 'agents of the self-perfecting human spirit' (para. 41.4). —However, there is a long-standing tradition of putting the predominance, or, indeed, the survival of the nation state into question, going back to French syndicalism of the late 19th century and Harold Laski's writings in the early decades of the 20th century. In that sense, the state-scepticism of the 1990s is but a re-staging of this topos, predictably followed by counter-arguments underscoring the continuing importance and vitality of the nation-state.

[215] For a good discussion of approaches centering on the responsibility of sending countries and the prevention of outflows and thus perceiving refugees as an anomaly, see D. Warner, 'The Refugee State and State Protection', in F. Nicholson and P. Twomey (eds), Refugee Rights and Realities. Evolving International Concepts and Regimes (1999, Cambridge University Press, Cambridge), pp. 262–8.

form of law and order. In all, the particularist seems to be more occupied with keeping chaos at bay than striving for a better state of affairs.

Universalist thinking rests on a history of thought stretching from enlightenment rationalism to contemporary modernism, ultimately resting on the belief that reality can be modified through the will of man. Historically, this approach has been countered by such diverse strands of thought as romanticism, positivism, system theory, and, finally, post-modernism. Within legal thinking, the repercussions of these paradigmatic crusades are manifold. Against the universalist thrust, countercurrents emerged, linking German 18th century historicism to the scepticism of 1920s anti-liberal thought and, finally, the indeterminacy critique formulated within the Critical Legal Studies movement.[216] As Tönnies has expounded, the contesters of universalism share a common belief in organically grown rather than man-made orders.[217] Therefore, she regards the dispute between universalism and particularism as just another variation of the tension between organism and artefact—the question being whether the dictates of nature or the dictates of man shall prevail in the formation of reality.[218]

Within the discipline of international relations, the same pattern reverberates in the classical debate between idealists and realists.[219] Another fault line is the opposition between essentialism and constructivism in contemporary feminist theory.[220] Within moral philosophy, the couplet of utlilitarian and deontological approaches reproduces this conflict once more. It goes without saying that the named schools of thought diverge to a great extent, and cannot be solely reduced

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[216] The indeterminacy critique takes a prominent place both in anti-liberal thinking of the 1920s and the Critical Legal Studies movement. See W. Scheuermann, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (1994, MIT Press, London), pp. 245–8.

[217] S. Tönnies, *Der Dimorphismus der Wahrheit* (1992, Westdeutscher Verlag, Opladen), pp. 17–33.

[218] For a comprehensive overview of dimorphism in legal theory, see Tönnies' work, supra. The debate on voluntarism and determinism is an important issue within Critical Legal Studies. For an introduction, see M. Kelman, *A Guide to Critical Legal Studies* (1987, Harvard University Press, Cambridge, MA), pp. 86–113.

[219] For an overview, see R. A. Crawford, *Idealism and Realism in International Relations* (1999, Routledge, London).

[220] See e.g. E. Kingdom, 'Citizenship and Democracy: Feminist Politics of Citizenship and Radical Democratic Politics', in S. Millns and N. Whitty (eds), *Feminist Perspectives on Public Law* (1999, Cavendish Publishing, London), pp. 158–62.

to their affirmation or contestation of universalism. Moreover, as we shall see later on, there is no such thing as a purely universalist or purely particularist approach. Each of these paradigms falls apart into opposing strands, which internalise the divide between universalism and particularism.[221] But there is also an argumentative interdependence between the paradigms. In order to win recognition by outsiders, particularism is usually argued with reference to universal concepts, while universalists feel compelled to particularist delimitations in order to secure the pragmatic viability of their theories.[222]

Within international law, this dimorphic pattern of thought is already present in the Grotian division, distinguishing natural law from man-made law, and has been exposed to a multitude of variations ever since.[223] As one would expect, this divide and the dynamics caused by it also inform refugee research.[224] We find a limitative school, which remains largely unwilling to discuss the migrational context of flight, other than those human rights violations being its immediate cause. It advocates a strict separation of migration and extraterritorial protection, pointing at the specific legal norms governing the latter. Moreover, this strand fears

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[221] By way of example, utilitarianism comes in a rule-focused and action-focused variety. For an example from the area of political theory, see our analysis of Frost's approach (text accompanying note 249 below).

[222] See chapter 2.6 below.

[223] A pertinent example is Koskenniemi's 'From Apology to Utopia', structuring international law as an oscillating movement between utopian and apologetic arguments. See Koskenniemi, 1989, p. 193, exercising the sovereignty concept through this oscillating movement. For a traditional structuring of international law along universalist and particularist fault lines, see Verdross and Simma, 1984, p. 11 et seq.

[224] For an excellent analysis of the interplay between positivist and non-positivist refugee research since the sixties, see B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', 11 *Journal of Refugee Studies* 350 (1998). Chimni holds that the perseverance of positivist refugee law within refugee studies led to a fragmented approach, which turned a blind eye to the political contingency of norm-creating and interpretation. On the other hand, those refugee scholars criticising the positivists opened the door to what Chimni denounces as the 'repatriation turn' in the eighties, propagating assistance and protection in the region of origin. Chimni, 1998, pp. 351–5. In a thoughtful essay, Warner has broken down refugee discourse along a slightly different fault line. To him, there are two groups: one sees the state as the major problem, the other perceives it as the major solution. While the first conceives of the refugee as 'paradigmatic in the sense of a physical representation of the dislocation of the modern condition', the second sees her as an atypical, special category of persons. Warner, 1999, pp. 253–4.

that an expansion of research to broader political issues would dilute the specific character of refugeehood—and the privileged position the refugee enjoys over other categories of migrants.[225] Typically, its proponents adhere to a paradigm based on legal positivism. The expansive school holds that flight cannot be isolated from a wider migrational and political context. Its proponents are sceptical toward a depoliticised approach based on legal positivism, and wish to complement it with elements of economic and political analysis. This analysis draws mainly on the observation of global inequality:

- the facilitated exchange of capital and goods around the globe has not been matched by a similar deregulation of migration. Seemingly out of tune with liberalisation, migration has become increasingly regulated and controlled throughout the last decades[226];
- global income disparities have increased in the same vein[227];
- the number of armed conflicts around the world is on the rise; and
- in the light of these factors, demographers are surprised by the relative stability of migration.[228]

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[225] See, e.g., Martin's argument, presented in chapter 2.3 above.

[226] 'Regional trends support the view that in all parts of the developed and developing worlds, a growing number of Governments have adopted policies aimed and influencing, and, especially, lowering the immigration level. While in 1976, a majority of countries in Asia, Europe and Oceania had a policy of non-intervention towards immigration, the percentage of non-interventionist countries was down to about 15 per cent in each of these regions in 1995.' UN Department of Economic and Social Affairs, Population Division, *International Migration Policies* (1998, UN, New York), p. 5.

[227] The gauge of global income inequality combines inequality within countries with inequality between states. Inequality is measured by the Gini coefficient, which ranges between 0 (complete equality) and 100 (complete inequality). Milanovic has shown that the global Gini coefficient has increased from 63 in 1988, to 66 in 1993. B. Milanovic, *True World Income Distribution, 1988 and 1993: First Calculations, Based on Household Surveys Alone.* World Bank Policy Research Working Paper (1999, The World Bank, Washington D C), p. 51.

[228] 'Despite the lack of comprehensive data on a global level, it is possible to affirm that the global number of international migrants has been growing at an increasing rate since 1965. However, given the concomitant increase in the number of distinct units (countries and territories) constituting the world and the persistence of sharp economic and demographic disparities among countries and regions, coupled with the widespread prevalence of political instability and outright conflict, *the percentage of people who have left and remained outside their countries of origin is remarkably small* and has been relatively stable

Proponents of a universalist approach wish to extend the study of refugee issues to possible causal chains leading from economic deprivation via factional conflict to persecution and flight. For such universalists, the individual quest for protection is inextricably linked to global redistribution. Their argument is that any protection claim may be the result of an unjust world order, of which the potential host state is a profiteer.[229]

Our crude synopsis may suffice to illustrate that the conflict between Mr. Chahal and the U.K. population is far from finding a determinate outcome through a theoretical shortcut. This overview also illustrates that neither the universalist nor the particularist strand are monolithic entitities. Being interested in refugees does not automatically make one a universalist, and preserving the nation state need not be an expression of egoistic particularism. Rather, both strands hold a number of smaller strategic and methodological conflicts, which mirror and reproduce the universalist-particularist divide within each strand.

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for a long period, oscillating between 2.1 and 2.3 percent of the world's population during 1965–90.' [Emphasis added] H. Zlotnik, 'Trends of International Migration since 1965: What Existing Data Reveal', 37 *International Migration* 21 (1999), p. 42.

[229] The following two quotes from the eighties may provide interesting illustrations of this approach.

'Politische Repressionen insbesondere in den Ländern der Dritten Welt werden vorrangig duch ein das westliche Interesse befördernde [sic] Weltwirtschaftssystem verursacht. [...] Die öffentliche Stigmatisierung der Flüchtlinge aus der Dritten Welt als sogenannte Scheinasylanten ist Teil des Verdrängungsprozesses einer Industriegesellschaft hinsichtlich der sozialen und politischen Folgen des Wirtschaftssystems im Süden.' ['Political repressions, especially in the countries of the third world, are primarily caused by a global economic system furthering Western interests. [...] The public stigmatisation of refugees from the third world are part of a suppression process of an industrial society with regard to the social and political consequences of the economic system in the South.' Translation by this author.] R. Marx, *Eine menschenrechtliche Begründung des Asylrechts* (1984, Nomos Verlagsgesellschaft, Baden-Baden), pp. 227–8.

'The moral obligation of the North to share the global asylum burden rests on its enormous resource capabilities relative to those of the South, and on the transnational dynamics of social conflict in the contemporary world, which at least to some degree makes the North corresponsible for the upheavals in the South.' A. R. Zolberg, A. Suhrke and S. Aguayo, *Escape from Violence. Conflict and the Refugee Crisis in the Developing World* (1989, Oxford University Press, Oxford), p. 279.

2.6 Meandering Arguments

Dividing positions on access to extraterritorial protection into a universalist and a particularist strand does, of course, injustice to the complexity of thought behind them. While we are unable to depict an impressively rich and refined debate here[230], we would like to present a number of intermediary positions, showing that universalists perforce integrate particularist elements into their arguments, and vice versa. This does not mean, though, that universalism and particularism end up in about the same result. Quite the contrary: both approaches dictate a certain procedure to be followed when negotiating access to the protection of communities. This necessarily has repercussions on the precise location of boundaries and the formulation of limits.

Let us first look at Bruce Ackerman, who addressed fundamental questions of membership in his work 'Social Justice in the Liberal State'. The underlying idea of his theory is that, in discussions on the just distribution of various goods, the challenged party cannot respond by asserting the moral inferiority of the challenging party, when faced with the question of legitimacy.[231] This is a specification of the principle of equality, identified earlier as the pivotal element in the universalist approach. Ackerman develops his theory along a dialogic form of reasoning, and elaborates very aptly that, in practice, the enjoyment of goods is made contingent on membership in a community. In that sense, membership is a good prior to all other goods. However, different from particularists, he does not stop there, but subjugates the distribution of membership to the same justificatory tests as applied to the distribution of other goods. This leads him to claim that 'the *only* reason for restricting immigration is to protect the ongoing process of liberal conversation

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[230] A carefully compiled and instructive survey of the debate in political theory can be found with A. Somek, 'Einwanderung und soziale Gerechtigkeit', in C. Chwaszcza and W. Kersting (eds), *Politische Philosophie der internationalen Beziehungen* (1998, Suhrkamp, Frankfurt am Main), structuring it along the divide between liberals and communitarians. For an interesting, although at times polemical, overview see C. Joppke, 'Immigration Challenges the Nation-State', in C. Joppke (ed.), *Challenge to the Nation-State* (1998, OUP, Oxford), using the fault-line of globalists and non-globalists (one should disregard his misguided perception of human rights law as 'soft law').

[231] B. Ackerman, *Social Justice in the Liberal State* (1980, Yale University Press, New Haven), p. 93.

itself'.[232] As an example, Ackerman refers to situations where 'the presence of so many alien newcomers will generate such anxiety in the native population that it will prove impossible to stop a fascist group from seizing political power to assure native control over the immigrant underclass'.[233] We note the difference with respect to the particularist position: it is one thing to protect a specific community from a migratory influx, it is quite another to vouchsafe the 'ongoing process of liberal conversation'. If anything, the latter goal entails a greater argumentative burden to justify exclusion. Moreover, while the particularist is seized with protecting the resources—material or political—of the community in which membership is sought, Ackerman is concerned with preserving a political resource—the natives' consent to maintaining a liberal political order. This reproduces a Rawlsian approach, giving precedence to the enjoyment of fundamental rights over the enjoyment of material goods.[234]

Another good illustration is provided by Joseph Carens' critique of Walzer. In particular, Carens takes issue with Walzer's assertion of states' freedom to determine inclusion and exclusion.[235] Carens then observes that we let the right to free migration *within* states prevail over the seclusionist wishes of cities and provinces, although migration has detrimental economic consequences to them, and might even change the character of these communities.[236] 'If freedom of movement within the state is so important that it overrides the claims of local political communities, on what grounds can we restrict freedom of movement across states?' asks Carens, suggesting that such restriction 'requires as stronger case for the *moral* distinctiveness of the nation-state as a form of community than Walzer's discussion of neighbourhoods provides'.[237]

Secondly, and probably more decisively, Carens unravels that Walzer's defence of particularism draws on universalist language and rationality, and that communitarianism is dependent on a liberalist mode of thinking:

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[232] Ackerman, 1980, p. 95. Emphasis in the original.

[233] Ackerman, 1980, p. 93.

[234] Somek, 1998, p. 415.

[235] Of lesser importance for our purposes, Carens also criticises Walzer's comparison between states and private clubs for ignoring the divide between public and private spheres, which Walzer draws on in other parts of his theory. J. H. Carens, 'Aliens and Citizens: The Case for Open Borders', *IL Review of Politics* (1987), pp. 266–8.

[236] Carens, 1987, p. 267.

[237] Carens, 1987, p. 267. Emphasis in the original.

> Any approach like Walzer's that seeks its ground in the tradition and culture of *our* community must confront, as a methodological paradox, the fact that liberalism is a central part of our culture. The enormous intellectual popularity of Rawls and Nozick and the enduring influence of utilitarianism attest to their ability to communicate contemporary understandings and shared meanings in a language that has legitimacy and power in our culture.[238]

Following Carens, '[t]o take *our* community as a starting point is to take a community that expresses its moral views in terms of universal principles'.[239] Subsequently, Carens submits that Walzer's argument against states' right to expel certain residents or to restrict emigration is framed in universal terms, applying not only to our particular state, but to all states. With this universality of rules comes a universality of individuals' equal moral worth.[240] And Walzer's stipulation of a state right to exclude would violate this basic liberal principle, ingrained in our community and expressed in universal terms.

While basing his case for open borders on a liberal tradition represented by Rawls, Nozick and utilitarianism, Carens is careful not to strip membership qua citizenship of all distinctive meaning:

> To say that membership is open to all who wish to join is not to say that there is no distinction between members and nonmembers [sic]. Those who choose to cooperate together in the state have special rights and obligations not shared by noncitizens. Respecting the particular choices and commitments that individuals make flows naturally from a commitment to the idea of equal moral worth. [...] What is *not* readily compatible with the idea of equal moral worth is the exclusion of those who want to join. If people want to sign the social contract, they should be permitted to do so.[241]

Carens then asserts that our fears of immigration as threatening the distinctive character of our community or its resource base assume that many people would move if they only could. He counters this assumption

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[238] Carens, 1987, pp. 268–9. Emphasis in the original.

[239] Carens, 1987, p. 269. Emphasis in the original.

[240] Carens, 1987, pp. 269–70.

[241] Carens, 1987, p. 270. Emphasis in the original.

by claiming that, at the end of the day, people only move if life is very difficult where they are. Thus, he concludes, when weighing the interests of migrants against those of the host community, the case of exclusion 'will rarely triumph'.[242]

Notwithstanding Carens' primary interest in equality, this goes to show that he is principally prepared to set limits for access to the host community. So is Ackerman, as we noted earlier. The limits of access are to be assessed by weighing the interests of members against those of non-members. So far, universalists and particularists use the same argumentative techniques. But the approaches differ in what factors they admit to the weighing process and the weight they attach to these factors. Quite clearly, particularists grant membership in a community—e.g. citizenship, nationality or ethnicity—a special weight.

Let us briefly consider an example of how a particularist-communitarian approach is put to work by a refugee lawyer. David Martin is a prime exponent of that profession in the U.S. and when he makes a case for a restrictive legal entitlement to asylum, he certainly does so in a thoughtful, balanced manner. Here is his argument. An 'overly expansive' legal entitlement to asylum should be avoided, because it drains domestic political support not only for asylum itself, but also for other, related political decisions (such as the granting of temporary protection, or the creation of safe havens).[243] Thus, Martin's argument unfolds from a primacy of the host state's electorate. This may be considered realistic, but for us, the communitarian core of this argument is probably more interesting. However, most intriguingly, Martin does not stop with the preferences of host countries:

> Refugee law, taken to extremes, ironically can demean those it means to benefit. Its focus is solely on haven, on sheltering people who fear their governments—as though governments never had anything to fear from the people, as though the act of leaving in search of individual relief would have no impact on the ongoing struggle for community reform. With its "exilic bias" (a telling phrase used by Professor Hathaway), ambitious refugee law tends to treat people as history's pawns, never its players: as objects,

[242] Carens, 1987, p. 270.

[243] Martin, 1991, p. 37.

> always on the receiving end of home government action, not as subjects capable of acting in their own right.
>
> A narrower political standard, of the kind I advocate here, respects this capacity in those persons. [...] Such an approach also husbands the limited political reserves that keep asylum vital in the haven countries for those who are in greatest jeopardy.[244]

Whatever one may think of its intrinsic merit, Martin's suggestion is a successful exploration of the structural power inherent in the particularist position, doing away with its egoistic overtones. Restriction of access to extraterritorial protection is necessary not only to preserve the interests of potential host societies, but also those of the refugees themselves. Rhetorically, there is some appeal to it: by focusing on the provision of haven only, we reify refugees. The underlying communitarian logic may read like this: haven is a false hope, because it juxtaposes the individual in flight to the wrong society. In the long term, the true potential of the individual can only be realised in her own society—the society she fled from.

Nonetheless, there are important flaws to Martin's argument. To deny haven to outsiders for the benefit of a community is to reify outsiders. And, if we are eager to reframe the refugee as history's agent, rather than its object, how can we disrespect her decision for flight? Why should historical agency, including the right to transform communities, be confined to one's own community? Just as Carens questioned Walzer, we are compelled to question Martin: what are the compelling reasons for confining agency to the citizen, and barring the refugee from it? This brings us back to the preferential treatment of membership in the weighing process described earlier. Such preference is clearly incompatible with the universalist's insistence on equality. But beyond that, how can this privileged position be justified *within* a particularist approach?

An answer may be sought with David Miller, who tried to argue for nationality as a privileged form of membership from a particularist perspective. At the outset, he underscores that national boundaries are not congruent with state boundaries, and identifies nationality as

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[244] Martin, 1991, p. 46.

> essentially a subjective phenomenon, constituted by the shared beliefs of a set of people: a belief that each belongs together with the rest; that this association is neither transitory nor merely instrumental but stems from a long history of living together which (it is hoped and expected) will continue into the future; that the community is marked off from other communities by its members' distinctive characteristics; and that each member recognizes a loyalty to the community, expressed in a willingness to sacrifice personal gain to advance its interests.[245]

To justify the trump status of nationality, Miller questions the rationality concept underlying universalist positions, and opposes it with a particularist counterpart:

> Most theories of a universalist type do [...] make room for individuals' particular duties, responsibilities and rights – the duties of parents, colleagues, and so on—but these are never regarded as fundamental commitments. The moral self is defined by its rational capacities, so only general principles can have this basic status; other commitments are contingent and subject to revision if, for example, new facts come to light which demand this. In contrast, consider a second view of ethical agency in which the subject is seen as already deeply embedded in social relationships. Here the subject is partly defined by its relationships and the various rights, obligations, and so forth that go along with these, so these commitments themselves form a basic element of personality. On this view, the agent can still aspire to rationality, but the rationality [...] consists in the capacity to reflect on existing commitments, jettisoning some and reaffirming others, depending on how they stand up to scrutiny.[246]

This conception of rationality entails a problem, however, which Miller unsuccessfully attempts to resolve. If the degree of human 'embeddedness' in communities is a trump criterion for establishing obligations towards others, how does a particularist tackle loyalty conflicts, by which the individual is torn between competing communities? If the choice is to be loyal towards, say, an ethnic community and a national community (a conflict actually canvassed by Miller), a particularist would be forced to

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[245] Miller, 1988, p. 648.

[246] Miller, 1988, pp. 649–50.

abandon the latter for the former. Miller merely argues for *harmonizing* ethnic and national obligations, and makes an argument for 'having national allegiances that promise to protect your ethnicities [footnote omitted, GN]'.[247] Basically, this reproduces the argument of the universalist who pushes for the primacy of human rights over membership: one day, the state may be unable or unwilling to protect you. Then, human rights are the only residual protection. Miller's argument is analogous: ethnicity may not be able to secure political autonomy, while nationality does.[248] The smaller unit will fail to protect you, and therefore, it is better to grant primacy to the larger unit—be it in the form of human rights or nationality. So, for the particularist, the question of drawing the line poses itself somewhat differently. She has to choose between competing forms of embeddedness: family, friends, neighbourhoods, ethnicities, nationalities. In doing so, she has to take a perspective external to the compared embeddednesses. With the benefit of Carens' analysis, we may conclude why drawing this line is so difficult for particularists: after all, 'embeddedness' is a criterion grounded on the universalist rationality of a neutral observer's perspective.

Mervyn Frost offers an interesting example of a particularist approach with a strong universalist twist. His 'constitutive theory of individuality' is a communitarian one, stressing that we are constituted as ethical beings within communities, and that only within these, we can sensibly conduct ethical discussion.[249] Nonetheless, he does not identify a single community as constitutive, but resorts to a hierarchy of institutions whose boundaries do not coincide. 'In constitutive theory, migrants are not portrayed as outsiders, but as insiders within the hierarchy of our wider ethical community, global civil society.'[250] This brings him to a conclusion reminiscent of universalist positions. Frost recognises the presumption that people have a right to freedom of movement and that '[d]emocratic states may *only* limit movement when they have good reason to believe

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[247] Miller, 1988, p. 659. Although less radically formulated, the element of sacrifice is parallel to that of Carl Schmitt's delimitation of a political community, turning on an individual's willingness to kill and to die for that community. See Schmitt, 1963, p. 46, and the discussion in chapter 13.1.2 below.

[248] In this argument, Miller disregards his initial distinction between nation and state. Miller, 1988, pp. 422 and 453.

[249] M. Frost, 'Migrants, Civil Society and Sovereign States: Investigating an Ethical Hierarchy', XLVI *Political Studies* (1998), p. 878.

[250] Frost, 1998, p. 879.

that the migrant civilians are seeking to "tap in" to the services which the citizens have established exclusively for themselves'.[251] If, however, migrants can show that they will not become free riders, they may not be excluded. It is strikingly quixotic that the communitarian axiom is complemented with an economistic criterion for determining inclusion and exclusion. The contradiction inherent in being 'embedded' into the largest unit conceivable—global civil society—annihilates Frost's credibility as a communitarian. And his economistic delimitation criterion is too anti-egalitarian to convince universalists. While necessary, straddling over two paradigms also has its risks.

In this chapter, our ambition was to profile the dynamics underlying the conflict between freedom and equality in the law of extraterritorial protection, and to reveal some of the typical manoeuvres performed by universalist and particularist actors. We have done that for the realm of political theory, illustrating how the dichotomy between universalism and particularism refines the question of delimitation by demarcating argumentative paths to be followed. It has also emerged that particularism cannot be theoretically defended without universalist arguments, and that universalism is in need of particularist delimitations to sustain its pragmatic dimension. In the legal analysis, we shall see this couplet of mutual affirmation reappear.[252]

Now, to clear our thoughts further on the interrelationship between the two approaches, we must leave the realm of abstraction and descend to the nitty-gritty of specific norms and everyday legal conflict. This brings us back to the initial questions. What norms govern the attribution of extraterritorial protection? How are they interpreted? Provided there is a balance between universalism and particularism *implied* in international law, it should emerge here.

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[251] Frost, 1998, p. 885. Emphasis in the original.

[252] See chapter 10.1.1.1 below, analysing the reasoning of the ECtHR on the issue of extraterritorial protection as an amalgam of universalist and particularist arguments.

3 Determinants of Protection Systems

THE AVAILABILITY OF extraterritorial protection depends on a large number of factors. Do I have enough money to flee? Does my potential host state have the resources to protect me? Is there a flight connection to that host country? Can I get a passport? An entry visa? Is that country obliged to admit me? Will I really be admitted? Or will they send me back? Some of these factors are linked to law; others are not. In the following, we shall attempt to systematize those factors of a legal nature; in so doing, we find that not all of them are catered for in legal norms on extraterritorial protection. Certain questions asked by the protection seeker find their answer in norms relating to migration at large.

To reach safety, a protection seeker simply has to migrate. This she has in common with other categories of persons who cross borders for reasons unrelated to protection in the narrow sense. That commonality is a risky one, and it can be approached in a particularist as well as a universalist fashion.

It enables particularist political discourse to relegate protection seekers to the categories of 'migrants' or, indeed, 'illegal migrants'.[253] This re-definition makes it easier to expose protection seekers to deflection and exclusion.[254] Certainly, reducing protection seekers to 'illegal migrants', pure and simple, adds insult to the injury of the human rights violations triggering flight. To counter such tendencies, some refugee lawyers and advocacy organisations argue that issues of extraterritorial protection should be strictly severed from the discussion of migration. This is risky too, as access to extraterritorial protection is often contingent on the rules steering migration at large. A deliberate one-eyed approach tends to lose itself in the rights contained in the 1951 Refugee Convention and omits the impact visa requirements have on their enjoyment.

Thus, the discussion of extraterritorial protection and migration seems to be caught between two extremes. The search for extraterritorial protection may neither be reduced to the quest for greener pastures, nor artificially decoupled from its migrational dimensions. After highlighting this double risk, we shall focus on *access* to extraterritorial protection and *control* of migration by host countries, proposing an approach that keeps them conceptually apart, without turning a blind eye to their factual interlinkages.

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[253] An antidote to such confusion is the rigorous separation of *means* and *motivation*. Protection seekers may use the same *means*—i.e. migratory channels—as other categories of migrants, but their *motivation* is different. See J. Crisp, *Policy Challenges of the New Diasporas: Migrant Networks and their Impact on Asylum Flows and Regimes*, Report WPTC-99-05 (1999, UNHCR Policy Research Unit, Geneva), p. 9. —For the purpose of this work, we prefer the term 'undocumented migrants'. This term has been defined in the Cairo Conference Programme of Action as comprising 'persons who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity'. Programme of Action, International Conference on Population and Development, Cairo, 5–13 September 1994, para. 10.15, UN Doc. No. A/CONF.171/13.

[254] Sometimes, undocumented migration is named—and brandished—in the same vein as trafficking, sexual exploitation in host countries and other forms of modern slave trade, or the smuggling of narcotic substances. By crafting such linkages, protection seekers are made subject to an unwarranted 'guilt by association'. Therefore, it is worth reiterating that protection seekers often have no choice but to use unorthodox methods of flight, including the services rendered by human smugglers. It is important to recall that the illicit market of smuggling is not created by would-be protection seekers attempting to leave their countries of origin, but rather by state-crafted policies. The demand stems from an interplay of the occurence of human rights violations in countries of origin, and the ever more restrictive immigration and admission policies of potential host states.

To facilitate our understanding, we shall describe migration control and extraterritorial protection as systems.[255] This implies, among other things, that both aim at serving specific functions. The function of migration control is the production of a population on a given territory through the regulation of transborder movement. More specifically, the system functions by managing the inflow, presence, and outflow of non-citizens on state territory. The code used for running this system is whether a person is allowed access to state territory, or not (access/deflection).

It is important to recall that extraterritorial protection is qualitatively different from migration control. The former is not a sub-system of the latter, as both pursue different functions. The function of extraterritorial protection is to produce a subsidiary form of human rights protection. Or, more pointedly, and at the risk of being misunderstood, one could claim that extraterritorial protection aims at producing refugees.[256] Be that as it may, the system of extraterritorial protection attempts to realize its function by determining aliens that are defined to be in need of its benefits, and by according these benefits to them. The code underlying extraterritorial protection is whether a person is entitled to extraterritorial protection, or not (protection/rejection).

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[255] Luhmann has described systems as 'Identitäten [...], die sich in einer komplexen und veränderlichen Umwelt durch Stabilisierung einer Innen/Außen-Differenz erhalten'. ['Identities [...], which sustain themselves in a complex and changing environment by stabilising an interior/exterior-difference'. Translation by this author]. N. Luhmann, *Zweckbegriff und Systemrationalität* (1991, Suhrkamp, Frankfurt/Main), p. 175. By borrowing parts of its terminology, we do not purport to do justice to the discipline of systems theory, whose explicatory interests are much more far-reaching than the more modest ones pursued in this work.

[256] This claim does not distribute guilt onto a certain actor. To be sure, it does *not* say that host states are creating refugees by virtue of an ominous pull effect. To illustrate this claim further, we may revert to Soguk, who has depicted the refugee as a product of statecraft and territoriality. To him, 'the figure of the refugee is functionally central to statecraft even in his socially produced, discourse-bound marginality, a marginality that is vitally productive of the normative centrality of the citizen/nation/state hierarchy in life'. N. Soguk, *States and Strangers. Refugees and Displacements of Statecraft* (1999, University of Minnesota Press, Minneapolis/London), p. 244. Put in somewhat simpler terms, the protection seeker represents the 'other' which enables the citizen to perceive her identity. It makes sense that states 'fight' this form of otherness, be it in the form of refugee-producing 'root causes' or by repeatedly alluding to the need of avoiding a 'mass influx' of protection seekers. Countering this 'other' means adding value to the 'id', that is, the identity produced by citizenship.

There should be little doubt that these differences are rather fundamental.[257] The concept of two dedicated systems suggests that it is not functional if one system performs tasks that should properly be performed within the other system. This would be the case if the protection system allowed persons not in need of protection to bypass migration control, or if the control system denied refuge on behalf of the system of extraterritorial protection. Let us illustrate this by giving two examples—one related to the return of rejected protection seekers, and the other to the deflection of would-be beneficiaries of extraterritorial protection. First, it has been claimed that failure to return rejected asylum seekers endangers the credibility of the protection system.[258] As protection is a scarce commodity, it is of interest that only those with a valid claim enter the system of extraterritorial protection, thereby evading the risk of removal under the system of migration control. As both systems draw on the same financial base, a free rider in the protection system would take resources from individuals who are in real need of protection. The non-return of rejected cases runs counter to the repartition of tasks between both systems, as the protection system never 'hands over' the rejected person to the control system, thus colonising its functions.

To be sure, this constellation can also be turned around. It is undesirable that potential beneficiaries of the protection system are denied access to its benefits by the control system. This is what happens when the fear of unauthorized immigration incites states to block access for *bona fide* protection seekers as well. In this example, the state would take a free ride by saving protection expenses. This free ride is to the detriment of the would-be protection seeker. If the credibility of protection systems is endangered by the non-return of rejected cases, it is equally endangered by indiscriminate deflection policies.

These examples may suffice to illustrate that both systems possess the capacity to interfere with each other, or, indeed, to colonize each other.

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[257] However, there is also a fundamental commonality between migration control and refugee protection. Both systems operate in the same medium, namely law. Therefore, one could describe both migration control and extraterritorial protection as sub-systems of the legal system. To be sure, the legal system operates with the code legal/illegal, which is an abstraction of the codes access/deflection and protection/rejection. If one chooses to conceive both migration control and extraterritorial protection as sub-systems of law, it is important to realize that they are not hierarchically related to each other.

[258] IGCARMP, *Report on Asylum Procedures. Overview of Policies and Practices in IGC Participating States* (1997, IGCARMP, Geneva), Introduction, p. VII.

This is so because their fields of operation overlap. The overlapping area is of utmost importance for our further work. In the present chapter, we shall attempt to sketch a rough design of how extraterritorial protection and migration control interact, from the perspective of both host states and the protection seeker.

3.1 The State Perspective

The availability of protection hinges to a large extent on the way its costs are distributed.[259] This is clear not only from domestic social policies, but from international refugee law as well. One of the prime interests of states is to manage the costs of protection systems—be they fiscal, social or political. In this context, 'to manage' implies to keep costs within certain limits. Such limits can be informed by a wide range of factors, ranging from fiscal calculations to strong ethical convictions to a feeling for the politically feasible and opportune. Needless to say, these limits are beyond objective assessment. Setting them means to mould the conflict between universalism and particularism into the form of a specific political decision.[260]

From the outset, we should recall the deficiencies of a cost-focused perspective. One is the tacit assumption that protection systems generate net costs rather than net benefits for a host state. As history has shown, this assumption need not be a correct one.[261] Another deficiency is the fuzziness of cost calculation. The sum of fiscal costs generated by protection systems will vary, depending on which costs we decide to regard as protection-related and the time frame we choose to look at. A time frame spanning a short period will catch most of the integration

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[259] Generally on the relationship between rights and costs: S. Holmes and C. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999, W.W. Norton, New York).

[260] Determining the limits for 'acceptable' costs is challenging not only on the domestic level, but in a supranational setting as well. In a later chapter, we shall track the immense difficulties states have when deciding on common limits for the purpose of burden-sharing. See chapter 8.3.2 below.

[261] The large-scale success of resettlement policies by Western countries in the aftermath of World War II shows quite graphically that protection seekers are readily received where they fill the needs of the labour market. See, e.g. K. Salomon, *Refugees in the Cold War* (1991, Lund University Press, Lund), pp. 197–217. However, in his analysis, Salomon is careful not to reduce resettlement only to be a mere labour-market transaction.

costs, while neglecting the integration benefits. A time frame covering a longer period will probably turn costs into benefits, provided that integration is successful. The quantification of social and political costs is probably even more dubious: we may all know such costs when we see them, but we are at pains to measure them. Therefore, in the following, we shall limit ourselves to fiscal costs. Finally, a perspective focusing on costs runs the risk of depicting host states as cynical maximizers of egoistic utility, devoid of any capacity to reason in terms of human suffering. This is quite obviously not a description we wish to endorse. It has to be underscored that the reception of persons in need of protection encompasses important elements of altruism and compassion, which are irreducible to mere strategic thinking.[262]

Nonetheless, if we keep these risks and shortcomings in mind, the idea of cost management can still serve as a structuring device to explain why states do what they do in the area of extraterritorial protection. It helps in taking the perspective of an—admittedly fictive—rationally acting state. Now, from this perspective, what factors have a bearing on the costs of operating a protection system?

We suggest starting out with three general determinants:

1. the number of beneficiaries of extraterritorial protection present on the territory of the host state,
2. the level of individual rights accorded to these beneficiaries, and
3. the degree of burden sharing.

The relevance of these three determinants is rather self-evident: many beneficiaries, a high level of rights accorded to them, and no help from other states will yield high costs. A limited number of beneficiaries enjoying a low level of rights and forthcoming assistance from other states will yield low costs. Also, given that protection resources are assumed to

[262] Some contributors to the burden-sharing debate have attempted to make systematic use of these elements to improve the efficiency of burden-sharing schemes. Drawing on a communitarian paradigm, Hathaway and Neve have proposed a temporary protection scheme that attempts to pool protection seekers and host countries sharing 'functional' and 'cultural' commonalities. The underlying assumption for both criteria is that such systematic pooling will improve host states' willingness to receive protection seekers. See J. Hathaway and M. A. Castillo, 'Temporary Protection', in J. Hathaway (ed.), *Reconceiving International Refugee Law* (1997, Martinus Nijhoff Publishers, The Hague), p. 16.

be finite, each determinant affects the two remaining determinants. Low numbers may entail fiscal and political margins to accord a higher level of rights, and vice versa. Or, the availability of burden sharing may exonerate the purse of a state that would otherwise have slashed rights or restricted access to its territory. Beyond these simple dynamics, any combination of the three determinants can be imagined. Simplifying, one may claim that the total reception costs of a state are a function of all three determinants. We have attempted to visualize the interdependence of these three determinants in Figure 2.

This interdependence may take on many forms. A state receiving many protection claims due to its geographical situation may resort to a very restrictive practice of recognising beneficiaries in order to keep costs at bay.[263] Or a state unable or unwilling to alter the level of individual rights may attempt to restrict access to its territory. This is an expression of the tension between immigration and integration.[264] Finally, states unable to manage inflows and to alter the level of individual rights may choose the strategy of burden sharing to limit costs.

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[263] This relationship between access and legal interpretation has been acknowledged by the German Federal Minister of the Interior Otto Schily in an interview: 'Und seien wir doch einmal ehrlich: Die alte Fassung des Grundrechts auf Asyl hat den Menschen zwar das liberalste Zugangsrecht nach Deutschland verschafft, hatte aber zugleich die illiberalste Anerkennungspraxis in Europa zur Folge.' ['And let us be honest: the old version of the constitutional right to asylum resulted in the most liberal right to access to Germany, but entailed simultaneously the most illiberal recognition practice in Europe.' Translation by this author]. *Das Asylrecht lässt sich nicht halten*, Die Zeit, No. 44, 28 October 1999, p. 3. Indeed, the German restriction of the right to asylum entailed elevated recognition rates (In 1992, the Convention status recognition rate was 4.2 percent, while the corresponding number in 1994 was 7.5 percent. Source: UNHCR, *Refugees and Others of Concern to UNHCR, 1998 Statistical Overview*, (1999, Geneva), p. 72).

[264] For an excellent account of this tension, see J. Öberg, *Gränslös rättvisa eller rättvisa inom gränser? Om moraliska dilemman i välfärdsstatens invandrings- och invandrarpolitik* (1994, Almqvist & Wiksell International, Uppsala), pp. 123–30. Öberg uses a matrix assembling four factors for structuring policy solutions: immigration policy can either be liberal or controlled, and integration policy can either be discriminating or equality-minded. To describe the unstable relationship between immigration and integration, Öberg suggests the metaphor of a seesaw.

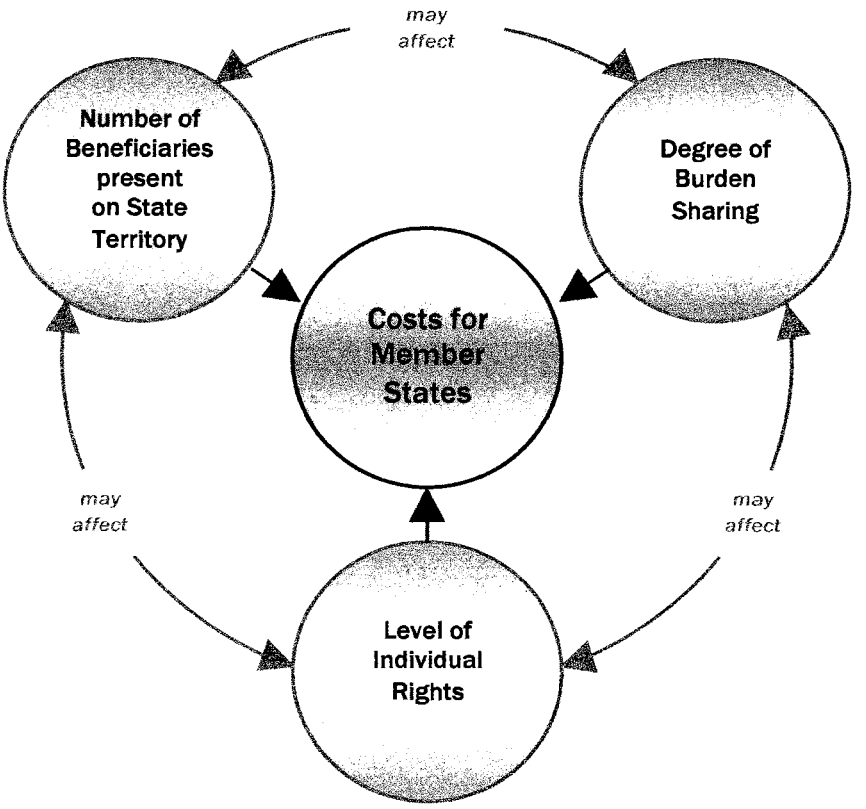

Figure 2: Three determinants affecting the costs of protection regimes

We may now take another step and refine this crude model. The first two determinants—the number of beneficiaries and the rights accorded to them—can each be split up further. Looking at the number of beneficiaries, we may ask two questions: how many beneficiaries reach the territory of host states, and how long do they stay? Expressed simply, the regulation of entry and exit determines costs subsumed under the first determinant. It covers, first, the regulation of access to the territory of a host state and, second, the regulation of departure from that territory. Both areas of regulation will determine the number of beneficiaries present on the territory at a given point of time and the length of their stay. Entry regulation stretches over various forms of border controls as well as the enforcement of visa requirements. But we may also factor in safe third country arrangements, by which protection seekers may be removed immediately upon arrival in a formerly transited country. Ultimately, it is a matter of taste whether such arrangements are considered measures inhibiting entry or as speeding up exit. The decisive issue is that they impact the actual number of beneficiaries present in the host country. Finally, regulations on the termination of beneficiary status or measures on the physical enforcement of removal may be counted under the exit heading. Thus, the discussion on temporary protection is largely on the numerical limitation of beneficiaries, because one of its main issues is the replacement of permanent residence permits for certain beneficiaries with temporary ones. Precisely like the three general determinants, the regulation of entry and the regulation of exit are also interdependent. Confronted with a new inflow, a state may wish to promote the earlier return of beneficiaries who are already present. Conversely, where return is difficult due to the situation in the country of origin, a state may opt for blocking possible new inflows.

Moving on to the level of individual rights, we may split this determinant into procedure and substance. First, it is clear that procedures determining the status of protection seekers trigger costs. A simple group determination is cheaper than individual determination, and a differentiated system of multiple court appeals is more costly than an administrative decision-making process involving two tiers.[265] The point in such procedures is to distinguish persons in need of protection from persons wishing to enter for other reasons—thus, to single out

[265] This presupposes that the compared procedures converge at a minimum level of procedural standards.

beneficiaries. Second, equally obvious, the level of material rights accorded to beneficiaries is decisive for the costs of protection. Does protection merely imply that the presence of a beneficiary is tolerated? Or is the beneficiary entitled to housing, education and social assistance? Often, host countries operate with protection categories, splitting beneficiaries into distinct groups. Each category is linked to a certain level of rights. To name but one example, a refugee in the sense of the 1951 Refugee Convention usually enjoys a higher level of rights than a person protected under a Temporary Protection scheme. Just as was the case with entry and exit, the regulation of procedure and substance are principally interdependent as well.

The individual rights accorded to beneficiaries may include family reunion. This right is a special case. First and foremost, it relates to the second determinant, comprising the level of rights accorded. But as it also brings additional persons into the country, it possesses concurrently linkages to the first determinant, relating to the numbers of beneficiaries. Once more, it is a matter of choice whether to classify family members as beneficiaries of protection, or whether they should be counted under a separate heading. The issue of family reunion should serve as a caveat that the three determinants are not mutually exclusive in a strict sense.

We recall that the legal devices used to regulate the number of beneficiaries and the level of rights enjoyed by them work as a system of filters. Generally speaking, this system will allocate protection to the deserving cases, and reject those not in need of it. Whether it actually fulfils this task is quite another matter, and shall be scrutinized in later chapters.[266]

This leaves us with the third determinant—burden sharing—which cannot be described as a filter. What is the place of burden sharing in protection systems? Roughly, the management of costs entailed by such systems may be depicted as a zero-sum game. For a moment, let us imagine a situation in which protection needs are constant. A state restricting access to protection will cut its own costs, but increase the costs borne by the protection seeker, by another host state, or by both. Just like measures targeting the single protection seeker, burden sharing is a way of externalising costs. The difference lies in who shall bear the externalized costs. In the case of burden sharing, costs are not shifted to

[266] See chapters 5 to 7 below.

the protection seeker, but to another, co-operating state. So burden sharing is about the consensual relationship between host states, rather than the non-consensual relationship between a host state and the individual protection seeker.

Due to its special characteristics, a separate chapter shall be dedicated to the issue of burden sharing.[267] Suffice it here to note that the degree of burden sharing affects the shaping of a single state's protection system. This dynamic works both ways. Consensus among states on a burden sharing arrangement can improve the openness of protection afforded by their domestic protection systems. On the other hand, the absence of burden sharing may set off a spiral of restriction in domestic protection systems. Where one Member State introduces restrictive legislation, other Member States risk experiencing a consequential rise in the number of protection claims. Therefore, as in a game of domino, all other Member States will introduce restrictive laws as well.

3.2 The Perspective of the Protection Seeker

Let us reconsider the steering devices used by states from the perspective of the protection seeker, who attempts to enter the protection system set up by a potential host state. This gives us an opportunity to explain the most pertinent filter devices in some detail, and to reflect upon the counter-strategies used by the protection seeker. After all, her prime interest is to evade a threatening violation of human rights at home.[268] As a corollary, she wants to maintain maximum control over the process of

[267] See chapter 8 below.

[268] The literature on the motivational factors determining flight decisions is comprehensive. Among the classics, we find Kunz and Richmond. E. F. Kunz, 'The Refugee in Flight: Kinetic Models and Forms of Displacement', 7 *International Migration Review* 125 (1973); E. F. Kunz, 'Exile and Resettlement: Refugee Theory', 15 *International Migration Review* 42 (1980); A. H. Richmond, 'Sociological theories of international migration: The case of refugees', in B. E. Harrell-Bond and L. Monahan (eds), *The sociology of involuntary migration* (1988, SAGE Publications, London) (a revised version of this paper was published in: Journal of Refugee Studies, vol. 6(1), 1993). For a good overview of scholarly writings and empirical research on the causes of refugee migration, see S. Schmeidl, 'Causes of Forced Exodus: Five Principal Explanations in the Scholarly Literature and Six Findings from Empirical Research', in A. P. Schmidt (ed.), *Wither Refugees? The Refugee Crisis: Problems and Solutions* (1996, PIOOM, Leiden).

flight, first and foremost to avert forcible return to the very threat she is fleeing, but also to secure a stable existence in the country of refuge.[269]

To the protection seeker, the legal devices used by states to regulate protection systems appear as hurdles on the road to safety. Let us reconstruct the order in which a would-be protection seeker is confronted with these devices before, during and after flight. Following her itinerary, we can separate them into three categories:

1. access to territory,
2. access to full-fledged procedures, and
3. access to protection.

We shall now take a thorough look at each of these categories.

3.2.1 Access to Territory

The first difficulty the protection seeker meets is gaining access to the territory of a potential host state. Two groups of norms impact access to territory. The first group comprises pre-entry measures. Their function is to steer the access of aliens—including protection seekers—to state territory by extraterritorial means of control. The second group comprises post-entry measures, which allow for the immediate allocation of a protection seeker to another state, cutting her territorial contact to an insignificant minimum.

The entry regulations set up by a potential host state represent the core of pre-entry measures.[270] Generally, these comprise the demand for a valid passport and an entry visa. An entry visa is permission by the destination state to enter its territory. Such a visa must be sought before entering that state. Normally, one applies for a visa at a diplomatic representation of the destination country.

How are visa requirements enforced? Of course, states wish to deflect those not meeting its entry requirements as early as possible, so as to

[269] Crisp has pointed out that 'even those asylum seekers who merit refugee status have clear preferences in relation to their ultimate destination', deploring that the polarized debate on asylum in Western Europe does not accomodate such insights. Crisp, 1999, p. 5.

[270] There are a number of factual impediments as lack of travel resources (money, infrastructure) or large geographical distances which are not of interest here.

avoid any territorial contact. In this context, so-called *carrier sanctions* constitute an important complement to visa requirements. Such sanctions are imposed by destination states on airlines, ship-owners and other carriers who bring persons without the necessary documentation—passport and visa—into their territory. To evade these sanctions, carriers will check that passengers are in possession of such documentation before allowing them to embark. In fact, parts of the state border control have been moved over to the check-in counters at foreign airports—and into private hands.[271] In addition, some states place immigration officers at points of embarkation abroad to train and assist local authorities as well as carriers in checking the completeness and authenticity of travel documents.[272] A further step is to entice the authorities of third countries to exercise exit control. Thus, beyond the state border and the airline check-in counter, a third front is established where the border police of third countries inhibit the migration attempts of persons without the necessary documentation.[273]

Taken together, these measures aim at blocking the entry of undocumented migrants, among whom we find persons in need of protection; such measures have therefore been described under the heading of non-arrival[274] or non-entrée[275] policies. They constitute the first filter a would-be protection seeker meets. Where a visa requirement exists, and a visa is denied in accordance with the pertinent rules, a person in need of protection will not even be able to leave her country of origin. The only remaining option in such cases is to use informal channels: bribing an embassy official who issues visas, acquiring a falsified visa of

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[271] This diminishes the leeway for protection considerations. Already in 1989, Feller stated succintly that '[a] transportation company which is trying efficiently and profitably to move large numbers of passengers shares neither the motives, nor the expertise and training of State immigration authorities'. E. Feller, 'Carrier Sanctions and International Law', 1 *IJRL* 48 (1989), p. 57. See also la Cour Bødtcher A and J. Hughes, 'The effects of legislation imposing fines on airlines for transporting undocumented passengers', in M. Kjærum (ed.), *The Effects of Carrier Sanctions on the Asylum System* (1991, Danish Refugee Council, Copenhagen).

[272] J. Vedsted-Hansen, *Responding to the arrival of asylum seekers. Control vs. protection in asylum procedures*, Paper prepared for the Technical Symposium on International Migration and Development, The Hague, Netherlands, 29 June–3 July 1998, Paper No. IX/2 (1998, Geneva), p. 15.

[273] Vedsted-Hansen, 1998, p. 16.

[274] Vedsted-Hansen, 1998, p. 14.

[275] J. Hathaway, 'The emerging politics of non-entrée', *Refugees* (1992), pp. 40–1.

sufficient quality, or evading border controls at large. There is a black market offering such services, and accepting them implies taking a risk. Clients of human smugglers[276] are often subject to various forms of exploitation.[277] In a separate chapter, we will look into how Member States use visa requirements as a regulatory device.[278]

While pre-entry measures are preventive, post-entry measures are reparative. Their aim is to cut short the presence of the protection seeker on state territory by allocating her to another country. To effectuate such an allocation without violating international refugee law and human rights law, states have devised the concept of safe third countries.

What is the thinking behind that concept? On the way to a destination state within the EU, a large number of protection seekers travel through other countries. Provided they deem one of the transit countries as safe, Member States do not consider a protection claim on its merits, if the claimant could have sought protection there. Instead, the protection seeker will be sent back to that transit country. Such deflective mechanisms are also described with the concept of *protection elsewhere*.[279]

A precondition to this form of deflection is the safety of the third country—meaning that a protection seeker is safe from refoulement to the country of origin. Thus, safe third country-arrangements acknowledge the possibility of a protection need. However, this need should be assessed and catered for in another country—the safe third country. Obviously, this reasoning denies the protection seeker the option to choose a country of protection. Nonetheless, this option is very valuable for the protection seeker, for at least two reasons. First, protection systems differ from

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[276] Although the terms 'traffickers' and 'smugglers' are often used interchangeably in migration discourse, we shall follow the set-up of definitions elaborated by the United Nations Office for Drug Control and Crime Prevention. 'The smuggling of migrants can be defined as the procurement of illegal entry of a person into a State of which the latter person is not a national in order to obtain a profit. Trafficking can be defined as the recruitment, transportation or receipt of persons through deception or coercion for the purpose of prostitution, other sexual exploitation or forced labour.' United Nations Office for Drug Control and Crime Prevention, *Global Programme against Trafficking in Human Beings. An outline for action*, Vienna, February 1999, p. 5.

[277] Such exploitation may take the form of ordinary fraud, i.e. charging for a service which is not rendered. Protection seekers have also been enticed to pay for being smuggled by trafficking drugs to their destination countries.

[278] See chapter 5.1.1 below.

[279] UNHCR, *Re-Admission Agreements, 'Protection Elsewhere' and Asylum Policy* (August 1994, Geneva), Section 5.

country to country, making it reasonable to choose a country where there are realistic prospects of protection.[280] Or, in a worst case scenario, the safe third country may simply turn out not to be safe in practice, and a protection seeker returned there would soon find herself removed back to her country of origin.[281] Second, non-legal factors, such as family ties, the existence of diasporas, or a common language may play an important role for the successful establishment of a new life in exile.[282]

To work properly, safe third country-arrangements presuppose the consent of the safe third country to take back protection seekers who have passed through its territory. This consent is often assured formally through the conclusion of a readmission agreement between destination states and transit states.[283] At a later stage, we will look into the effects of a multilateral safe third country arrangement among Member States, based on the Dublin Convention.[284]

Following the itinerary of a typical protection seeker, we find that safe third country arrangements are the second hurdle on the way to the destination country. For the protection seeker, it is possible to circumvent

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[280] 'For example, some countries will return an asylum-seeker to a "first country of asylum" if they are satisfied that he or she will have access there to fair procedures for the determination of refugee status under the 1951 Convention. No inquiry is made whether a refugee from armed conflict, who does not *also* fear persecution, would be granted protection in that country.' [Emphasis in the original]. UNHCR, *Note on International Protection (submitted by the High Commissioner)*, 7 September 1994, UN Doc. No.A/AC.96/830, para. 43.

[281] 'UNHCR is aware of a number of instances where asylum-seekers have been refused admission and returned to a country through which they had passed, only to be summarily sent onwards from there, without an examination of their claim, either to their country of origin or to another, clearly unsafe country. Where asylum-seekers are returned to third countries, this needs to be implemented with due regard to the principle of non-refoulement. Without the prior consent and the co-operation of the country to which an asylum-seeker is returned, there is a grave risk that an asylum-seeker's claim may not receive a fair hearing there and that a refugee may be sent on, directly or indirectly, to persecution, in violation of the principle of non-refoulement and of Article 33 of the 1951 Convention.' UNHCR, *Note on the Principle of Non-refoulement—EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures*, November 1997, para. G.

[282] In recent years, the role of transnational social networks in the process of forced migration has received increased attention by researchers. For a brief overview of the significance of such networks and the research issues arising, see Crisp, 1999.

[283] For a typology of readmission agreements, see G. Noll, 'The Non-admission and Return of Protection Seekers in Germany', 9 *IJRL* 415 (1997a), pp. 416–24

[284] See chapter 5.2.1.1 below.

this hurdle by obfuscating her travel itinerary, destroying travel documents bearing traces of transit, and pretending that she has arrived directly from her country of origin. We shall see, however, that states seek to retaliate against such tactics.[285]

3.2.2 Access to Full-fledged Procedures

Let us now assume that the protection seeker has managed to reach the territory of a given destination country and has indeed filed a protection claim. Before this claim is fully examined on its merits, it has to pass another filter—whose implementation Member States secure through a variety of terminology and practical arrangements—all however with a common core: the denial of access to full-fledged determination procedures. Thus, certain cases are screened out on predominantly formal grounds.

This can be described as a two-tier process. First, a claim is screened regarding its admissibility. If, and only if, it passes the admissibility stage will it receive a full-fledged examination on its merits. In some Member States such formal screening is done in the framework of ordinary asylum procedures, while others deal with it in specific *admissibility procedures*. The rationale of admissibility procedures is to filter out cases that can be dealt with in a more expeditious manner, usually involving restricted legal safeguards and fewer appeal options. Such claims are often termed to be *manifestly unfounded cases*.[286]

Which cases are rejected at the admissibility stage? The range of such grounds is comprehensive and may vary among Member States. Common to all Member States is, however, the formal rejection of cases where the claimant could have sought protection in a *safe third country*.

As we have seen, safe third country-arrangements amount to a far-reaching denial of an examination on the merits in the country of destination.[287] This is, however, not the only category of cases where Member States cut down the profundity of examination. While we cannot

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[285] On the procedural sanctions in the EU acquis, see chapter 6.1 below.

[286] To speak of *pending* cases as 'manifestly unfounded' is a contradiction in terms, as the European Commission has observed. See text accompanying note 700 below.

[287] The denial is not total, however, as the protection seeker may challenge the presumption of safety, which leads to reasoning on the substance. See chapter 12.2 below.

name all national practices in this overview[288], the concept of *safe countries of origin* merits mentioning here. Under this concept, a full examination on the merits of each individual case is cut short through a formal presumption that the country of origin is safe. A protection seeker originating from a country of origin presumed to be safe will not receive a full-fledged examination of her claim unless she is able to rebut this presumption of safety. This concept has not been implemented by all Member States, but there are instruments of Union law alluding to it. Therefore, we shall revert to it in our later analysis.[289]

For protection seekers, procedural filters of admissibility represent a considerable challenge. Rebutting presumptions of safety can be a demanding task. In the single case, it may appear easier to circumvent the admissibility screening by misrepresenting the travel route or the country of origin. However, where detected, such misrepresentations strike against the overall credibility of the claimant, putting the success of the claim at risk.

3.2.3 Access to Protection

In the last set-up of filters, it is determined how much protection is meted out to a claimant who has passed the previous filters. Actually, these filters can be best described as a range of definitions. Most famous is probably the definition of the term 'refugee', to be found in the 1951 Refugee Convention and mirrored in the domestic legislation of Member States. Those who satisfy the criteria of this definition—as interpreted by the domestic decision-makers—are accorded a predefined package of rights. Usually, this package is the most beneficial one that protection systems have on offer. Nonetheless, protection options are not exhausted with Convention status. As we shall see, safety from return is also available under a number of international treaties for the protection of the individual, the content of which is sometimes mirrored in domestic legislation. Beyond that, domestic protection categories offer various alternatives, dubbed B-status, humanitarian status, war refugee status, temporary protection or otherwise. The delimitation of beneficiary

[288] For a more detailed comparison of state practice in Europe, North America and Australia, see IGCARMP, 1997, pp. 24–5.

[289] See chapters 6.1 and 6.2 below.

groups under these categories, as well as the rights enjoyed by them, vary from Member State to Member State. However, there are certain tendencies towards harmonisation, which we will track later on.[290]

In this context, we should recall that not all protection seekers whose claim is rejected in a final decision are removed from the territory of the state where protection was sought. For legal or factual reasons, deportation may be stayed temporarily. Legally, a person may not satisfy the exigencies of the refugee definition. Nonetheless, she may fall under the less demanding requirements of a mere prohibition of removal in domestic aliens' legislation. Factually, a rejected person may be unable to return, as there are no travel connections to her country of origin. Although stay of deportation places a person in a very volatile and precarious position, it represents a rudimentary form of protection and must therefore be counted under the present heading. Thus, it is insufficient to look exclusively at the filter consisting of status recognition. Our scrutiny must also extend to another filter—the law and practice of return.

To be classified in a favourable protection category, there are few other strategies than good legal representation and, where necessary, the full use of appeal options. Strategies such as claiming false nationalities or making up alternative accounts of persecution may appear promising to avert rejection in determination procedures, but in reality they weaken the credibility of those parts of the claim that correspond to the truth. Confronted with rejection in the last instance, an unknown number of protection seekers choose to avoid removal by going underground.

3.3 Two Loops

In the discussion above, taking the state perspective helped us to understand the rationale of control as well as the interdependence of the general determinants decisive for the layout, capacity and practical operation of protection systems. Switching to the perspective of the protection seeker, the steering devices used by states presented themselves as a differentiated set-up of filters, through which any successful protection claim has to pass. These steering devices pertained to both the system of migration control and the system of extraterritorial protection.

[290] See text accompanying note 737 below.

Faced with them, the protection seeker develops a variety of counter-strategies. In turn, potential host countries react by trying to fix what they perceive as loopholes. Thus, taking a bird's eye view, state strategies and protection seeker strategies evoke and affect each other, and their relationship is probably best described as a dialectical one. We are faced with a loop, where governmental efforts of control and the individual quest for extraterritorial protection feed back into each other.

Crisp has described these dynamics very aptly with regard to the role of diasporas as facilitators of flight:

> The hypothesis [...] is that by establishing and activating transnational social networks (aided to a considerable extent by new transport and communications technologies) a considerable number of asylum seekers were able to negotiate their way through the many obstacles to entry erected by the states of Western Europe. And the success of migration strategies was such that governments introduced ever more draconian measures (some of them in contravention of states' international legal obligations) to deter or prevent further arrivals.[291]

Let us for now disregard his assessment of the legality of governmental counter-measures and focus on the dynamics he describes. While states—and the electoral constituencies behind them—remain the formal masters of legislative measures in the field of extraterritorial protection and migration control, protection seekers actually affect the content of such measures by their evasive and compensatory strategies. Thus, we may conclude that the conflict between universalist and particularist perspectives is not confined to the political constituencies crafting laws. It is equally present in the loop of implementation, circumvention and amendment following their original adoption. While the single protection seeker is excluded from law making, she may indirectly affect this loop by her strategies of circumvention. This loop juxtaposes the protection seeker, in the universalist position, and the potential host state, in the particularist position.

To this loop between protection seeker and potential host state, we have to add the effects evoked by the degree of burden sharing among potential host states. This brings in a second feedback loop, which was

[291] Crisp, 1999, p. 10.

described above[292], where non-co-operation among states yields a spiral of restriction and co-operation produces openness. Even this loop features an interplay of particularist and universalist positions. After all, heavily burdened host states seeking to arrange for burden sharing pursue both their own self-interest and the interest of the protection seeker.

Looking at extraterritorial protection as a product of both loops lets us comprehend how contradiction and conflict emerge within law itself. In the next part of this work, we shall proceed to the law of the European Union, and clear our minds as to how it has regulated access to territory, to full-fledged procedures, and to protection. To do so, we shall set out by first summarising the flight movements confronting Europe throughout the last decade, and then look into the gradual development of the institutional framework seized with European integration during the same period.

[292] See chapter 3.1 above.

4 European Integration and Extraterritorial Protection

NECESSARY DELIMITATION of the Common Market or seclusionist fortification against an imaginary invasion? The story of integration in the field of immigration and asylum can be told in many different ways. Rather than adding to an impressive collection of exhaustive linear accounts[293], we would like to proceed in three distinct steps, starting out with a macro perspective and ending with the presentation of single legal instruments.

To our mind, three different layers should be discerned when telling the story of integration: the real world, the institutional world and the normative world. With the real world, we mean actual events impacting

[293] Comprehensive accounts are readily available elsewhere. See E. Guild, 'The impetus to harmonise: asylum policy in the European Union', in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (1999, Cambridge University Press, Cambridge) (covering developments until the conclusion of the Treaty of Amsterdam); T. Brübach, *Die Zusammenarbeit der Mitgliedstaaten der Europäischen Union auf dem Gebiet Inneres und Justiz, unter besonderer Berücksichtigung der Asyl- und Einwanderungspolitik sowie der polizeilichen Zusammenarbeit* (1997, Shaker Verlag, Aachen) (covering the period until the 1996 IGC); C. Klos, *Rahmenbedingungen und Gestaltungsmöglichkeiten der Europäischen Migrationspolitik* (1998, Hartung-Gorre Verlag, Konstanz), pp. 27–87 (covering developments until the conclusion of the Treaty of Amsterdam).

on migration and the demand for protection, such as the outbreak of conflict and the advent of refugee crises. Below, a brief overview of the realities of flight to European host countries will be given, in the attempt to reflect some pertinent changes in this layer. Next, there is the institutional world: it comprises single states and state groupings, notably the EC, the EU and the Schengen Group. Further on in this chapter, we shall track the development of the institutional setting from Schengen to Amsterdam in greater detail. By means of these institutional structures, Member States have created norms in reaction to the real world layer: the *acquis communautaire* on asylum and migration.[294] The subsequent three chapters shall be dedicated exclusively to this normative layer: the instruments spawned by the integration process shall be expounded in a subject-related order, starting with access to territory and finishing with the issue of return.

For this as well as the following chapter, we would like to beg acceptance for a temporal limitation from 1985–99, a period spanning over two highly symbolic events, albeit on different levels: the White Paper of the Commission on the Completion of the Common Market[295] and the Kosovo intervention. Notably, four segments seem to recur more often than others: 1985 to 1989, 1989 to 1992, 1992 to 1997 and 1997 to 1999. We shall attempt to structure the following narrative around these four segments.

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[294] At this stage, it might be appropriate to define what is meant by the term 'acquis communautaire'. As the concept is a flexible one, and its content changes as any other legal codification, we choose to delimit it as follows. The aquis communautaire on asylum and migration shall be what the Council of the Euopean Union considers it to be at any given point in time. The instruments belonging to the acquis are listed in: Council of the European Union, Draft list of the 'acquis' of the Union and of its Member States in the field of Justice and Home Affairs, 20 March 1998, Doc. No. 6437/2/98 REV 3 [hereinafter Draft List] and in the Addendum to this document [hereinafter Draft List Addendum]. Those parts of the list relevant for asylum issues are reproduced in P. J. van Krieken, *The Asylum Acquis Handbook* (2000, T.M.C. Asser Press, The Hague), pp. 86–98.

[295] European Commission, *Completing the Internal Market. White Paper from the Commission to the European Council,* COM(85) 310 final [henceforth White Paper].

4.1 The Real World: Flight Movements to and within Europe since 1985

Let us recap the development of flight and displacement in the real world.[296] With the benefit of hindsight, the period 1985–9 must be regarded as relatively peaceful for host states in Western Europe. Certainly, the number of protection seekers was on the rise, but the Eastern borders of the EC and the transit routes leading to them were still managed by a *cordon sanitaire* of socialist states exercising rigorous exit control.[297]

This would change with the dismantling of the Iron Curtain in the period from 1989–92, making physical access from Central and Eastern European countries to Member States of the EU easier. Mobility augmented not only for citizens of these states, but for transiting refugees from other parts of the world as well. After a decade of steady growth, the number of asylum applications took a sharp turn upwards at the end of the eighties. Within the EC, applications increased almost tenfold in the period between 1985 and 1992.[298] The peak of protection claims in 1992 was unprecedented in the post-war period: almost 700 000 persons sought refuge in European countries.[299]

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[296] The following does not purport to give a full overview of the complex migrational realities in the period 1985–99. For a survey of asylum migration to the EU, see A. Böcker and T. Havinga, *Asylum Migration to the European Union: Patterns of Origin and Destination* (1998, European Commission, Luxembourg). For a thorough presentation of forced migration and flight movements, see UNHCR, *The State of the World's Refugees 1993* (1993, Penguin, New York); UNHCR, *The State of the World's Refugees 1995. In Search of Solutions* (1995, OUP, Oxford); and UNHCR, *The State of the World's Refugees 1997-98. A Humanitarian Agenda* (1997, OUP, Oxford). For patterns of migration in general, see UN Commission on Population and Development, *World Population Monitoring, 1997. Issues of international migration and development: selected aspects*, 20 December 1996, UN Doc. No. ESA/P/WP.132. For a historical account of flight and refuge throughout the 20th century, see T. Kushner and K. Knox, *Refugees in an Age of Genocide* (1999, Frank Cass, London).

[297] However, these borders were sometimes permeable for transiting protection seekers. By way of example, the German Democratic Republic allowed Lebanese protection seekers to transit through its territory en route to Sweden in the early Eighties. See H. Quaritsch, *Recht auf Asyl. Studien zu einem missdeuteten Grundrecht* (1985, Duncker & Humblot, Berlin), p. 24.

[298] By the end of 1992, the Member States hosted some 1.2 million refugees of a world refugee population comprising almost 19 million people. UNHCR, 1993, pp. 151–3.

[299] Source: IGCARMP, 1997, p. 21.

The 1992 statistics indicate that the majority of protection seekers originated from European countries, one of the main causes being the conflict in Former Yugoslavia, flaring since 1991.[300] The implications of this conflict for migration and protection in Europe can hardly be overestimated, and it certainly represents the decisive event of the 1992–7 period. For the first time since the Hungarian crisis in 1956, Western Europe was confronted with a substantial outflow of *Europeans*.[301] Soon, the focus of the conflict moved to Bosnia, which dominated the migrational agenda well beyond the Dayton peace agreement in 1995. While Germany sent a first wave of Bosnians back as early as 1996, other countries waited until 1997 before phasing in return movements.[302]

In the 1997–9 period, Bosnia gave way to Kosovo. After a successive build-up of aggression and persecution, the conflict erupted in early 1999, forcing a wave of over 800 000 protection seekers to seek refuge abroad. Kosovo differed from Bosnia in three respects. First, NATO intervened with considerable military resources, expressly pursuing the aim of stopping further displacement and creating the conditions for return of those already displaced. Second, deflection proved to be much more effective than it had been during the Bosnian crisis. After all, the majority of Kosovars were displaced internally or were hosted in Albania and the Former Yugoslav Republic of Macedonia. Third, attempts to share the receptive burden surfaced. Considerable resources were sent from Western Europe to the regional host countries, and a limited evacuation programme was launched to exonerate Macedonian refugee camps.

On the numerical level, one may state that the real world layer brought a moderate rise in protection claims between 1985–98 and a steep rise to an unprecedented peak between 1989 and 1992. A decline followed, and in

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[300] A survey of ten European countries shows that in 1992, 35 % of asylum applications were made by nationals of former Yugoslavia (Austria, Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom), UNHCR, 1993, pp. 37, 158.

[301] The conflict in the former Yugoslavia exceeded the 1956 Hungarian outflow by a factor of five. European Commission, Explanatory Memorandum to the Proposal to the Council for a Joint Action adopted by the Council on the basis of Article K.3 2 (b) of the Treaty on European Union concerning Temporary Protection of Displaced Persons, 4 March 1997, p. 2, para. 2.

[302] For an overview of the return policies and practices by EU Member States with regard to Bosnians, see R. Black, K. Koser and M. Walsh, *Conditions for the return of displaced persons from the European Union: Final report. 1998* (1998, European Commission, Luxembourg).

1995 the numbers had fallen below the 1989 level again. The period 1997–9 saw rising demands, mostly due to the conflict in Kosovo. Beyond mere statistics, Western Europeans had to realize that they could no longer profit from the control exercised by the socialist regimes in the East: borders had become permeable, and the dismantling of state structures had led to the first large-scale refugee crises in decades. In that sense, 1989 and 1992 are pivotal dates for the history of refugee protection in Europe.

4.2 The Institutional World: From Schengen to Amsterdam

Parallel to the changing dynamics of flight in the period from 1985 to 1999, a reinforcement and diversification of multilateral institutions seized with migration and protection issues took place.[303] While both issues belonged—and still belong—to the *domaine reservée* for autonomous policy decisions by single European states, prudent preparations for a greater measure of multilateralism were made. We shall track this development in the process of European integration by highlighting five steps: the 1985 White Paper, the Schengen process, the European Political Cooperation, the Maastricht Treaty and, finally, the Treaty of Amsterdam.

[303] Taking a wider perspective, this diversification can be tracked in other arenas as well. One may point at the decision of a number of industrialized states to sever parts of the discourse on migration and protection from the universal forum offered by UNHCR, and to start their own private discussion club by launching IGCAMRP in 1985. IGCAMRP offers states an environment where protection concerns occupy a more subordinate role than at UNHCR, and the perspectives of the South are largely excluded.

4.2.1 Freedom through Control: The 1985 White Paper and the Single European Act

Although the harmonization of asylum systems in different European states had seized the Council of Europe for quite a while[304], it was the emerging Common Market without internal border control that inspired serious work on common rules regarding asylum issues. Institutionally, this relocated the initiative from the Council of Europe to the EC Member States. Materially, it brought the issues of asylum and protection under the heading of migration control.

For almost thirty years, the objective of free movement of persons had been a near-comatose item on the agenda of European integration. With the beginning of the eighties, the political process aiming at the realization of the internal market started to gain momentum.[305] The 1985 White Paper on the Completion of the Internal Market[306] was probably the most elaborate expression of this process. It attempted to offer a blueprint for the next seven years of integration, with completion of the internal market envisaged for the year 1992. The White Paper laid down the goal of the complete abolishment of internal border controls[307] and pointed out that asylum law and the situation of refugees had to be considered in the discussion on measures compensating for the loss of control due to their abolishment.[308]

The thrust of the Commission White Paper was mirrored in the Single European Act[309], adopted a year later. Two features of the SEA merit underscoring. First, an express provision confirmed the political

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[304] Back in the Seventies and the early Eighties, the Council of Europe had already taken issue with harmonization aspects. See, e.g., Recommendation 787 (1976) on Harmonization of Eligibility Practice; Recommendation R (1981) 16 on the Harmonization of National Procedures Relating to Asylum. For an overview of harmonization efforts within the Council of Europe in that phase, albeit with a somewhat particularist bias on state interests, see K. Hailbronner, *Möglichkeiten und Grenzen einer europäischen Koordinierung des Einreise- und Asylrechts. Ihre Auswirkungen auf das Asylrecht der Bundesrepublik Deutschland* (1989, Nomos Verlagsgesellschaft, Baden-Baden), pp. 27–34.

[305] For developments preceding the White Paper, see Brübach, 1997, pp. 2–15.

[306] See note 295 above.

[307] White Paper, para. 27.

[308] White Paper, para 11.

[309] Single European Act, 9 September 1985, OJ (1987) L 169/1.

determination of Member States to complete the internal market by 1992.[310] Second, the Member States laid down the following statement in the Final Act of the SEA.

> In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries.[311]

The form of such co-operation would continue to be outside the institutional framework of the EC until the Maastricht Treaty. The quoted statement was without prejudice to the sovereign powers of the Member States in the named areas.[312] Nonetheless, it flags that the message of the Commission White Paper had been heard and approved by the Member States: no internal market without measures on the movement of non-communitarians. Or, more succinctly: freedom had to be attained through the means of control. Thus, it has to be understood that the European harmonization of asylum law was never intended to be a comprehensive solution to the problems of refugee protection. It was conceived as a technical consequence of the abolition of internal borders. To a significant degree, this heritage still haunts the contemporary *acquis*.

4.2.2 L'Europe accélérée: Schengen

Meanwhile, pioneering work in the area of free movement was being done by a small integrationist elite. 1985 sees the birth of *l'Europe à deux vitesses*: an avant-garde of five EC Member States signs the Schengen Agreement[313], drawing up a framework for the abolishment of internal border controls

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[310] See Art. 8a (1) TEC. In a declaration on Art. 8a, the Member States clarified that the specification of a date for the completion of the common market would not imply a legal obligation.

[311] Final Act, Political Declaration by the Governments of the Member States on the Free Movement of Persons, annexed to the Single European Act. OJ (1987) L 169/26.

[312] General Declaration on Articles 13 to 19 of the Single European Act. Annexed to the Final Act of the Single European Act, OJ (1987) L 169/25. See also Brübach, 1997, pp. 18–9.

[313] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 14, 1985 [hereinafter Schengen Agreement].

and the adoption of compensatory measures. This instrument introduced a number of concrete measures facilitating cross-border traffic among Contracting Parties and established a work programme for the complete abolishment of internal borders among its Contracting Parties. Among the necessary compensatory measures, the harmonization of visa policies and of certain areas of domestic aliens legislation was listed.[314]

Five years of negotiations on the topics of immigration, police and justice co-operation, drug policy and information exchange followed. Finally, a document subsequently known as the Schengen Convention[315] was signed by Belgium, France, Germany, Luxembourg and the Netherlands. Its normative core is contained in Article 2 SC, stating that the internal borders of Contracting Parties may be passed at any point without any checks on persons being carried out. As compensatory measures, the Schengen Convention contains inter alia provisions on the control of external borders, on visa requirements, on the responsibility for the processing of asylum applications, on information exchange under the so-called Schengen Information System (SIS) and on the introduction of carrier sanctions. The Convention provided for its own institutional framework by arranging for an Executive Committee[316] and endowing it with the power to issue detailed and binding regulations on a number of issues. Under its Rules of Procedure, the Executive Committee was presumed to meet under seclusion of the public[317], and its deliberations and votes were covered by the duty of confidentiality.[318] Moreover, it was capable of deciding that its own decisions—which could very well have a binding effect and impact on individual rights or obligations—were

[314] Art. 20 of the Schengen Agreement.

[315] Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990 [hereinafter Schengen Convention, abbreviated SC].

[316] Under Chapter VII SC.

[317] Schengen Executive Committee, Rules of Procedure of the Executive Committee established pursuant to Title VII of the Agreement implementing the Schengen Agreement, 18 October 1993, Art. 3 (1).

[318] Ibid., Art 2 (1).

confidential.[319] The opaqueness of procedures and the amount of secrecy engulfing the Committee's work provoked harsh criticism and were brandished as a 'democratic retrogression'.[320] It is noteworthy that the executive powers of the Schengen Committee were not balanced by any judicial review through the ECJ, and that its secretive modus operandi largely precluded corrections by domestic or supranational parliaments.

A lengthy ratification process as well as complex technical preparations protracted the implementation of the Schengen Convention after its formal entry into force on 1 September 1993. Following a decision by the Executive Committee[321], the instrument has been applied since 26 March 1995.[322] A number of Schengen States have concluded bilateral agreements with each other to facilitate the practical implementation of the Convention.[323]

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[319] Curtin and Meijers quote a particularly absurd example of the secrecy policies within the Schengen Committee. On the demand of a single Member State (Germany), a decision on a common list of countries whose nationals must be in possession of a visa for entering Schengen states was classified as confidential. Thus, it was impossible for any outsider observer—e.g. a citizen of a Schengen state—to determine whether or not the imposition of visa requirements stemmed from international obligations under the Schengen Convention. D. Curtin and H. Meijers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?', in B. G. Tahzib, C. Groenendijk, M. Vreugdenhill-Klap and J. M. van de Put (eds,), *Democracy, Migrants and Police in the European Union: The 1996 IGC and Beyond* (1997, FORUM, Utrecht), p. 23.

[320] Curtin and Meijers, 1997, pp. 19–28.

[321] According to a declaration to Art. 139 SC by the Schengen Parties, the Convention would only enter into force if external border controls functioned properly. The smooth operation of SIS would be a precondition, too. In the light of the technical difficulties, the Executive Committee decided that the entry into force should take place on 26 March 1995. See K. Würz, *Das Schengener Durchführungsübereinkommen: Einführung, Erläuterungen, Vorschriften* (1997, Boorberg, Stuttgart), p. 30.

[322] Starting with that date, the Schengen Convention was only applied in seven countries—the five original contracting parties, Portugal and Spain. The other Schengen Members were to join successively, upon satisfaction of the technical requirements for the implementation of the Schengen *acquis*. The starting date of the Convention's implementation in a certain country is determined by unanimous decision of the Executive Committee.

[323] Such agreements have been concluded between a large number of Schengen states. See e.g. Accord relatif aux articles 40 et 41 de la Convention d'application de l'Accord de Schengen du 14.6.1985, relatif à la suppression graduelle des controles aux frontières communes du 19.6.1990, JO 1995, p. 16445; Accord relatif aux articles 2 et 3 de l'Accord d'adhésion du Royaume d'Espagne á la Convention d'application de l'Accord de Schengen du 14.6.1985, relatif à la suppression graduelle des controles aux frontières communes du 19.6.1990, JO 1995, p. 16445.

It must be emphasized that both the Schengen Agreement and the Schengen Convention are products of intergovernmental co-operation outside the Community framework. Community institutions were not involved in the drafting process. Nonetheless, the same bureaucrats were involved in the Community process and in the Schengen process. Therefore, it is hardly surprising that the Schengen Group in many respects seemed to act upon the analysis presented in the Commission White Paper of 1985. And normative coherence with the Community framework was an explicit goal for the Schengen avant-garde; the Schengen Convention contains a savings clause for EC law in Article 134 SC.

By and by, the avant-garde project went mainstream. Successively, additional Member States acceded to both Schengen instruments.[324] Accession Protocols and Agreements were signed with Italy (on 27 November 1990), Spain and Portugal (25 June 1991), Greece (on 6 November 1992), Austria (on 28 April 1995) and Denmark, Finland and Sweden (on 19 December 1996). Ireland and the United Kingdom remained outside, however, denying the Schengen co-operation full congruence with the group of EU Member States. Institutional convergence was reached in 1997, when the Schengen *acquis*[325] was incorporated into the framework of the European Union by means of a Protocol to the Treaty of Amsterdam[326], taking into account the outsider role of Ireland and the United Kingdom.[327] Concurrently, the role of the Schengen Executive Committee was taken over by the Council of the European Union.

To preserve the free movement of persons already attained among the Scandinavian states by virtue of the Nordic Passport Union, Iceland and Norway were associated to the implementation of the Schengen *acquis*.[328] This implied that both countries were to handle external border controls on behalf of the Schengen Group.

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[324] According to Art. 140 (2) SC, a prerequisite for accession is membership in the European Union.

[325] On the precise content of the Schengen *acquis*, see chapter 4.2.6 below.

[326] Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 5, [hereinafter Schengen Protocol].

[327] See chapter 4.2.7 below.

[328] See text accompanying note 420 below.

4.2.3 Trying to Catch Up: The European Political Cooperation

4.2.3.1 The Dublin Convention

It would be wrong to depict the phase from 1985–92 as solely dominated by the avant-garde activism of the Schengen countries. The Twelve were pursuing the same track, albeit at a slower pace, within the non-institutionalized framework of the European Political Co-operation (henceforth EPC). The vehicle of this co-operation was the Council of EC Immigration Ministers and, on a subsidiary level, the Ad-Hoc-Group on Immigration[329]; its prime product was the Dublin Convention.[330] The Dublin Convention was signed by all Member States on 15 June 1990, and is still the core instrument in the area of asylum and migration law. Unlike the much broader Schengen Convention, the Dublin Convention deals exclusively with the allocation of asylum applications. Its allocation criteria are largely identical with those laid down as the Schengen Convention, and can be historically traced to an unsuccessful Draft Agreement stemming from discussions within the Council of Europe.[331] The Dublin Convention represents a gain over the Schengen Convention thanks to its expanded geographical scope, comprising all EU Member States.

To avoid normative conflicts between the two Conventions, Contracting Parties to the Schengen Convention signed the so-called

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[329] Further on the organisational aspects of the Council and the Ad-hoc Group on Immigration, see Klos, 1998, pp. 32–7; Brübach, 1997, p. 27–33.

[330] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990 [hereinafter Dublin Convention].

[331] CAHAR drew up a Draft Agreement on responsibility for examining asylum requests in 1988. With some minor deviations, this draft features the same allocation principles which were to be used in the Schengen and Dublin Conventions. A German-language version of the Draft agreement is reprinted in Hailbronner, 1989, pp. 228–32. Within the Council of Europe, disagreement on the Draft was considerable—countries of the South feared that the Draft agreement would shift reception burdens onto them (for a description of the various positions taken by states, see Hailbronner, 1989, pp. 29–31). With the benefit of hindsight, one may claim that these fears turned out to be entirely justified, as shown in chapter 8.4.1 below.

Bonn Protocol.[332] The Protocol provided that the rules on the responsibility for asylum applications laid down in Chapter VII SC were no longer applicable with the entry into force of the Dublin Convention.[333]

After the final ratification by the Republic of Ireland, the Dublin Convention entered into force on 1 September 1997. It remains an instrument of international law, outside the EC framework. Precisely as the Schengen Convention has done, the Dublin Convention triggered the conclusion of bilateral agreements between Member States to facilitate its implementation.[334] We shall have reason to revert to the details of the Dublin Convention and of the instruments related to it in a later chapter.[335]

4.2.3.2 *The Draft External Border Convention*

Beyond the Dublin Convention, the Ad-hoc Group on Immigration also elaborated a draft for a convention on the crossing of external borders[336], which mirrored the approach taken in the Schengen Convention. In addition, the draft featured norms on access to the territory of Member States based on humanitarian grounds or on international obligations.[337] Nonetheless, due to a conflict between Spain and the U.K. on the status of Gibraltar, the draft never reached the signature stage.

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[332] Protokoll zu den Konsequenzen des Inkrafttretens des Dubliner Übereinkommens für einige Bestimmungen des Durchführungsübereinkommens zum Schengener Übereinkommen, Bonn, 26 April 1994, BGBl II 1995, pp. 737–8 [hereinafter Bonn Protocol].

[333] See Art. 1 of the Bonn Protocol, stating that provisions in Title II Chapter VII SC as well as the definition of the terms 'application for asylum', 'applicant for asylum' and 'processing of an application for asylum' in Art. 1 SC shall no longer be applicable.

[334] See, e.g., the German-Swedish agreement, determining the modalities of readmission, and the precedence of the Dublin Convention over an older readmission agreement between the two countries: *Överenskommelse med Tyskland angående tillämpningen av konventionen den 15 juni 1990 rörande bestämmandet av den ansvariga staten för prövning av en ansökan om asyl som framställts i en av medlemsstaterna i Europeiska gemenskaperna (SÖ 1997:4)*, Stockholm 19 November and 9 December 1998, SÖ 1998:28.

[335] See chapter 5.2.1.1 below.

[336] Brübach, 1997, pp. 31–2. The Draft Convention has not been published.

[337] J. Ketelsen, 'Die Zuständigkeit der EG für die Schaffung eines EG-Asylrechts nach Maastricht', in K. Barwig, G. Brinkmann, B. Huber, K. Lörcher and C. Schumacher (eds), *Asyl nach der Änderung des Grundgesetzes* (1994, Nomos, Baden-Baden), p. 358.

On 10 December 1993, the Commission presented a proposal based on Article K.3 TEU/Maastricht establishing the Convention on the crossing of the external frontiers of the Member States.[338] The content of this proposal was largely identical to that of the aforementioned draft, but it was never adopted. Now, with the entry into force of the Amsterdam Treaty and the integration of the Schengen *acquis* into the Union framework, the situation has changed. Ireland and the United Kingdom can now easily opt in with regard to the Schengen *acquis*.[339] Hence, the negotiation and conclusion of a treaty largely mirroring the Schengen Convention has become superfluous.

4.2.3.3 *Enter Soft Law: The London Resolutions*

In the year before Maastricht would change the institutional framework of integration, the EPC launched four non-binding instruments in the field of asylum and migration. This step marked the debut of soft law as a steering instrument in this field. The texts dealt with

- manifestly unfounded applications for asylum;
- the concept of safe third countries;
- the concept of safe countries of origin; and
- the expulsion of illegal third country nationals.[340]

They have collectively become known as the 'London resolutions'. The content of these instruments shall be expounded contextually in later chapters.[341]

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[338] European Commission, Proposal for a decision based on Article K.3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States, 10 December 1993, COM(93)684 final.

[339] See chapter 4.2.7 below.

[340] See text accompanying notes 585, 625, and 640 below.

[341] See chapters 6.1, 5.2.2.1 and 7.2.1 below.

4.2.3.4 *Swapping Information: CIREA and CIREFI*

In the same year, the EC Immigration Ministers added an institutional layer to their co-operation by establishing the Centre for Information, Discussion and Exchange on Asylum (henceforth CIREA)[342] and Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (henceforth CIREFI)[343], two fora of information exchange in asylum and migration matters.[344]

CIREFI was assigned to collate intelligence on the crossing of Member States' external borders, inter alia serving as an early warning mechanism for the inflow of undocumented migrants. According to its present mandate, CIREFI shall 'assist the Member States in effectively studying legal immigration preventing illegal immigration and unlawful residence, in effectively combating immigration crime, in better detecting forged documents and in improving expulsion practice'.[345]

CIREA, on the other hand, was tasked with the collection of information on the situation in countries of origin[346], which was well in line with the provision on mutual information exchange enshrined in the Dublin Convention[347] and in the London resolution dealing with safe

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[342] Decision of 11 June 1992 setting up the CIREA (Centre for Information, Discussion and Exchange on Asylum), WGI 1107 (The acronym CIREA stems from the body's French name).

[343] EC Ministers responsible for immigration, Decision of 30 November and 1 December 1992 to establish a Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI). This instrument has not been published in the Official Journal.

[344] Since 1998, information on countries of origin is also collated within the High Level Working Group on Migration and Asylum. See text accompanying note 761 below.

[345] Council of the European Union, Conclusions of 30 November 1994 on the organization and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI), OJ (1996) C 274/50, pp. 50–1, para. 1.

[346] For a comparison of CIREA and other bodies dealing with asylum information within the EU, see Advisory Council on International Affairs, *Asylum Information and the European Union* (1999, AIV, The Hague), focusing inter alia on sources used, the degree of public access and the impact of collected information on asylum procedures.

[347] See Art. 14 DC.

countries of origin.[348] Its information sources are the governments of Member States and the European Commission, and the information collated by it is in principle only accessible to the bodies directly involved in determination procedures at the administrative and ministerial levels.[349] It discharges its tasks by compiling so-called 'joint reports' on the situation in countries of origin, based on guidelines drawn up by the Council.[350]

Although its function is primarily a consultative one, it cannot be excluded that CIREA's assessment of the situation in countries of origin may have a critical impact on the outcome of protection claims in Member States. CIREA documents are largely confidential, which blocks external screening of how it performs its tasks.[351] As sceptics have pointed out, this may put protection seekers and their lawyers at a considerable disadvantage, as they do not know whether and to what extent a decision on an individual protection claim has been affected by information passed on through CIREA.[352] However, it is quite evident that Member States themselves do not consider their common data collection exercises as

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[348] EC Ministers responsible for immigration, Conclusions adopted on 30 November 1992 on countries in which there is generally no serious risk of persecution, WGI 1281 [henceforth SCO Conclusions]. Para. 2 states inter alia that 'Member States have the goal to reaching [sic!] common assessment of certain countries that are of particular interest in this context. To this end, Member States will exchange information within an appropriate framework on any national decisions to consider particular countries as ones in which there is generally no serious risk of persecution'.

European Parliament, *Asylum in the European Union: The 'Safe Country of Origin Principle'* (1997, The European Parliament, Brussels), p. 24. Council of the European Union, Circulation and confidentiality of joint reports on the situation in certain third countries, 20 June 1994, OJ (1996) C 274/43.

[350] Council of the European Union, Guidelines for joint reports on certain third countries, 20 June 1994, OJ (1996) C 274, pp. 52–5.

[351] In a recent case, the ECJ considered a Council decision not to allow public access to certain CIREA documents as unlawful. ECJ, Case T-188/98, *Kuijer v Council of the European Union*, Published April 14, 2000.

[352] This is said to violate the principle of 'equality in arms' in determination procedures. European Parliament, 1997, p. 24. Calls in a European Parliament Resolution to make the work of CIREA more transparent, and to admit non-governmental information to its dissemination system have remained unheard. European Parliament, Resolution on the harmonization within the European Communities of asylum law and policies, A3-0337/92, para. 33.

satisfactory.[353] At best, this may imply that they exercise caution in using such data for decision-making. Nonetheless, as data collected through CIREA is disseminated among domestic authorities, the risk prevails that individual bureaucrats also use them, regardless of doubts at the ministerial level.

4.2.4 Maastricht—Progress through Split Competencies?

Comparing the normative output of the Schengen co-operation with that of the European Political Co-operation at the beginning of the nineties would make it perfectly clear that the EPC simply lagged behind. The EPC had only accomplished 22 binding norms enshrined in the Dublin Convention, while the Schengen Group had produced 142 articles on a broad variety of migration-related topics in the Schengen Convention alone. Within the Schengen Group, the abolishment of border controls was no longer unrealistic. Within the EC at large, it certainly was.

The delegations to the 1991–2 Inter-governmental conference (henceforth IGC) preparing the Treaty of Maastricht were well aware of the limited output of the EPC. The integration process simply needed a tighter structure and a proper institutional framework. What could be accomplished in Maastricht were first steps in that direction: a partial EC competence was created for visa issues, and the brunt of remaining questions were to be handled by the newly-created Union framework. Hence, Maastricht split competencies into a supranational piece under the first pillar and an intergovernmental chunk under the third pillar. This made the geometry of integration more complex. To the separation of Member States into the Schengen avant-garde and a group of back-benching governments, Maastricht would add a separation of asylum and migration issues into EC law and Union law.

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[353] According to a 1998 draft strategy paper by the Austrian Presidency, 'data on overall figures (i.e. for instance, number of asylum seekers or illegal border-crossers apprehended in a particular year)' are missing in spite of joint collection exercises. Council of the European Union, Note from the Presidency to the K.4 Committee, Strategy paper on migration and asylum, 1 July 1998, Doc. No. 9809/98, para. 74. It must be considered a serious shortcoming, if basic data on the number of yearly applications at borders are missing. One may wonder how the Council is to make joint assessment of persecutory risks in third countries, if it is incapable of sorting out what happens at the frontiers of Member States.

The Union competence was laid down and specified in Title VI of the TEU. Under Article K.1, Member States agreed to consider the following items as issues of common interest: (1) asylum policies; (2) rules on the passage of persons of the external borders of Member States, and the exercise of control thereon; (3) immigration policy and policies towards third country nationals as regards their entry and movement, conditions for their residence on the territories of Member States, including family reunification and access to employment, and combating illegal immigration. Precisely as was the case for the whole of the third pillar, these issues would be subject to unanimous decision-making by the Council. According to Article K.3 TEU/Maastricht, relevant measures could be given the form of joint positions, joint actions and conventions. Only the latter offered undisputed force to bind Member States in a legal sense.[354] To be sure, the ECJ has no competence to rule on measures adopted under the third pillar.[355] However, supranationalism was not completely banned from the third pillar: a two-thirds majority was sufficient to decide on measures for carrying out a joint action or a convention.[356]

The Community competence was enshrined in Article 100c TEC, empowering the Community to adopt a list of third countries whose nationals must be in possession of visas when crossing the external borders of the Member States. To wit, the transgression to supranationalism was softened by paragraph (3) of the said provision: until 1 January 1996, unanimity was required in the Council, but from that date on, a decision could be taken by qualified majority. In exercising this competence, the EC could make use of all instruments offered by community law, including those having binding force.

By means of the *passerelle* in Article K.9 TEU[357], measures concerning asylum and immigration could have been moved over to Community competence. The procedure was somewhat less demanding than a treaty

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[354] See chapter 1.4.2.6 above on the legal effects of joint actions and joint positions.

[355] Nonetheless, the Commission may, of course, challenge any third pillar measures infringing EC competence. Moreover, a convention concluded under Art. K.3 (c) TEU/Maastricht may give competence to the ECJ on matters of interpretation and application. As no conventions were concluded under that provision, the ECJ never received that competence.

[356] Art. K.3 (2) (b) and (c) TEU/Maastricht.

[357] The french term *passerelle* (footbridge) is widely used as a metaphor for this norm.

amendment, but required the unanimous decision of the Council and acceptance by national constituencies. The *passerelle* was never used. Instead, the Amsterdam Treaty provided for a gradual shift of asylum and immigration issues to a supranational level.

Until the Amsterdam Treaty entered into force and ended the Maastricht era in 1999, two visa-related instruments were adopted under the first pillar. As they were given the form of regulations, they had binding force. The third pillar did not yield a single convention under the same period. It brought about a number of non-binding texts, of which the majority was given the form of atypical instruments.[358] Therefore, it comes as no surprise that the Maastricht *acquis* was criticized for its inefficiency.[359]

What issues dominated the Maastricht era? In the three areas of asylum, external border control and migration, the latter clearly dominated by the sheer number of adopted instruments, most of which relate to the topics of readmission and return. By virtue of the two visa regulations, the external border issue stands out as the only one that features binding instruments. In the asylum area, two instruments merit special mention, as they directly allude to the legal classification and the standing of individual protection seekers: the 1995 Resolution on Minimum Guarantees in Asylum Procedures and the 1996 Joint Action on the Harmonized Application of the Refugee Definition. Another noteworthy attempt to solve a central problem of harmonized protection was the adoption of a resolution on burden-sharing of displaced persons in 1995. The remaining instruments of the asylum *acquis* refined information collection procedures or provided for the monitoring of adopted instruments.

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[358] In the asylum *acquis*, there is only one Joint Position, which is expressly deprived from any binding force in the domestic domain. Eleven atypical instruments were adopted in the asylum area (of which three stem from the EPC era). In the migration acquis, we find two Joint Actions, and, apart from the named two EC regulations, the astonishing number of 26 atypical instruments (of which one stems from the EPC era). The acquis on external borders features two joint actions, one joint position, two EC regulations and one atypical instrument. In the training area, four joint actions were adopted, of which one related to asylum. See Draft List and Draft List Addendum.

[359] See further R. Bank, 'The Emergent EU Policy on Asylum and Refugees. The New Framework Set by the Treaty of Amsterdam: Landmark or Standstill?', 68 *NJIL* 1 (1999), p. 8.

Among sceptics of the integration process, a recurrent theme in the critical assessment of the Maastricht era was the lack of transparency in decision-making[360] and the absence of judicial scrutiny of adopted instruments.[361] As we shall see below, cautious steps towards greater openness and accountability have been taken since the Maastricht period. However, in spite of their questionable democratic merits, the instruments adopted in that period are still applicable today and play an important role in the enlargement process.

4.2.5 Planning the Economy of Harmonization: Amsterdam

A major reshuffle of competencies, a binding time-table for future integration, the integration of the Schengen *acquis* and a protocol slashing the standing of protection seekers who happen to be Union citizens—these were the key achievements of the Amsterdam IGC. The Treaty of Amsterdam entered into force on 1 May 1999 and presently governs the multilateral co-operation on asylum and immigration in the Union. In the following sub-sections, we shall look into the bundle of competencies and obligations spawned by Amsterdam as well as the geometry of integration under it. Together with the Amsterdam Treaty, a 'Protocol on asylum for nationals of Member States of the European Union' was adopted.[362] This instrument—the so-called Spanish Protocol—shall be dealt with contextually in a later chapter.[363]

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[360] For an elaborate argumentation, see Curtin and Meijers, 1997, pp. 29–42, suggesting that European integration implies a 'reduction of the democratic content of European society' (at p. 42).

[361] The role of the ECJ under the third pillar was a peripheral one. To wit, it had no competencies with regard to the instruments adopted in the asylum and migration area. For an overview, see C. A. Groenendijk, 'The European Court of Justice and the Third Pillar', in B. G. Tahzib, C. A. Groenendijk, M. Vreugdenhill-Klap and J. M. van de Put (eds), *Democracy, Migrants and Police in the European Union: The 1996 IGC and Beyond* (1997, FORUM, Utrecht).

[362] Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 24 [hereinafter Spanish Protocol].

[363] See section 6.2 below.

4.2.5.1 Competencies and Obligations

At first sight, the most striking change brought about by the Amsterdam Treaty is a wholesale transfer of asylum and immigration matters from the third to the first pillar. Although a corset of intergovernmental elements in decision-making has significantly reduced the impact of this transfer, new doors have been opened. The move to the first pillar makes the powerful legislative tools of Article 251 TEC available (that is, regulations, directives and decisions), offering undisputed bindingness, justiciability and, under certain preconditions, even direct effect. Henceforth, the Council may adopt regulations, directives and decisions in a wide array of specified issues relating to asylum, external borders and immigration, and not only in certain visa issues. Furthermore, scrutiny of adopted measures now comes under the ambit of the ECJ.

Technically, this has been achieved by inserting a new Title IV into the TEC. The portal provision of this title, Article 61, delimits the competencies of the Community under this title:

> In order to establish progressively an area of freedom, security and justice, the Council shall adopt:
>
> (a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;
>
> (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63; [...]

The main ideas of the whole title are spelt out here. With the allusion to 'an area of freedom, security and justice', a new telos is introduced or, rather, the 'abolishment of internal border controls' is cloaked in less technocratic apparel. The provision also couples free movement measures to 'flanking measures'. Here, freedom through control—a paradigm running through the history of integration since the mid-eighties—resurfaces. However, the competencies meted out in the provision come with obligations. The Council is assigned to adopt both categories of

measures within five years after the entry into force of the Amsterdam Treaty. This transitory period will end on 1 May 2004. The inclusion of a time-table makes the Amsterdam approach fundamentally different from the one taken in Maastricht: integration is sought not merely by enhancing competencies, but by setting out a binding schedule of achievements and by phasing in supranational decision-making corresponding to this time-table. Title IV suggests that the internal market needs a dose of planned economy.

However, the Community competencies under Title IV are neither all-embracing nor exclusive.[364] Articles 62 and 63 TEC enumerate the issues within EC competence in an exhaustive manner. Thus, there is no comprehensive EC competence in the areas of visa, asylum, immigration and external borders. Those issues not specified in Articles 62 and 63 TEC remain within the competence of the Member States. The enumerative approach is markedly different from the sweeping competencies meted out in the third pillar by the Maastricht Treaty. Moreover, as long as the Community has not made use of its competence, Member States remain free to legislate. The competence of Member States is also retained in areas where the Community has adopted measures setting out minimum standards, as long as domestic legislation accommodates those standards.[365] Finally, Article 64 TEC prescribes that Title IV 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[366]

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[364] K. Hailbronner, 'Die Neuregelung der Bereiche Freier Personenverkehr, Asylrecht und Einwanderung', in W. Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam* (1998, Manz, Vienna), p. 180.

[365] Art. 63 TEC specifies this repartition of competencies further. Measures on immigration policy and measures defining the rights and conditions under which nationals of third countries which are legally resident in one Member State may reside in other Member States do not prevent any Member State from maintaining or introducing national provisions which are compatible with the TEC and with international agreements.

[366] For an argument that Art. 64 (1) TEC does not prejudice the powers of the ECJ under Title IV, see G. Noll and J. Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in P. Alston (ed.), *The European Union and Human Rights* (1999, OUP, Oxford), p. 374.

Which issues does the enumeration embrace? The Council is assigned to adopt the following measures within a period of five years after the entry into force of the Treaty of Amsterdam:

- measures on the crossing of internal borders[367];
- measures on the crossing of the external borders of the Member States, establishing standards and procedures to be followed by Member States in carrying out checks on persons at such borders[368] as well as rules on visas for intended stays of no more than three months[369];
- measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months[370];
- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States[371];
- minimum standards on the reception of asylum seekers in Member States[372];
- minimum standards with respect to the qualification of nationals of third countries as refugees[373];
- minimum standards on procedures in Member States for granting or withdrawing refugee status[374];
- minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection[375]; and

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[367] Art. 62 (1) TEC.

[368] Art. 62 (2) (a) TEC.

[369] Art. 62 (2) (b) TEC.

[370] Art. 62 (3) TEC.

[371] Art. 63 (1) (a) TEC.

[372] Art. 63 (1) (b) TEC.

[373] Art. 63 (1) (c) TEC.

[374] Art. 63 (1) (d) TEC.

[375] Art. 63 (2) (a) TEC.

- measures on illegal immigration and illegal residence, including repatriation of illegal residents.[376]

For the sake of simplicity, we may call these measures 'the obligatory measures' in the following.

The temporal obligation is not merely a political one, but possesses legal character. If the Council fails to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice under Article 232 TEC.[377] However, the drafters could not agree to affix temporal obligations to all of the issues enumerated under Title IV. Strikingly, Article 63 TEC exempts three types of measures from the obligation to legislate within five years:

- measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (burden-sharing)[378];
- measures on the conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion (legal immigration)[379]; and
- measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States (mobility rights for legally present aliens).[380]

In doing so, the drafters created a hierarchy within the competencies of Article 63 TEC, dividing measures into an obligatory and a facultative group. To be sure, measures adopted earlier set the parameters for those adopted later. The consequences of the exemption of burden-sharing from the list of obligatory measures shall be discussed extensively in a specific section of this work.[381]

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[376] Art. 63 (3) (b) TEC.

[377] Hailbronner, 1998, p. 182.

[378] Art. 63 (2) (b) TEC.

[379] Art. 63 (3) (a) TEC.

[380] Art. 63 (4) TEC.

[381] See chapter 8.3.3 below.

4.2.5.2 *Decision Making under Title IV*

How shall the Community exercise the competencies enumerated in Articles 62 and 63 TEC? Torn between demands of increased supranationality and the insistence of certain Member States on veto power, the Amsterdam drafters resorted to piecemeal engineering. To start with, the hopes and expectations of supranationalists were thwarted: the move to the first pillar did not imply automatic access to majority vote. Rather, Title IV relies on the gradual phasing in of supranational decision making.

Title IV offers two distinct decision-making procedures. One turns on unanimity voting in the Council and is applicable to most of the measures enumerated in Articles 62 and 63 TEC. The other is based on a vote by qualified majority in the Council and applies to certain measures on visas.

The unanimity procedure comes in two varieties—one applicable before 1 May 2004 and another thereafter. Before 1 May 2004, the procedure envisages that the Council take a unanimous decision on proposals from the Commission or on initiative by a Member State and after consultation of the European Parliament.[382] One should note the overlapping time-frames: this predominantly intergovernmental procedure will be applied to the original adoption of the obligatory measures under the five-year period. Thus, the Member States have secured for themselves a strong position for determining the content of the first cohort of Community acts. This is no different from the intergovernmental procedure under the third pillar of the Maastricht era.

After 1 May 2004, and without any further decision, the Commission acquires a monopoly right of initiative. From that date on, the Council shall act on proposals from the Commission, and the Commission shall examine any request made by a Member State that it submit a proposal to the Council.[383] Still, under both varieties of the unanimity procedure, the European Parliament has no power to amend or to veto a text.

Continuing the tradition inaugurated by Article K.9 TEU/Maastricht, Title IV also features a new *passerelle*. Article 67 (2) TEC provides for an optional transition to the co-decision procedure after 1 May 2004: '[T]he Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas

[382] Art. 67 (1) TEC.

[383] Art. 67 (2) TEC.

covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice'. This provision opens an avenue towards expanded supranationalism, but it remains a non-binding offer. Although it uses the verb 'shall', there is no time set out—or, for that matter, implied—for the accomplishment of this obligation.[384] Hence, should the Council remain passive, it would be hard to argue an infringement of this obligation under Article 232 TEC. In practice, if the Council does not wish to introduce a transition to the co-decision procedure, it simply refrains from taking that decision. This would imply that unanimity voting would continue to dominate this area.[385] Should the Council decide to make use of the transitory offer, it remains free to choose which issues to transfer; after all, the transitory decision may refer to 'all or parts of the areas' covered by Title IV.

The qualified majority procedure applies to certain measures regulating visas for intended stays of no more than three months. One group of norms is immediately placed under the qualified majority procedure, while another group shall be transferred to it on 1 May 2004. First, for those issues which had been located in the first pillar already during the Maastricht era, the situation remains unchanged: such measures are adopted by the Council acting by a qualified majority on a proposal from the Commission and then consulting the European Parliament.[386] This procedure applies to the adoption of a list of third countries whose nationals must be in possession of visas when crossing the external borders (the so-called negative list)[387] and of a uniform format for visas.[388] To those issues, the Treaty of Amsterdam added another, namely the

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[384] This assessment is not altered by the non-binding Declaration on Article 73o of the Treaty establishing the European Community (Declaration No. 21 annexed to the Final Act of the Inter-Governmental Conference): 'The Conference agrees that the Council will examine the elements of the decision referred to in Article 73o(2), second indent, of the Treaty establishing the European Community before the end of the five year period referred to in article 73o with a view to taking and applying this decision immediately after the end of that period.' In the course of consolidation of the Treaties, Art. 73o was renumbered to Article 67.

[385] For an elaborated argument to this effect, see A. Weber, 'Möglichkeiten und Grenzen europäischer Asylrechtsharmonisierung vor und nach Amsterdam', 18 *ZAR* 4 (1998), p. 148.

[386] Art. 67 (3) TEC.

[387] Art. 62 (2) (b) (i) TEC.

[388] Art. 62 (2) (b) (iii) TEC.

adoption of a list of third countries whose nationals are exempt from a visa requirement when crossing external borders (the so-called positive list).[389]

Second, two further visa issues are maintained under the unanimity procedure until 1 May 2004, to be automatically transferred to the qualified majority procedure under Article 251 TEC afterwards. Those issues cover measures on the procedures and conditions for issuing visas by Member States and on rules on a uniform visa.[390]

Taking a birds-eye view on Title IV, it is fair to say that the veto principle still dominates this regulatory area. In effect, the solution chosen in Article 67 TEC is structurally identical to the old '*passerelle*' in Article K.7 TEU/Maastricht and the question imposes itself, whether any substantial progress has been attained. During the Amsterdam IGC, neither Germany nor the U.K. were willing to cede the unanimity trump in numerous areas.[391] Thus, the gains for supranationalism consisted of partial advances. The price to be paid for them was a confusing multitude of decision-making procedures.

4.2.5.3 The Role of the ECJ

The Amsterdam Treaty has given the ECJ competence of interpretation in the areas circumscribed in Title IV TEC. This must be counted among the most important supranationalist onslaughts in the field. It opens measures on asylum, external borders and immigration to judicial review, and it provides for the resolution of interpretatory conflicts, both on the supranational and the national level. In principle, the ECJ may be seized and act through the procedures laid down for it in the TEC[392], with two important modifications, of which one is relevant in the present

[389] Art. 62 (2) (b) (i) TEC.

[390] Art. 67 (4) TEC compared to Art. 62 (2) (b) (ii) and (iv) TEC.

[391] Hailbronner, 1998, p. 191.

[392] The relevant norms can be found in Part Five, Title I, Chapter 1, Section 4 TEC.

context.[393] The threshold for seizing the ECJ for purposes of interpretation has been elevated. Article 68 (1) TEC expounds when a referral to the ECJ shall take place:

> Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

The difference with respect to the standard procedure under Article 234 TEC is obvious. Not any court, but only such courts, against whose decisions there is no judicial remedy in the domestic system, may refer a question to the ECJ. In contrast to the procedure under Article 234 TEC, that Court is not under an unqualified obligation to make a referral, but shall do so 'if it considers that a decision on the question is necessary to enable it to give judgment'. This opens a margin of discretion to the relevant domestic court, tempting some commentators to conclude that referral as such is facultative.[394] As Gialdino has pointed out, such an interpretation would, inter alia, run counter to the wording and context of the very provision.[395] After all, the drafters opted for the term 'shall' and against inclusion of the phrase 'may request', which was used when regulating the competence of the ECJ in Article 35 (3) TEU. Therefore, the margin of appreciation under Article 68 (1) TEC is limited: where a relevant court has established that it is confronted with a question of

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[393] Following Art. 68 (2) TEC, the ECJ does not have jurisdiction to rule on any measure or decision on the crossing of internal borders under Art. 62 (1) TEC relating to the maintenance of law and order and the safeguarding of internal security. This exception is of no further importance for the areas of asylum, external borders and immigration. Accord: Bank, 1999, p. 25, Noll and Vedsted-Hansen, 1999, p. 374. See also Hailbronner, 1998, p. 192.

[394] For an account of such positions, see C. C. Gialdino, 'Schengen et le troisième pilier: le contrôle juridictionnel organisé par le traité d'Amsterdam', 1998 *Revue du Marché Unique Européen* 2 (1998), pp.105–6.

[395] See Gialdino, 1998, pp. 106–7, adducing further arguments for an obligatory referral.

interpretation under Article 68 (1) TEC, it is under an obligation to refer the case to the ECJ.[396]

An innovation for the whole area of EC law is the competence of the ECJ to give advisory rulings on interpretative questions under Title IV. According to Article 68 (3) TEC,

> [t]he Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

Together with the ECJ competence in contentious cases, this mechanism could very well contribute to a more harmonious interpretation of Title IV and the measures conceived under it. However, the limitative moments built into judicial control must be seen against the background of the substantially augmented competencies of the EC and the availability of binding instruments under Article 249 TEC. This accumulated empowerment is not matched by an equivalent empowerment for the ECJ. Therefore, in the grand total, Title IV amounts to a weakening of the individual's legal standing.[397]

After the transitory period of five years, the Council may adapt the rules on the competence of the ECJ. As earlier mentioned, Article 67 (2) TEC states that

> the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

Thus, provided that the Council decides to move all or parts of the relevant areas over to the co-decision procedure after the transitory period, this decision must also provide for a congruent adaptation of the ECJ competencies. However, the quoted provision does not prescribe the precise nature or extent of such an adaptation.

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[396] Gialdino, 1998, p. 106.

[397] Accord: Gialdino, 1998, p. 104; see also Noll and Vedsted-Hansen, 1999, p. 373.

4.2.5.4 *The Position of Denmark, Ireland and the U.K.*

In the course of the Amsterdam negotiations, Denmark, Ireland and the U.K. were not prepared to accept a further communitarization in the area of asylum, external borders and immigration.[398] However, none of these countries opposed movement of these issues to the first pillar by the remaining twelve Member States, provided that the rights and obligations of the three outsiders remained untouched by such a move. Thus, the communitarization described earlier has been achieved not for all Member States, but only among twelve of them, creating a 'variable geometry' of integration. The practical arrangements have been laid down in the Protocol on the Position of the United Kingdom and Ireland[399] and in the Protocol on the Position of Denmark.[400] Principally, all three sceptics are not participating in the adoption of instruments under Title IV TEC.[401] Therefore, adopted measures or interpretative decisions of the ECJ in this area are not binding, applicable, or otherwise entitling or obliging upon the three states.[402] Protocol No. 4 lays down an opt-in mechanism for Ireland and the U.K., allowing each of these states, or both, to participate in the elaboration, adoption and application of measures under Title IV TEC.[403] Such a mechanism does not exist for Denmark.[404]

Thus, on issues relating to Title IV TEC, the Member States are not a homogeneous group. This has consequences. First, it entails detailed rules

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[398] However, Denmark has to co-operate on those visa issues already within EC competence in the Maastricht era (measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States and measures relating to a uniform format for visas). Prot. 7, Art. 4.

[399] Protocol on the Position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 15 [hereinafter Irish-British Protocol].

[400] Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 19 [hereinafter Danish Protocol].

[401] Irish-British Protocol, Art. 1, Danish Protocol, Art. 1.

[402] Irish-British Protocol, Art. 2, Danish Protocol, Art. 2.

[403] Irish-British Protocol, Art. 3 (1).

[404] However, Art. 7 of the Danish Protocol provides for a comprehensive opt-in to co-operation within Title IV: 'At any time Denmark may, in accordance with its constitutional requirements, inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the European Union.'

on the weighing of voices in the Council and on the financing of measures and their administration.[405] Second, for each measure adopted under Title IV TEC, the geographical scope of application must be established individually, taking into account any opt-in by the three outsiders.

4.2.6 The Integration of the Schengen *acquis*

Bringing the Schengen avant-garde back into the Union mainstream was one of the more ambitious aspirations of the Amsterdam IGC. The task was not an easy one, and entailed an extraordinarily complex normative apparatus, involving both the third and the first pillar, and catering for the specific situation of Denmark, Ireland and the U.K. With Iceland and Norway, two countries outside the Union had to be involved to secure the viability of the Nordic Passport Union. There is no need to include an exhaustive presentation of this integrative effort here[406]—it is sufficient to examine those issues having a bearing on asylum and immigration issues.

The integration of the Schengen *acquis* is provided for in the Schengen Protocol[407] attached to the treaty of Amsterdam, to be regarded as an integral part of it, and binding under international law. Simultaneously with the entry into force of the Amsterdam Treaty, the Schengen *acquis* has become applicable among the Thirteen, and the Council has substituted itself for the Schengen Executive Committee.[408]

The Schengen *acquis* consists of the following norms:

- The Schengen Agreement;
- The Schengen Convention, with related Final Act and common declarations;
- The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy, Spain,

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[405] For a detailed presentation, see K. Hailbronner and C. Thiery, 'Der neue Titel im EGV: Freier Personenverkehr, Asylrecht und Einwanderung', 1998 *EuR* 5 (1998), pp. 597–602.

[406] See J. de Zwaan, 'Opting Out and Opting In: Problems and Practical Arrangements under the Schengen Agreement', 1 *The Cambridge Yearbook of European Legal Studies* (1998).

[407] See note 326 above.

[408] Schengen Protocol, Art. 2 (1).

Portugal, Greece, Austria, Denmark, Finland and Sweden with related Final Acts and declarations; and

- Decisions and declarations adopted by the Schengen Executive Committee, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers.

The Council, acting unanimously, shall determine, in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions that constitute the Schengen *acquis*.[409] As the norms pertaining to the Schengen *acquis* stretch over a broad array of issues, there are two choices. Either such provisions or decisions can be based on Title IV TEC or, failing that, on the third pillar. Norms allocated to the first pillar are EC law, while those allocated to the third pillar are norms of international law.[410] So far, a number of Schengen instruments have been transposed.[411]

The allocation of Schengen norms among the first and third pillar also impacts the role of the ECJ. The Schengen Protocol states: 'With regard to such provisions and decisions and in accordance with that determination, the Court of Justice of the European Communities shall exercise the powers conferred upon it by the relevant applicable provisions of the Treaties'.[412]

It merits recalling that the competencies of the ECJ are much broader under the first pillar (Article 68 TEC) than they are under the third (Article 35 TEU). In any event, the Schengen Protocol states that the ECJ shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security.[413] This exception is much broader than the one introduced in Article 68 (2) TEC, as the latter solely encompasses measures relating to the abolishment of checks at internal borders. This means that the judicial

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[409] Schengen Protocol, Art. 2 (1). This provision also prescribes that, as long as the measures referred to above have not been taken, the provisions or decisions that constitute the Schengen *acquis* shall be regarded as acts based on Title VI TEU. On the exact delimitation of the Schengen acquis, see Hailbronner and Thiery, 1998, pp. 607–8.

[410] Hailbronner and Thiery, 1998, p. 608.

[411] See OJ (1999) L 119/49, L 176/1, L176/17, L 176/31, L 176/34, L 176/35.

[412] Schengen Protocol, Art. 2 (1).

[413] Schengen Protocol, Art. 2 (1).

control of Schengen norms allocated to the first pillar is less dense than that of other norms under the same pillar.

Beyond the mere qualification of the existing Schengen *acquis*, the institutions are competent to adopt further measures within its scope. Such elaboration is faced with the same choice, depending on the subject matter; relevant measures shall be adopted either under the first or the third pillar.[414] To be sure, the aforementioned limitation of the Court's competence with regard to law and order as well as internal security[415] does not apply to such norms.

4.2.7 The Variable Geometry of Integration

At this stage, a rather complex picture of co-operation has emerged, stretching over the first and the third pillar as well as over international law beyond the institutional framework of the Union. Before we proceed, it should be sufficient to briefly reiterate which regime applies to each single country involved in the co-operation. To facilitate comparison, the most essential features of the regime are presented in Table 1.

For the Schengen Group, the situation is relatively simple. With the exception of Denmark, all Schengen states will participate in the co-operation under Title IV TEC without any reservations.

Denmark is not participating in the co-operation under Title IV TEC, save for measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas.[416] Denmark will apply the parts of the Schengen *acquis* that were adopted before the Treaty of Amsterdam entered into force. However, Denmark is not participating in the further development of the Schengen *acquis* under Title IV TEC. By means of an opt-in procedure, Denmark can accept to be bound by a measure developing the Schengen *acquis*. This creates an obligation under international law between Denmark and the

[414] Schengen Protocol, Art. 5 (1).

[415] See text accompanying note 413.

[416] Danish Protocol, Art. 4.

other Schengen countries.[417] There is no such opt-in procedure for other measures adopted under Title IV TEC.[418]

The United Kingdom does not participate in the co-operation of Member States under Title IV TEC, nor is it member in the Schengen Group. However, the United Kingdom can avail itself of an opt-in procedure, allowing it to accept single measures adopted under Title IV TEC, whether or not they build on the Schengen *acquis*. It can also accept any of the instruments and decisions contained in the Schengen *acquis* by the same procedure.

In order to preserve the 'Common Travel Area' between both countries, Ireland has decided to take the same position as the United Kingdom. However, Ireland has set a lower threshold for entering co-operation under Title IV TEC. It may notify the President of the Council in writing that it no longer wishes to be covered by the terms of Protocol No. 4. In that case, the normal treaty provisions will apply to Ireland.[419]

To ensure the continued functionality of the Nordic Passport Union and the free movement of persons realized therein, Norway and Iceland have associated themselves with the Schengen co-operation. To that effect, an association agreement was concluded between both countries and the Schengen states on 19 December 1996.[420] After the integration of the Schengen *acquis* into the Union framework, a new agreement between the named states, which shall replace the 1996 agreement[421], was signed in 1999. The rationale of this agreement is to extend the application of

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[417] Danish Protocol, Art. 5 (1).

[418] But see note 404 above.

[419] Irish-British Protocol, Art. 8.

[420] Co-operation Agreement between the Kingdom of Belgium, the French Republic, the Federal Republic of Germany, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Italian Republic, the Kingdom of Spain, the Portuguese Republic, the Hellenic Republic, the Republic of Austria, the Kingdom of Denmark, the Republic of Finland, the Kingdom of Sweden, Contracting Parties to the Schengen Agreement and the Schengen Convention, and the Republic of Iceland and the Kingdom of Norway on the abolition of controls on persons at their common borders, signed in Luxembourg on 19 December 1996.

[421] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis, signed on 17 May 1999 [hereinafter 1999 Agreement].

norms pertaining to the law of the European Union and related to the abolishment of internal border control to Iceland and Norway:

- The existing Schengen *acquis* is implemented and applied by Iceland and Norway.[422]
- Certain existing EC acts are implemented and applied by Iceland and Norway, inter alia the Visa Regulation.[423]
- Future acts and measures by the EU amending or building upon the aforementioned norms shall be accepted, implemented and applied by Iceland and Norway.[424]
- An agreement on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in any of the Member States or in Iceland or Norway should be concluded before the existing *acquis* enters into force in Iceland and Norway.[425] This agreement would fulfil the same function as is fulfilled by the Dublin Convention among Member States.

The adoption of new acts or measures is explicitly reserved to the competent institutions of the European Union.[426] Such acts have to be formally accepted by Iceland and Norway, and a specific procedure has been laid down in the agreement.[427] However, non-acceptance of any of these measures may lead to the wholesale termination of the agreement between the non-accepting party and the other parties.[428] In other words, the costs of non-acceptance are very high. To mitigate the transfer of sovereign powers effectuated under the agreement, a mixed commission

[422] Art. 2 (1) 1999 Agreement. The relevant norms are listed in Annex A.

[423] Art. 2 (2) 1999 Agreement. The relevant norms are listed in Annex B.

[424] Art. 2 (3) 1999 Agreement. This provision covers all norms listed in Annex A and B.

[425] Art. 7 1999 Agreement.

[426] Art. 8 (1) 1999 Agreement.

[427] Art. 8 (2) 1999 Agreement.

[428] Art. 8 (4) 1999 Agreement.

has been established to operate as a consultation body in this co-operation.[429]

Furthermore, as Ireland and the U.K. may opt into all or parts of the Schengen *acquis*, it has become necessary to regulate the legal relationship of those countries with Norway and Iceland. Based on the Schengen Protocol, a separate agreement has been drawn up, specifying the rights and obligations between the named four countries.[430]

[429] See Art. 3 of the 1999 Agreement. The working procedure of the mixed committee is laid down in Decision No. 1/1999 of the EU/Iceland and Norway Mixed Committee established by the agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association in the implementation, application and development of the Schengen acquis of 29 June 1999 adopting its Rules of Procedure, 29 June 1999, OJ (1999) C 211, pp. 9–11.

[430] See Schengen Protocol, Art. 6 (2). The agreement is entitled as follows: Accord conclu entre le Conseil de l'Union Europeenne et la Republique d'Islande et le Royaume de Norvège sur l'etablissement des droits et obligations entre l'Irlande et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, d'une part, et la Republique d'Islande et le Royaume de Norvege, d'autre part, dans les domaines de l'acquis de Schengen qui s'appliquent à ces Etats. It is attached to the following Council decision: Decision du Conseil relative à la conclusion de l'accord avec la République d'Islande et le Royaume de Norvège sur l'établissement des droits et obligations entre l'Irlande et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, d'une part, et la République d'Islande et le Royaume de Norvège, d'autre part, dans les domaines de l'acquis de Schengen qui s'appliquent à ces Etats, 25/06/99, Doc. Nos 9551/99 JAI 54, 9357/99 JAI 50.

	Denmark	Ireland	United Kingdom	Other Member States	Norway and Iceland
Participating in the adoption of measures under Title IV TEC	**No**	**No** but opt-in possible (Prot.4, Art.3)	**No** but opt-in possible (Prot.4, Art.3)	**Yes**	**No** save for consul-tations
Applying measures under Title IV TEC	**No** exception of certain visa-related measures	**No** but opt-in possible (Prot.4, Art.4)	**No** but opt-in possible (Prot.4, Art. 4)	**Yes**	**No** exception of five enumerated acts
Applying the pre-Amsterdam Schengen acquis	**Yes**	**No** but opt-in possible (Schengen Protocol, Art. 4)	**No** but opt-in possible (Schengen Protocol, Art. 4)	**Yes**	**Yes**
Decision-making power in the development of the Schengen acquis under Title IV TEC	**No**	**No**	**No**	**Yes**	**No**
Applying the post-Amsterdam Schengen acquis	**No** but opt-in possible (Prot. 5, Art. 5)	**No**	**No**	**Yes**	Upon acceptance of each new measure

Table 1: The variable geometry of integration under Title IV TEC and within the Schengen co-operation

4.2.8 Enlarging the Union

On 30 March 1998, formal negotiations on accession were opened with the thirteen states applying for membership in the European Union. Of these, Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia are considered to possess the best prospects for early membership. As the accession process is most advanced with respect to these states, it is reasonable to touch upon their position under the *acquis communautaire* and under the international law relating to extraterritorial protection in the course of this work.[431]

The enlargement of the European Union results in a shift of the Union's external borders. Given that intra-Union freedom of movement is one of the central features of the single market, this shift needs to be managed carefully if Member States wish to avoid losing their capacity to control migration. But enlargement is not solely about border control, it is also about the extension of protection capacities to candidate countries. The advantages are obvious. At best, enlargement may imply a form of burden-sharing for Member States, and lead to an expeditious improvement of extraterritorial protection available in candidate countries. Yet the risks are equally obvious. The accession process may also degenerate to burden-shifting eastwards and the export of protection standards could 'replicate EU failings'[432] or remain a dead letter.

Therefore, it must be deemed reasonable that the adaptation of domestic migration and asylum policies in the candidate countries has been accorded an important role in the pre-accession phase.[433] Exporting

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[431] In Parts III and IV of this work, the named first wave candidate countries will be included into the scope of presentation.

[432] ECRE, *ECRE Position on the Enlargement of the European Union in Relation to Asylum*, September 1998, Conclusions and Recommendations, para. 3.

[433] For an excellent analysis of the gains and risks of enlargement in the area of asylum, see R. Byrne, 'Future Perspectives: Accession and Asylum in an Expanded European Union', in R. Byrne, G. Noll, and J. Vedsted-Hansen, *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (2000), whose main point is that the deficiencies of the acquis will be amplified when implemented by candidate countries, and that the experience of protection in the East should inspire the reformulation of refugee policy in the West. For a political science perspective, see S. Lavenex, *Safe third countries. Extending EU asylum and immigration policies to Central and Eastern Europe* (1999, Central European University Press, Budapest). For a brief overview, based mainly on a statistical analysis, see IOM/ICMPD, *Migration in Central and Eastern Europe: 1999 Review* (1999, IOM, Geneva). See also UNHCR, *3rd International Symposium on the*

the *acquis* related to protection is not unproblematic, though. After all, from the perspective of the candidate countries, the accession process is about being integrated and not necessarily about integrating 'the other'. In other words, the prime goal of the candidate countries is to receive membership, rather than to extend membership.

The criteria adopted by the 1993 European Council meeting in Copenhagen[434] constitute the basis for the accession process. These criteria reflect the tension between universal goods and particular interests underlying enlargement. On the universalist side, membership in the Union requires that the candidate country has achieved stability of institutions guaranteeing inter alia human rights.[435] Needless to say, this includes the protection of certain groups of aliens, including refugees. On the particularist side, 'the ability to take on the obligations of membership' is one of the preconditions for accession.[436] Among these obligations, we find the duty to guard the external border of the Union.

As pointed out by the Council upon the opening of accession negotiations with six of the candidates, membership obligations comprise the *acquis* as it evolves; future conventions and instruments, as well as the agreed points of instruments still under negotiation, will have to be taken into account.[437] The candidate countries will have to implement all instruments belonging to the EU *acquis* according to their legal nature.[438] The same applies to the Schengen *acquis* and further measures taken by the institutions within its scope.[439] In its basic document underlying the

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Protection of Refugees in Central Europe, 23-25th April, Budapest. Report and Proceedings (1997, UNHCR, Geneva); K. Hakola (ed.), *Migration and Refugee Policy on the Eastern Border of the European Union* (1998, University of Jyväskylä, Jyväskylä) and M. King, 'The Impact of Western European Border Policies on the Control of Refugees in Eastern and Central Europe', in V. Robinson (ed.), *Migration and Public Policy* (1999, Edward Elgar Publishing Ltd, Cheltenham).

[434] Conclusions of the Presidency (Copenhagen Summit Conclusions) reprinted in H. Bull, European Communities, June 1993, points 1.1–4.1.

[435] Ibid.

[436] Ibid.

[437] Draft List, p. 2, para. 4.

[438] The Draft List merely states that the various elements of the *acquis* do not all have the same legal status. The list itself contains no indication as to the extent to which a particular instrument is legally binding. 'This might be dealt with in explaining the "acquis" to the candidate countries during the screening process.' Draft List, p. 5, para. 12.

[439] Schengen Protocol, Art. 8.

Union's enlargement strategy, dubbed Agenda 2000[440], the Commission proposed bringing together the different forms of pre-accession support provided by the Union within a single framework, the Accession Partnerships. At its meeting on 12–13 December 1997, the Luxembourg European Council endorsed the Accession Partnership as a new instrument destined to be the key feature of the enhanced pre-accession strategy.[441] As a complement to the Accession Partnership, each candidate country has been invited to adopt a National Programme for the Adoption of the *acquis*.

Since the opening of negotiations, the EU institutions and single Member States have embarked on large-scale monitoring exercises, training programmes and resource transfers eastwards.[442] By means of a dedicated Joint Action, the Council has established a group of experts, which is tasked with the 'collective evaluation' of progress made with the implementation of the *acquis* in the area of justice and home affairs.[443] Moreover, the Luxembourg European Council has assigned the European Commission the task of compiling so-called regular reports analyzing the progress made in the capacity of each candidate country to implement the *acquis*.

On the ground, the export of the asylum and migration *acquis* has been largely channelled through the Union-funded PHARE Horizontal Programme, whose aim is to explain the content of the *acquis* to candidates and to identify gaps in their protection systems. This programme has provided for extensive training and information events, disseminating knowledge of the asylum *acquis* in the administrations of candidate countries. On the basis of the assessment of each candidate country's capacity to implement the acquis, National Action Plans are

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[440] European Commission, Agenda 2000: For a stronger and wider Europe, 15 July 1997, COM (97) 2000 final/1.

[441] Luxembourg European Council, Presidency Conclusions, 12 December 1997, Doc. No. SN 400/97, paras 14–6.

[442] For an overview of the enlargement process from an institutional perspective, see O. Seiffarth, 'The Enlargement Process and JHA Co-operation', in P. J. van Krieken (ed.), *The Asylum Acquis Handbook* (2000, T. M. C. Asser Press, The Hague).

[443] Council of the European Union, Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the acquis of the European Union in the field of Justice and Home Affairs, OJ (1998) L 191, pp. 8–9.

drawn up, along which the candidate countries and international actors proceed in order to fill the remaining gaps. To that end, they may receive assistance through other PHARE programmes.

Taking a step back, two aspects of the accession process are particularly striking. The first is the hardening of soft law in the accession process, the second the selling of an outdated product to the cousins in the East. While the present Member States are far from having implemented the asylum *acquis* themselves, they demand strict compliance of the queuing non-members.[444] It is something of a paradox that the rules of the club apply first and foremost to outsiders. What is soft law in the West, may very well take on a harder edge in the East, as Union membership is conditional on its implementation. And, while the shortcomings of the acquis have been identified and become the subject of an overhaul *within* the Union, the very instruments carrying those defects are being exported to candidate countries.[445]

4.3 Conclusion

This chapter began by depicting the dynamics of flight to and within Europe, and continued by tracking integration in the field of immigration and asylum law. Now, having sifted through recent crises as well as the major institutional developments on the way from Schengen to Amsterdam, it might be asked whether it makes sense at all to subsume this process under the heading of *integration*?

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[444] The issue is predominantly a political one. The non-compliance of Member States with the non-binding parts of the *acquis* is regularly documented in monitoring exercises (see e.g. note 608 below). There is no sufficient political leverage to produce greater compliance within the Union. However, this leverage exists with regard to the queuing candidate countries, for which the soft law of the acquis becomes de facto binding through its conditional linkage to future Union membership.

[445] 'While the accession process is driving the replication of the asylum acquis, the Commission driven reform underway is acknowledging some of the endemic problems in the asylum practices that the European Union has already exported eastward.' Byrne, 2000, Section II, in fine. It is quite noteworthy that UNHCR is involved in this transfer within the framework of the PHARE Horizontal Programme, given that it has criticized pivotal elements of the acquis. The Office must have considered that the opportunity to influence information transfer outweighs the risks inherent in its implicit endorsement of the *acquis*.

Let us recapitulate. The real world layer was dominated by imploding state control in the East. Borders became permeable again—sometimes to a degree with which liberal governments in the West were quite uncomfortable—and power struggles filling the void left by totalitarianism led to large-scale displacement within Europe. Both issues were more than single Member States could manage unilaterally in the long run. Thus, theoretically, the changing reality of flight and displacement offered good reasons for an advance of multilateralism in the institutional world and, consequently, a boost for regional integration.

Did the institutional layer respond to this challenge? Does it really make sense to speak of European *integration* with regard to asylum and immigration? The scale of possible responses stretches from outright affirmation to prudent scepticism to determined denial.

For those wishing to answer in the affirmative, good arguments are on offer. In little more than a decade, both issues have moved from a fringe position to the centre, from ad-hoc co-operation outside EC institutions to the first pillar of the Union. In an unprecedented expansion, the number of fora seized with matters related to asylum and migration has multiplied throughout the period. The avant-garde project of Schengen, and its ensuing mainstreaming into the Union framework, is probably the best illustration of these integrative dynamics. Both the Schengen and Dublin Conventions boasted their own executive committees, and co-operation involved an increasing number of administrative echelons in the Member States. There is no precedent in Europe or in other regions of the world with regard to the diversity and depth of co-operation on issues related to flight and migration. The importance of the *acquis* thus elaborated was further boosted through the enlargement process, which de facto exported a whole regime of protective norms to Central and Eastern European candidate countries.

A prudent sceptic would accept such arguments but point to the side effects of this rapid development. True enough, intergovernmental forms of co-operation largely replaced the prevailing atmosphere of unilateralism, and such co-operation was later channelled into a supranational setting by the Amsterdam Treaty. However, a price had to be paid. From the outset, integration was bought by sacrificing transparency, accountability and judicial control, which did not follow the shift to the intergovernmental level. The move to the first pillar has not compensated

for these shortfalls, and integration remains stuck with a considerable legitimacy deficit.[446]

Finally, a radical sceptic would find at least two reasons to support a negative response. First, in more than a decade, the normative output in both fields has been limited in substance. As the following chapter will show, few instruments possess the character of hard law. In addition, many non-binding instruments are vaguely phrased or make deference to domestic law. Second, the term 'integration' suggests a movement towards unity. In the area of protection, there is little evidence in favour, and much in disfavour.[447] Domestic legislation still differs to a great extent, and protection burdens are concentrated rather than shared. In spite of ever more elaborate supranational mechanisms, there are good reasons to believe that unilateralism will retain an important role in the shaping of practice. The persistence of the veto in decision-making under Title IV is probably the most prominent of these reasons.

To elaborate the multifaceted image of integration further, we need to zoom in on the norms developed on the way from Schengen to

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[446] 'As long as the EP is not given a more powerful position in the procedure, its role can hardly be described as "controlling" the legislative process.' Bank, 1999, p. 24. However, Bank acknowledges that the transfer from the third to the first pillar made important parliamentary control mechanisms accessible—such as the right to set up Committees of Inquiry, to examine petitions, and the processing of claims by the Ombudsman. Ibid. See also Noll and Vedsted-Hansen, 1999, pp. 372–4, considering that Amsterdam has brought limited progress in the area of transparency and accountability, whereas the degree of judicial control provided for under the Treaty of Amsterdam is less satisfactory.

[447] However, even the radical sceptic has to acknowledge that substantial integration is taking place in the area of deflective measures: as we will see below, visa requirements are harmonised to a large extent, and the allocation of responsibility for processing asylum claims is governed by common rules.

Amsterdam and beyond. In the remaining chapters of Part II, we shall look into the normative world of the *acquis* as it stands today. The perspective of the protection seeker informs the order of presentation. First, we shall expound norms regulating access to territory (chapter 5); second, we will present norms regulating access to full-fledged procedures (chapter 6); and third, we shall proceed by expanding on those norms governing access to protection (chapter 7). The fourth and last step shall be an exploration of the issue of burden-sharing in the EU context (chapter 8).

5 Access to Territory under the EU acquis

WHICH NORMS ADOPTED within the framework of European integration have a bearing on the ability of protection seekers to gain access to a Member State's territory? As explained earlier, the multitude of existing norms can be divided into two groups. The first group comprises pre-entry measures, and consists of the EU visa acquis as well as norms complementing it. The second group comprises post-entry measures steering the allocation to states within and outside the Union, as well as norms complementing them. Each shall be dealt with in turn below.

5.1 Pre-entry Measures

Pre-entry measures affect the possibility of protection seekers to reach the territory of potential host states. Amongst these measures, visa requirements are the prime tool of control. However, to improve their efficiency, states have devised a number of complementary norms, which shall also be dealt with in the present section. They comprise carrier sanctions and measures countering human smuggling as well as pre-frontier training and assistance programmes.

5.1.1 The Harmonisation of Visa Regimes

Visa harmonisation involves formal and material issues. On the material side, the harmonisation of visa requirements operated by single Member States occupies an important position. A further step towards material harmonisation would be to agree on conditions for the issuing of visas. The formal side stretches over procedural and technical co-operation, e.g. modes of sharing information on applicants or the standardisation of visa documents. As we are seized with the impact of visa policies on the seeking of extraterritorial protection, the main focus of this subsection shall be on a particular material aspect, namely the harmonisation of visa requirements. Beyond that, other forms of material co-operation as well as procedural and technical co-ordination shall be covered to the extent they touch upon the position of protection seekers.

Why is it so important to harmonise visa requirements in an area without internal border controls? Let us explain by means of a simple example. A is a citizen of country X. She wishes to go to Germany, where members of her family are staying. For citizens of X, a visa is requested to enter Germany. She applies for a visa at the German embassy in Sarajevo, but her application is turned down. Subsequently, A finds out that Italy does not require a visa from citizens of X. Hence, A goes to Italy. Once there, she takes advantage of the abolition of internal border controls among the Schengen states, and travels on to Germany. In an area without internal border controls, divergences in visa requirements undermine the efficiency of entry control. Therefore, 'the operation by Member States of visa controls on the movement of third-country nationals is, in practical terms, irreconcilable with the complete abolition of border controls'.[448] Compared to a non-Schengen state, for example the U.K., Germany has very limited chances of exercising its personal sovereignty.

How have the Schengen group and the EC approached the problem of diverging regimes? First, the co-operating states agree on which nationalities shall be required to hold an entry visa by all states in an area of free movement. This is the so-called 'negative list'. Second, the co-operating states can also draw up a list of third countries whose citizens are free to enter without a visa. This is the so-called 'positive list'. Beyond both lists, there are states whose nationals are requested to hold an entry

[448] Case C-170/96, *Commission of the European Communities v Council of the European Union*, Opinion of Advocate General Fennelly, 5 February 1998, para. 19.

visa by some Member States, but not by others. These residual countries are entered onto the so-called 'grey list'. Eliminating countries from the grey list and moving them over to the negative or the positive list is the goal of harmonisation. An empty grey list is the ultimate desideratum, and it would mean that visa regimes within the area of free movement are fully integrated. Constellations as the one described earlier would be inconceivable then—A could not have entered Italy, which would have blocked her secondary movement to Germany.

This is the status quo of harmonisation on visa lists[449]: At the time when the Schengen acquis was integrated into the EU framework, its negative visa list embraced 132 entries[450], and its positive list contained 44 entries. The grey list of the Schengen group comprised only one entry. The EC as a whole has a less demanding negative list, including over 101 entries.[451] With the entry into force of the Amsterdam Treaty, the EC has received competence for adopting a positive list.[452] To date, this competence has not been made use of. A comparison of the Schengen acquis with its EU counterpart indicates that harmonisation had proceeded much farther within the Schengen group.

In the EC, the harmonisation of visa requirements is limited to visas for an intended stay of no longer than three months.[453] The harmonisation mandate under the Schengen Convention goes further, but the focus is also on short-term visas. For intended stays no longer than three months, the Schengen Convention has introduced the so-called Schengen visa, valid in the whole Schengen area.

Focusing on short-term visas means concentrating harmonisation efforts in an area where the latter yield maximum effect. Quite logically, it is generally easier to be granted a short-term rather than a long-term visa. Due to the much larger migratory volumes using them, short-term visas are more vulnerable to irregular behaviour by the immigrant, such as secondary movements or overstaying. Therefore, a harmonisation of

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[449] Source indications are given in the subsequent sections on visa harmonisation in the EU and within the Schengen framework.

[450] The term 'entry' is chosen because it covers recognised states as well as entities not recognised as states by all co-operating states.

[451] Of these entries, one relates to an entity not recognised as a state by all the Member States, namely Taiwan.

[452] Art. 62 (2) (b) (i) TEC.

[453] See Art. 10 (1) SC, Art. 62 (2) (b) TEC and Art. 5 Visa Regulation.

requirements for short-term visas is a rational entry point for the integration process.

5.1.1.1 *Visa Harmonisation in the EU*

As mentioned earlier, a persistent split in competencies hampers harmonisation in the EU, involving both the first and the third pillar. The framework for the harmonisation of visa requirements is laid down in the binding and directly applicable[454]

- Council Regulation (EC) No 574/99 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States.[455]

Regulations are the most interventive form of Community law-making: they leave no discretion whatsoever to Member States as to the transposition of norms into domestic legal systems. Within the whole acquis impacting on migration and extraterritorial protection, this is the only regulation on offer, and it is no coincidence that it relates to the prime device of migration control, namely visa requirements.

This instrument defines the term 'visa' as an authorisation given or a decision taken by a Member State, which is required for entry into its territory with a view to:

> - an intended stay in that Member State or in several Member States of no more than three months in all;

[454] It is explicitly stated in its Art. 7 that the Visa Regulation 'shall be binding in its entirety and directly applicable in all Member States'.

[455] OJ (1999) L 072, 18/03/1999, pp. 2–5 [hereinafter Visa regulation]. This regulation replaces Council Regulation (EC) No 2317/95 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, 25 September 1995, OJ (1995) L 234/1. The 1995 Regulation was successfully challenged by the Commission before the ECJ, as the EP had not been consulted. See *Parliament vs. Council*, European Communities Reports of Cases 1997 I, 3231.

> - transit through the territory of that Member State or several Member States, except for transit through the international zones of airports and transfers between airports in a Member State[456]

Nationals of those third countries on the common list annexed to the Visa Regulation shall be required to be in possession of visas when crossing the external borders of the Member States.[457] The Visa Regulation excludes the following groups from a common regulation: (1) nationals of states and holders of passports or travel documents issued by non-recognised territorial entity or authority not on the common list and (2) stateless persons and recognised refugees.[458] The competence to determine visa requirements regarding these groups rests with the Member States, who are obliged to inform the other Member States and the Commission on the measures taken by them.[459]

The Visa Regulation contains a savings clause for 'any further harmonization between individual Member States, going beyond the common list'.[460] This allows members of the Schengen Group to operate a more demanding negative list, without infringing upon their obligations under the Visa Regulation.

Even though a country has been entered on the common list, its nationals may be exempted from visa requirements in specific cases: 'This shall apply in particular to civilian air and sea crew, flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident and holders of diplomatic passports, official duty passports and other official passports.'[461] Protection-related reasons are not named in this non-exhaustive enumeration.

From the perspective of the protection seeker, it is relevant to ask what considerations informed the decision to enter a country on the common list. The preamble provides an answer, stating that 'risks relating to

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[456] Art. 5 Visa Regulation.

[457] Art. 1 (1) Visa Regulation. For cases of state succession, Art. 1 (2) prescribes that '[n]ationals of countries formerly part of countries on the common list shall be subject to the requirements of paragraph 1 unless and until the Council decides otherwise under the procedure laid down in the relevant provision of the Treaty'.

[458] Art. 2 Visa Regulation.

[459] Art. 2 (4) Visa Regulation.

[460] Art. 6 Visa Regulation.

[461] Art. 4 (1) Visa Regulation.

security and illegal immigration should be given priority consideration when the said common list is drawn up'.[462]

The exact implications of the term 'risks relating to illegal immigration' remain undefined. However, a look at the common list suggests that those countries producing substantial numbers of protection seekers must have been entered due to the 'risks relating to illegal immigration' connected with them. On the common list, one can find the Federal Republic of Yugoslavia, Iraq and Turkey. Numerically, these three countries top the list of sending countries, representing 42 percent of total asylum applications filed in Europe in 1998.[463] The same countries also top a list of countries ordered along the number of recognitions in the period 1989–98 (relating to both Convention refugee status and humanitarian status), surpassed only by Bosnia-Herzegovina.[464] There can be little doubt that the number of protection seekers impacts on the assessment of 'risks related to illegal immigration' for the purposes of drawing up the common list.

Airport transit has been another open flank for migration control. Consider the following case. Y wishes to seek asylum in France. Her nationality is subject to French visa requirements. Her application for a French visa is turned down. She books an airline ticket to a destination outside Europe. Her flight connection involves a transit at Paris Charles de Gaulle airport. In the transit zone, she approaches an official of the French border police with an asylum claim. Due to its obligations under Article 33 GC, France has to process the claim.

Thus, for states wishing to control the entry of aliens, airport transit is a very sensitive matter. Certainly, in some jurisdictions, transiting air passengers present in an airport transit zone do not enter the country in a

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[462] Visa Regulation, preamble, para. (3).

[463] In 1998, the FRY stood for 93 836 applications, Iraq accounted for 34 521 applications, while the corresponding number for Turkey was 21 027 applications. The total number of asylum applications filed that year in Europe was 352 404. The survey draws on statistics from all EU Member States, with the exception of Luxembourg, Portugal and Finland, adding Switzerland, Poland, Norway and Hungary. Source: UNHCR, 1999, p. 78.

[464] Iraq: 92 267 recognitions, FRY: 74 676 recognitions, Turkey: 68 854 recognitions. The total of recognitions in the period added up to 730 624. Source: UNHCR, 1999, p. 84.

technical sense.[465] However, the transit situation provides an opportunity for filing an asylum claim, which, in turn, may lead to a de jure entry into the territory of the transit state.[466] Or, as the Council remarks, 'the air route, particularly when it involves applications for entry or de facto entry, in the course of airport transit, represents a significant way in with a view in particular to illegally taking up residence within the territory of the Member States'.[467] For these reasons, the Council has introduced so-called Airport transit visas (ATV).[468] The vehicle has been a non-binding instrument adopted under the third pillar:

- Joint Action of 4 March 1996, adopted by the Council on the basis of Article K.3 of the EU Treaty, on airport transit arrangements[469]

An actualised version of this instrument is presently being discussed, and would replace the 1996 Joint Action upon adoption:

- Draft Joint Action of the Council on airport transit arrangements, 16 July 1998[470]

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[465] See e.g. Section 59 of the German Aliens Act of 24 February 1997 (BGBl. I p. 310) and Section 18 (a) (3) of the German Asylum Procedures Act. Such solutions do not relieve the state on whose territory the airport is situated from its obligations under human rights law. In *Amuur*, the ECtHR saw itself competent to consider an alleged deprivation of liberty taking place in the international zone of an airport before entry into French territory in the technical sense. ECtHR, *Amuur vs. France*, Judgment of 25 June 1996, Reports 1996-III.

[466] Compare Section 18a (6) of the German Asylum Procedures Act.

[467] ATV Joint Action, note 469 below, preamble.

[468] The definition of the term 'visa' in Art. 5 of the Visa Regulation explicitly excludes airport transit visas from the scope of the regulation.

[469] OJ (1996) L 63/8 [hereinafter ATV Joint Action]. The Commission requested the ECJ to annul this Joint Action for encroaching upon EC competencies under Art. 100c(1). The Court maintained that it had jurisdiction in the case, and stated that ATV did not concern the crossing of the external borders of the Member States. The application was thus dismissed. Case C-170/96, *Commission of the European Communities v Council of the European Union*, Judgment of 12 May 1998. For a comment, see A. Oliveira, 'Case C 170/96, Commission of the European Communities v. Council of the European Union, Judgment of 12 May 1998, [1998] ECR I-2763', 36 *CMLR* 1 (1999).

[470] Not published in OJ yet.

For the purposes of the ATV Joint Action, an ATV is defined in its Article 1 as 'the authorisation to which nationals of certain third countries are subject, as an exemption to the principle of free transit laid down in Annex 9 to the Chicago Convention on International Civil Aviation, for transit through the international areas of the airports of Member States'. The core of the ATV Joint Action is laid down in Article 3:

> Each Member State shall require an airport transit visa of nationals of third countries included on the joint list in Annex I hereto who do not already hold an entry or transit visa for the Member State in question when passing through the international areas of airports situated within its territory.

The list attached as Annex I comprises ten countries[471]: Afghanistan, Ethiopia, Eritrea, Ghana, Iran, Iraq, Nigeria, Somalia, Sri Lanka and Zaire. The majority of these countries have a poor human rights record[472] and produce substantial numbers of protection seekers[473].

An ATV is issued by the consular services of the Member States, who shall determine the conditions of its issue 'subject to adoption by the Council of criteria relating to the preliminaries for and issue of visas'.[474] Article 2 of the ATV Joint Action underscores specifically that '[i]n all cases, the consular services must ascertain that there is no security risk or risk of illegal immigration'.[475] This would mean that a consular officer will deny an ATV if she suspects that the transit passage will be used for the purposes of filing a protection claim.

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[471] The Draft Joint Action currently under discussion adds Bangladesh, the Democratic Republic of the Congo and Pakistan to the list, while Zaire is omitted. It should be noted that Zaire has changed its name to the Democratic Republic of Congo after the successful insurgency of Laurent Kabila.

[472] On the human rights situation, see generally the U.S. Department of State Country Reports on Human Rights Practices 1998, available at <http://www.state.gov/www/global/human_rights/1998_hrp_report/98hrp_report_toc.html> (accessed on 1 December 1998).

[473] The 1998 statistics for asylum applications filed in Europe indicate that Iraq occupies second place, Afghanistan is fourth, Sri Lanka fifth, Somalia sixth, Iran eighth, and Nigeria fourteenth among the top seventeen countries of origin of asylum seekers. See UNHCR, 1999, p. 82.

[474] ATV Joint Action, Art. 2.

[475] See also the preamble of the ATV Joint Action, alluding to 'the objectives of security and control of illegal immigration of the Treaty'.

It must be underscored that, at present, the ATV Joint Action is binding merely on a political level. So far, the Visa Regulation and the ATV Joint Action remain the only instruments aiming at a material harmonisation in the visa field.

On the procedural aspects of visa harmonisation, the Council has adopted a non-binding

- Council Recommendation of 4 March 1996 relating to local consular cooperation regarding visas[476]

The rationale of this instrument is to curb 'visa shopping'—a practice by which a third country national would seek to augment her chance for obtaining a visa by filing an application with several Member States simultaneously. To counter visa shopping, the quoted instrument recommends a number of measures promoting the co-operation of local consular services.

On the technical aspects of visa harmonisation, a binding instrument has been adopted under the first pillar:

- Council Regulation (EC) No 1683/95 of 29 May 1995, laying down a uniform format for visas[477]

Standardising visa formats facilitates entry control and the detection of false visas. Precisely as procedural harmonisation, such standardisation has an indirect bearing on the interests of protection seekers. For a desperate protection seeker who cannot obtain a visa of a Member State by regular means, visa shopping or the use of false documents may be the only remaining avenue to protection.

5.1.1.2 *Visa Harmonisation in the Schengen Group*

When it comes to harmonising visa matters, the Schengen Group has outstripped the EU in many respects. The reason is simple: in the Schengen area, internal border control has already been abolished, while this step has not been taken within the EU at large. Abolishment creates a

[476] OJ (1997) C 80, pp. 23–7.

[477] OJ (1995) L 164, pp. 1–4.

strong pull towards adopting and implementing flanking measures. This becomes particularly clear in the visa area. While both the EU at large and the Schengen Group maintain a negative list, only the Schengen Group has adopted a binding positive list as well. While the ATV list of the EU is only politically binding, the Schengen Group has agreed on a legally binding counterpart. While the EU has launched a non-binding recommendation on consular co-operation, the Schengen Group has elaborated a binding code harmonising all procedural and technical issues connected with the issuing of visas. The benefit for the individual wishing to stay no longer than three months is a uniform Schengen visa, valid not only in the issuing state, but in all states of the Schengen area. There is no equivalent to the uniform Schengen visa in the EU at large.

In the Schengen area, visa issues are regulated exhaustively in two instruments:

- the Schengen Convention, in particular Articles 9–18, and
- the Common Consular Instruction to the Diplomatic Missions and the Consular Posts of the Contracting Parties to the Schengen Convention, which are Headed by Career Consular Officers with its Annexes[478].

The base for all visa harmonisation within the Schengen Group is contained in Article 9 SC:

> 1. The Contracting Parties undertake to adopt a common policy on the movement of persons and in particular on the arrangements for visas. They shall give each other assistance to that end. The Contracting Parties undertake to pursue by common agreement the harmonization of their policies on visas.

[478] Gemeinsame Konsularische Instruktion an die diplomatischen Missionen und die Konsularischen Vertretungen der Vertragsstatateten des Schengener Durchführungsübereinkommens, die von Berufsbeamten geleitet werden [hereinafter Common Consular Instruction, abbreviated CCI], reprinted in A. Hildebrandt and K. Nanz, *Visumpraxis. Voraussetzungen, Zuständigkeiten und Verfahren der Visumerteilung in den Staaten des Schengener Abkommens* (1999, Verlag R.S. Schulz, Starnberg), pp. 209–324. A revised version of the CCI was adopted in 1999: Schengen Executive Committee, Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions. Hitherto, none of the named versions has been available in the OJ.

> 2. The visa arrangements relating to Third States, the nationals of which are subject to visa arrangements common to all the Contracting Parties at the time when this Convention is signed or later, may be amended only by common agreement of all the Contracting Parties. A Contracting Party may exceptionally derogate from the common visa arrangements with respect to a Third State for over-riding reasons of national policy that require an urgent decision. It must first consult the other Contracting Parties and, in its decision, must take account of their interests and of the consequences of that decision.

It follows that the Schengen co-operation aims at adopting not merely a harmonised, but a common visa policy. Based on this provision, the Schengen Group has drawn up a negative list and a positive list, which are annexed to the CCI.[479] Both are legally binding. Already in the Schengen Convention, provision is made for a common visa. ATV, transit visas, visas for short term stay, visas for multiple entries and group visas are all subject to common rules, provided that the accumulated stay in the area of the Contracting Parties does not exceed three months.[480] Visas for longer periods of stay are subject to the discretion of the Member States.[481]

As earlier mentioned, the negative list contains 132 entries, the positive list features 44 entries, while the grey list holds a sole entry. Regarding the issue of airport transit visas, the negative list of the Schengen Group is somewhat more comprehensive than its counterpart in the presently valid ATV Joint Position. The Schengen list contains the following countries: Afghanistan, Bangladesh, Democratic Republic of Congo, Ethiopia, Eritrea, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia and Sri Lanka. The list laid down in the 1998 Draft ATV Joint Action is actually identical with the Schengen list. Thus, an adoption of the former instrument would imply a further integration of the Schengen acquis into the Union framework. Nonetheless, the Schengen list is legally binding, while a Joint Action is not.

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[479] Annex 1 to the CCI contains the negative, the positive and the grey list. These lists have been updated by means of two Schengen Executive Committee Decisions: Decision of the Executive Committee of 15 December 1997 on the harmonisation of visa policy and Decision of the Executive Committee of 16 December 1998 on the abolition of the grey list of States whose nationals are subject to the visa requirement by certain Schengen States.

[480] Arts 10 (1) and 11 SC; CCI, Chapter I, para. 2.1.

[481] CCI, Chapter I, para. 2.2.

The procedure to be followed when issuing a Schengen visa is regulated in a detailed fashion, and Contracting Parties are bound to follow it. The CCI contain rules on the determination of the responsible state[482], the procedure to be followed by the claimant when making a request[483], the processing of that request and decision-making[484], the administration of visa issues[485] and the co-operation of local consular posts.[486]

A central element in these procedures is the question of the claimant's true intentions. Is there a risk for defection, once the claimant has reached the Schengen territories? Does she wish to immigrate, rather than to return or travel on after the envisaged short-term stay? The CCI alludes repetitiously to the element of intent. In the admission phase, the credibility of the claimant is looked into: 'The claimant has to convince the consular post seized with the claim that [...] return to the country of origin is warranted'.[487] If doubts persevere, credibility should be further investigated in the personal interview with the claimant.[488] The decision-making process is also geared toward the credibility issue. The CCI underscores that one of the essential elements in decision-making is the risk for unauthorised immigration. 'Special attention should be directed at "circles of persons with an increased risk factor" as unemployed persons or persons not possessing regular incomes'.[489] It should be underscored that the CCI contain no instructions whatsoever for cases where a visa is sought for protection-related grounds.

Contracting Parties—and their consular posts—are bound to issue a Schengen visa only if specified preconditions are fulfilled. According to Article 5 SC, a Schengen visa may be issued provided that the applicant fulfils the following conditions:

- she is in possession of a valid document or documents permitting them to cross the border, as determined by the Executive Committee;

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[482] CCI, Chapter II.

[483] CCI, Chapter III.

[484] CCI, Chapter V.

[485] CCI, Chapter VII.

[486] CCI, Chapter VIII.

[487] CCI, Chapter III, para. 3.

[488] CCI, Chapter III, para. 4.

[489] CCI, Chapter V.

- if applicable, she submits documents substantiating the purpose and the conditions of the planned visit and has sufficient means of support, both for the period of the planned visit and to return to their country of origin or to travel in transit in a Third State, into which their admission is guaranteed, or is in a position to acquire such means legally;
- she has not been reported as a person not to be permitted entry; and
- she is not considered to be a threat to public policy, national security or the international relations of any of the Contracting Parties.[490]

How do these conditions link to the right to entry? To start with, the possession of a visa does not entitle the holder to entry. It merely entitles the holder to seek entry or transit at a border post, and the border post may still reject the alien in possession of a visa.[491] On the other hand, entry to the territories of the Contracting Parties must be refused to any alien who does not fulfil all these conditions and, where required, is in possession of a visa.[492] Nonetheless, there is an opening for protection-related cases in Article 5 (2) SC: where a Contracting Party considers it necessary, it may derogate from that principle on humanitarian grounds or in the national interest or because of international obligations. In such cases permission to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.[493] Article 15 SC states explicitly that these rules shall not preclude the application of special provisions concerning the right of asylum.

For the three exceptional reasons enumerated in Article 5 (2) SC, a Contracting Party may not only allow entry to its territory, it may also issue a visa. However, in cases where a Contracting Party makes use of its right to exceptional derogation, it shall restrict the validity of the visa

[490] Art. 5 SC compared to Art. 15 (a), (c), (d) and (e) SC.

[491] CCI, para. 2.1.

[492] Art. 15 SC.

[493] Ibid.

issued to its own territory and inform the other Contracting Parties of its decision.[494]

For protection seekers, the message boils down to the following. Provided that 'international obligations' flowing from refugee law or human rights law enshrine a right to entry or, at least, a right to non-rejection for protection-related grounds, this right shall override the rules of the Schengen Convention. If such obligations can be shown to exist in international law[495], the Contracting Party concerned *must* allow entry in such cases. Beyond that, a Contracting Party *may* allow entry on humanitarian grounds or in the national interest.

5.1.1.3 *Mainstreaming the Schengen Visa acquis: The Commission Proposal*

The Commission has presented a proposal for a revised visa regulation which draws on the new first pillar competencies made available through the Treaty of Amsterdam as well as reacting to the incorporation of the Schengen acquis into the Union framework. The new regulation would in fact amalgamate the EC Visa Regulation presently in force with parts of the Schengen visa acquis:

- Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.[496]

Provided that it is eventually adopted, this instrument would give a telling example of the variable geometry reigning in Title IV. Curiously enough, it could be binding for countries outside the Union (that is, Iceland and

[494] Art. 16 SC.

[495] See chapters 10.2 and 12.1 on the question of entry.

[496] At the time of writing this document has not been published in the OJ. Henceforth Visa Regulation Proposal.

Norway), without even binding all Member States.[497] It is based on Article 62 (2) (b) (i) TEC, which endows the Community with competency of drawing up not only a negative list (as it was already empowered to do during the Maastricht era), but also a positive list.

The proposed negative list is brought up to the length of the Schengen visa acquis, adding 34 entries to the list annexed to the 1999 EC Visa Regulation, thus bringing the total up to 134. Going further than earlier instruments, the proposed positive list suggests the exemption of 48 entries from visa requirements in the Union. This means that Member States are precluded from unilaterally determining visa requirements once the Visa Regulation Proposal is adopted. In other words, the grey list will be relegated to history.

Just as in the existing EC Visa Regulation, Member States are entitled to make a number of exhaustively listed exceptions for nationals otherwise falling under its visa requirements under the proposed Regulation. Nonetheless, the relevant paragraph still makes no mention of protection-related grounds.[498]

5.1.2 Measures Complementing Visa Regimes

In the preceding section, the current status of visa harmonisation has been expounded at some length. Yet the effectiveness of the visa system would be greatly diminished if aliens could reach international airports or sea ports of the issuing states without a visa. In principle, the border police of the issuing state in the course of passport control could reject them. However, International law may inhibit their forcible return once they have made contact with the territory of a potential host state or they may simply not have the financial means to return. To avoid such situations,

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[497] For Ireland and the U.K., the validity of the Regulation would hinge on an opt-in. For Iceland and Norway, validity would presuppose consideration in the Joint Committee set up under the 1999 Agreement between the Council, Iceland and Norway. With regard to Denmark, a division of opinions seems to exist. The Commission considers that the competencies conferred upon the Community by Art. 100c/Maastricht are congruent with that under Art. 62 (2) (b) (i) TEC (see the Explanatory Memorandum attached to the Visa Regulation Proposal). It is unlikely, however, that Member States will accept this interpretation, given that they have opted for an explicit change in the wording of Article 100c/Maastricht.

[498] Art. 5 Visa Regulation Proposal.

states have been eager to make the possession of a valid visa a *precondition for departure* from a third country. Thus, control is externalised and shifted to the pre-departure stage. One method is to make carriers liable for transporting aliens not in possession of a valid visa. By means of such sanctions, carrier are incited to control visas and travel documents before embarkation. Carrier sanctions move the border control of the destination state to the check-in counter at airports in third countries.

Another method of control targets the informal sector offering travel services, the tool being to fine human smugglers. A third method is to send staff or equipment to third countries, which are thus enabled to carry out more efficient departure controls. This method goes by the name of pre-frontier assistance and training. In the absence of these complementary measures, the effectiveness of visa requirements as a means of entry control would be markedly diminished.[499]

5.1.2.1 Carrier Sanctions

Article 26 SC contains an obligation for states to introduce rules on the responsibilities of carriers in their national legislation. This responsibility is preventive and reparative. On the preventive side, carriers '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'.[500] On the reparative side, the carrier is tasked with the removal of aliens denied entry:

> 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 travelled or to any other Third State to which he is guaranteed entry.[501]

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[499] For an overview of the various components in European and U.S. migration control systems, see B. P. Christian, 'Visa Policy, Inspection, and Exit Controls: Transatlantic Perspectives on Migration Management', 14 *Georgetown Immigration Law Journal* 1 (1999).

[500] Art. 26 (1) (b) SC.

[501] Art. 26 (1) (a) SC.

The obligation to incorporate these rules on the preventive and reparative responsibilities of carriers is expressly made subject to the obligations flowing from the 1951 Refugee Convention.[502]

To the preventive and the reparative rules, the Schengen Convention adds a punitive rule:

> 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.[503]

Carrier sanctions as a result evolve into a market mechanism: the aggregate costs of reparative and punitive measures exceed the gains carriers make by selling tickets to undocumented travellers. Sanctions therefore incite carriers to check the travel documents of their passengers scrupulously.[504]

Of ten EU Member States included in a 1997 survey, eight had introduced penalisation rules in their domestic legislation.[505] Another

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[502] Art. 26 (1) SC.

[503] Art. 26 (2) SC. According to Art. 26 (3) SC, the preventive and punitive rules shall also apply to carriers of groups by coach over international road links, with the exception of border traffic.

[504] UNHCR has observed the detrimental effects of carrier sanctions prescribed in the Schengen Convention at an early stage: 'In symbiotic relation to visa requirements are the documentation review obligations States in effect impose upon carriers. Forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties on their corporate employer, rather than to provide protection to individuals. In so doing, it contributes to placing this very important responsibility in the hands of those (a) unauthorized to make asylum determinations on behalf of States (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations. Inquiry into whether the absence of valid documentation may evidence the need for immediate protection of the traveller is never reached. UNHCR believes that the concerns which States attempt to address through carrier sanctions and visas can be better addressed through the careful harmonization of standards of application, treatment and implementation'. UNHCR, Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), Geneva, 16 August 1991.

[505] IGCARMP, 1997, p. 434.

source describes the level of co-ordination between Member States as low, and points out that Finland, Spain and Sweden merely oblige carries to take financial and practical responsibility for repatriation.[506] The German legislation attempts to alleviate the negative effects of carrier sanctions by exempting carries from sanctions where undocumented protection seekers have been accorded some form of protective status.[507] It goes without saying that such patchwork benevolence cannot halt the market dynamics imposed by the sanctions instrument. After all, airlines and other carriers pursue the interests of their shareholders, and not those of protection seekers. A look at recognition rates would suggest to airlines that transporting protection seekers without documents is too high a risk and therefore, bad business.

5.1.2.2 Sanctions against Human Smugglers

Article 27 (1) SC contains an obligation for Contracting Parties 'to impose appropriate penalties on any person who, for purposes of gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties contrary to the laws of that Contracting Party on the entry and residence of aliens'.

Of ten EU Member States screened in a 1997 Survey, six had penalised human smuggling, one had not, and three did not make information available. Penalties ranged from a fine to eight years' imprisonment.[508]

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[506] European Parliament, 2000, p. 15.

[507] F. Löper, 'Das Dubliner Übereinkommen über die Zuständigkeit für Asylverfahren', 20 *ZAR* 1 (2000), p. 54. Löper names a corresponding construction in French law and practice, whereby carriers only fined if claimants are entered on a black list, or if protection claims are dismissed by the French authorities as manifestly unfounded. Thus, following the logic of the German and French solutions, a rational, profit-minded airline would need to carry out a small-scale determination procedure at the check-in counter to assess whether transport would entail a gain or a loss. This is manifestly absurd: for the airline, it would entail transactional costs consuming the eventual gains of transporting undocumented protection seekers.

[508] IGCARMP, 1997, p. 434.

5.1.2.3 *Pre-frontier Assistance and Training*

Both the EU acquis and the Schengen acquis contain instruments on pre-frontier assistance and training. A non-binding instrument adopted by the EU Council has provided an organisational framework for common measures in this field, adding to the bilateral exchanges among Member States and third countries. The relevant instrument is the

- Joint Position of 25 October 1996 defined by the Council on the basis of Article K.3 (2) (a) of the Treaty on European Union, on pre-frontier assistance and training assignments.[509]

This instrument aims to render the control of travel documents and visas prior to embarkation on flights destined for Member States more effective. Assistance assignments have as their objective the provision of assistance to officers locally responsible for checks either on behalf of the local authorities or on behalf of the airlines.[510] The purpose of joint training assignments shall be among other things to describe Member States' document and visa requirements and the methods by which the validity of documents and visas may be checked.[511] Joint assistance or training assignments are carried out by specialist officers designated by the Member States.[512] Where costs are not covered by the relevant third country or the airline involved, they are borne by the Member States agreeing to participate in the implementation of an assistance or training assignment.[513]

Within the Schengen Group, parallel measures have been taken. In a 1998 Decision[514], the Executive Committee affirms that the Schengen states 'find it necessary' to post 'liaison officers from the Schengen States to countries of origin and the transit countries' whose task would be to advise on the 'preventing of illegal migration [...] so as to fight against

[509] OJ (1996) L 281/1 [hereinafter Pre-frontier Joint Position].

[510] Art. 1 (2) of the Pre-frontier Joint Position.

[511] Art. 2 (2) of the Pre-frontier Joint Position.

[512] Art. 3 (1) of the Pre-frontier Joint Position.

[513] Art. 3 (3) of the Pre-frontier Joint Position.

[514] Schengen Executive Committee, Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration, 27 October 1998.

illegal immigration into a Schengen State'.[515] This initiative has been pursued further by means of the

- Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers.[516]

Under this instrument, Schengen states are intended to second executive staff as document advisers, whose task is to assist airlines or shipping companies, consular representations of Schengen states in third countries, and border or immigration authorities at airports or seaports of departure in third countries.[517] Assistance is delivered in the form of training on counterfeited and falsified documents as wells as controls in pre-boarding checks at airports and ports of exit.[518]

The instrument lists 46 locations in 35 countries as suitable postings for document advisers, and assigns them to single Schengen countries. Among these 35 countries, we find the worldwide elite of refugee-producing countries. Two locations in Turkey are pointed out, and one of them is assigned a priority status (Istanbul). In the year the Decision was adopted, Turkey held second place on the list of countries whose nationals are recognised as refugees under the 1951 Refugee Convention in Europe.[519] Of the 22 top refugee-producing countries of origin listed in the UNHCR 1998 statistics, six are represented on the list of locations: Democratic Republic of Congo, Pakistan, Sri Lanka, Tunisia, Turkey and Vietnam.[520]

It would be of the utmost interest to discover how 'document advisers' and EU training staff are instructed to react to protection-related cases. The instruments themselves do not give explicit instructions on this point, and thus there is the impending risk that individuals in such cases are regarded simply as undocumented migrants to be filtered out. But apart from amplifying the risks of delivering individuals to persecution, the instruments presented in this section evoke unhappy memories of the past. Just like the deployment of military advisers in the decades before the fall of the Iron Curtain, posting document advisers is a strong signifier

[515] Ibid., para. 3.

[516] Henceforth Document Adviser Decision. This decision has not been published in the OJ.

[517] Para 1 (a) of the Implementation Principles attached to the Document Adviser Decision.

[518] Ibid.

[519] UNHCR, 1999, p. 79.

[520] Ibid.

that the burden of conducting the Cold War against protection-induced and other migration is stealthily but inexorably being shifted to third countries.

5.1.3 Conclusion

The speedy harmonisation of visa requirements and the increasing co-ordination of measures complementing them are probably the clearest indicator that internal free movement is to be bought at the price of intensified control. The proliferation of visa requirements is probably the most serious threat to the personal mobility that a person needs in order to seek refuge.[521] It is important to recall, however, that the issuing of visas on protection-related grounds does not run counter to the visa regimes adopted within the EU or the Schengen Group. Nonetheless, the risk prevails that the consular officer equates the invocation of protection-related grounds by the visa claimant with the intent to immigrate in an unauthorised manner. Therefore, in practice, the filter function of visa requirements ultimately hinges on the existence of express domestic rules on the issuance of visas in protection-related cases. Some, but not all, Member States have made provisions for asylum applications at their consular posts and instructed them accordingly.[522] Others, however,

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[521] Christian, 1999, p. 234.

[522] In *Denmark*, such applications fall under section 7 (4) of the Aliens Act. In 1994, 1995 and 1996, 1 341, 4 951 and 1 498 persons respectively applied for asylum at a Danish consular post. In the three named years, 90, 41 and 17 applications respectively were approved. In *France*, embassies have been entitled to grant a residence permit to enable the claimant to seek asylum on French territory. *The Netherlands* accepts asylum requests filed with the Dutch Embassy in the claimant's country of origin. A positive decision entails the issuance of an entry visa. In *Spain*, the only asylum requests accepted by embassies are those in which the claimant has already left the country of origin. The *U.K.* accepts asylum claims at its embassies abroad. *Belgium, Finland, Germany, Italy* and *Sweden* do not accept asylum claims to be filed at consular posts. Source: IGCARMP, 1997, p. 435. In *Austria*, Section 12 (2) of the Asylum Law enables aliens to apply for asylum with Austrian diplomatic missions abroad. *Greece* and *Luxembourg* do not accept asylum applications to be filed with consular posts. Source: F. Liebaut and J. Hughes, *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries* (1997, Danish Refugee Council, Copenhagen), p. 16. Data for *Ireland* and *Portugal* were unavailable.

expressly discourage their consular authorities from issuing visas if there are indications of persecution, as this aggravates the risk of 'defection'.[523]

The extent to which international law obliges states to grant entry on protection-related grounds remains an unanswered question. Where such a right can be shown to exist, it could subsequently entail a duty to issue a visa to the beneficiary. This question shall be pursued in a later chapter.[524]

5.2 Post-entry Measures: The Concept of Safe Third Countries

In Western Europe, domestic rules for granting asylum vary greatly. This has two consequences. First, a rational protection seeker would not seek protection in just any potential host country, but rather in one having higher recognition rates than others. In other words, a rational protection seeker would prefer to choose between potential host countries. Secondly, it is also perfectly rational for a rejected protection seeker to file a new application in another European country, as chances are fair that the latter will assess her case differently than the country which rejected her. This phenomenon has become by the pejorative label 'asylum shopping'. However, it is important to recall that the behaviour of the protection seeker is not based on a malicious intent to manipulate, but is instead a

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[523] The information on country-related visa practice provided by the Swedish Statens Invandrarverk [State Immigration Board] is indicative in this regard. With regard to Cuba, it is suggested that a visa should be denied where the claimant 'has problems of a political nature'. With regard to Bulgaria, the occurrence of 'discrimination, mainly of gypsies' is pointed to, so 'a certain caution' should be exercised when processing visa claims from members of this group. For Iraqis, the 'risk of defection' is said to be very high, so it is 'very difficult for Iraqis to make credible' that they solely intend to visit Sweden. Statens Invandrarverk, Region mitt, Visumenheten, Information angående viseringsärenden, 21 October 1999 and 12 November 1999, Doc. No. SIV 19-99-4115, with attachments Praxisinformation Bulgarien, Praxisinformation Kuba, and Praxisinformation Irak.

It is quite noteworthy that for 'prominent politicians or journalists, who risk to be exposed to threats or violence in their professional activity and who wish to "take a rest" outside Algeria for a limited duration, there is no impediment for granting a visa'. Ibid., Praxisinformation Algeriet. From a universalist position, it is certainly to be welcomed that strict visa rules are somewhat relaxed for specific groups. However, it gives rise to concern that the beneficiaries of such relaxations happen to be social elites.

[524] See chapter 12.1 below.

rational reaction to the disharmony of European protection systems.[525] It is a form of market-adapted behaviour that is otherwise praised in Western economies.

Naturally, repeated evaluation of the same case in different European states is a waste of resources. It also renders the interpretation of statistics more difficult, as one person could be behind a number of applications submitted in different states.[526]

Theoretically, two remedies offer themselves—modifying the market offer or closing down the market. The first remedy would consist in slashing the incentive to choose by harmonising the protection offer: if all European states offered roughly the same procedural and material standards, asylum shopping would not make much sense anymore.[527] Invariably, this process would take time. To be effective, it would also imply deep intrusions into the aliens and asylum legislation of Member States, which are on the whole jealously guarded as belonging to the latter's sovereignty.

The solution actually devised by single Member States resembles a procedural fix rather than a material cure. Instead of intensifying the harmonisation of protection systems, whose divergence was the very cause of secondary movements, states stipulated the fictive equality of these systems, and allocated protection seekers to them under a mechanical rule. The mechanical rule is based on the concept of safe third countries: where a number of formal criteria indicate that the protection seeker could have sought protection in a third country through which she passed, her claim shall be rejected, and she shall be asked to turn to that

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[525] This is explicitly acknowledged by the European Commission: 'Substantive asylum law and asylum procedures have not yet been approximated and the recognition rates for certain nationalities can vary significantly from one Member State to another, so it is understandable that people in need of international protection may find one Member State a more attractive destination than another'. European Commission, *Commission staff working paper. Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, SEC (2000) 522, 21 March 2000 [henceforth Dublin Working Paper], para. 30.

[526] All restrictive measures notwithstanding, it is still unclear to what extent the statistics of applications mirror the actual number of protection seekers, or merely their mobility between European host states.

[527] However, making multiple applications still retains the advantage of delaying removal to the country of origin.

country.[528] Denmark was among the first countries to introduce the safe third concept in its domestic legislation—the so-called Danish clause.[529] The idea underlying the Danish clause proliferated quickly and found its way into the Dublin and Schengen Conventions, albeit in a more sophisticated form. A crude version of it underpinned a number of bilateral readmission agreements between EC Member States and their European neighbours.

Essentially, the safe third country concept embraces two elements. First, responsibility for the processing of a given protection claim must be established by a set of allocation criteria. Second, the physical readmission of the protection seeker to the responsible country must be secured. As states are under no obligation to readmit non-nationals under customary international law, the readmission obligation must be created by way of treaty. The Dublin Convention joins both elements in one instrument. By contrast, allocation to states outside the Union is usually governed by a readmission agreement only, while the allocation criteria are laid down in domestic law and, to a certain extent, in Union law.

The safe third country concept denies the protection seeker the opportunity to choose among potential host countries and does away with a state obligation to process each claim in substance.[530] Rather, the host country responsible for processing her claim is determined by the travel route or other allocation criteria. In theory, the market of protection offers has been abolished and replaced by a market of ever more efficient border control. In practice, however, allocation under the safe third country concept will only work if a number of preconditions are fulfilled. The identity and the travel route of the protection seeker have to be established, and the third country must be willing to take over the protection seeker and her case. Establishing the protection seeker's

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[528] See R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law', 9 *Harvard Human Rights Journal* (1996), p. 186.

[529] This radically formalistic solution had been launched by the Danish legislature in 1986. By virtue of the Danish clause, asylum seekers could be sent back to safe third countries regardless of appeal. The circle of safe third countries was determined by administrative practice.

[530] For a good overview of the debate on both issues, see K. Landgren, *Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests* (1999, UNHCR, Geneva), pp. 22–9. On the issue of choice, see also N. Albuquerque Abell, 'The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees', 11 *IJRL* 1 (1999), pp. 75–80.

identity is necessary in order to inhibit multiple applications under the disguise of false names. Establishing the travel route is mandatory for identifying a relevant third country to which she can be sent back. With these necessities in mind, states have devised methods of information exchange and fingerprinting to meet both threats against the workability of the safe third country concept. To ensure the willingness of third countries to take over protection seekers and their cases, international agreements have been concluded. All of the measures described complement the safe third country concept.

In the following, we shall first look into allocation to other Member States under the Dublin Convention, including the complementary measures linked to it. In a second step, allocation to safe third countries outside the Union will be expounded together with the complementary device of readmission agreements.

5.2.1 Allocation to other Member States

5.2.1.1 The Dublin Convention

Allocation among Member States is regulated in a comprehensive and legally binding manner by the Dublin Convention:

- Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities[531]

The rationale of the Dublin Convention is twofold. First, it allocates responsibility for the examination of asylum applications lodged on the territory of a Member State and, second, it lays down readmission obligations incumbent on the responsible Member State. Among the goals

[531] 15 June 1990, OJ (1997) C 254, 19 August 1997, pp. 1–12. For a background on the Dublin Convention, see Guild and Niessen, 1996, at 112 et seq. See also J. van der Klaauw, 'The Dublin Convention, the Schengen asylum chapter and the treatment of asylum applications', in P. R. Giuseppin and W. M. Jansen (eds), *Het Akkoord van Schengen en vreemdelingen. Eeen ongecontroleerde grens tussen recht en beleid?* (1997b); K. Hailbronner and C. Thiery, 'Schengen II und Dublin—Der zuständige Asylstaat in Europa', 17 *ZAR* 2 (1997). For a description from the perspective of a German government official, see Löper, 2000.

of the Convention, the preamble names a desire to speed up procedures, to guarantee a material determination to claimants in one of the Member States and to avoid orbit situations, where claimants are sent back and forth between Member States unwilling to consider their case.[532] The idea behind the Dublin Convention can be described as 'one for all'. One, and only one, Member State conducts a determination procedure, and it does so on behalf of all other Member States. At least in theory, the Dublin Convention should do away with the much-detested phenomenon of asylum shopping.

The Dublin Convention provides for its own institutional framework. Under its Article 18, a committee has been established consisting of one representative of each Contracting Party as well as a representative of the European Commission.[533] Among the tasks of the so-called Article 18-Committee, we find the examination of 'any question of a general nature concerning the application or interpretation of this Convention'.[534] Where a Contracting Party experiences major difficulties as a result of substantial change of circumstances since the conclusion of the Dublin Convention, it may bring the matter before the Committee, which can ultimately decide on the suspension of the Dublin Convention for that state.[535] In deviation from the otherwise prevailing unanimity rule, decisions of suspension under this clausula rebus sic stantibus are taken by a two-thirds majority in the Article 18-Committee.[536]

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[532] Preamble of the Dublin Convention, para. 4. Orbiting refugees were a considerable protection problem during the seventies and eighties. See G. Melander, *Refugees in Orbit* (1978, International University Exchange Fund, Geneva). For an early analysis of the incapacity of the Dublin Convention to solve the problem of orbiting, see J. J. Bolten, 'From Schengen to Dublin: The New Frontiers of Refugee Law', in J. M. Steenbergen, *Schengen. Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police* (1992, Stichting NJCM—Boekerij, Leiden), pp. 18–28. Today, with the benefit of statistical hindsight, we may state that Dublin has cloaked the phenomenon of orbiting in new garb. Grahl Madsen is right to seek the underlying cause for the orbiting phenomenon in the differences between domestic legal systems—a cause still existing in the EU. A. Grahl Madsen, *Territorial Asylum* (1980, Almqvist & Wiksell, Stockholm), p. 95.

[533] Art. 18 (1) DC. The Commission representative is only entitled to take part in discussions, without being involved in the decision-making process.

[534] Art. 18 (2) DC.

[535] Art. 17 (2) DC.

[536] Art. 18 (3) DC.

The Article 18-Committee has adopted a number of instruments to facilitate the implementation and application of the Dublin Convention:

- Decision 1/97 of 9 September 1997 concerning provisions for the implementation of the Dublin Convention[537],
- Decision 2/97 of 9 September 1997 establishing the Rules of Procedure of the Committee set up by Article 18 of the Dublin Convention[538], and
- Decision 1/98 of 19 June 1998 of the Article 18 Committee of the Dublin Convention, concerning provisions for the implementation of the Convention[539].

On the basis of concerns about inefficiencies in the application of the Dublin Convention, the Article 18-Committee also adopted a Programme of Action in June 1998.[540]

Moreover, the implementation of the Dublin Convention has also attracted the interest of the Council, which adopted the

- Council Conclusions of 27 May 1997 concerning the practical implementation of the Dublin Convention.[541]

In spite of these attempts to create greater clarity in the sometimes rather cryptic norms of the Dublin Convention, numerous ambiguities in its interpretation and application remain. Such problems encompass various areas, ranging from divergent readings of the responsibility criteria to requirements of proof.[542]

Regarding the territorial applicability of the Dublin Convention, we recall that Iceland and Norway have become involved with the Schengen co-operation aiming at an area without internal border control. Therefore, these countries must be involved in the system established under the

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[537] OJ (1997) L 281, pp. 1–25.

[538] OJ (1997) L 291, p. 26.

[539] OJ (1998) L 196, p. 49.

[540] Not published in OJ. See Dublin Working Paper, para. 12.

[541] OJ (1997) C 191, pp. 27–8. This instrument is not included in the acquis list.

[542] For a good overview, taking into account the divergent positions among Member States, see Löper, 2000.

Dublin Convention. As the Dublin Convention can only be signed or acceded to by Member States[543], however, an alternative route has to be used. It is planned that the Commission shall negotiate with Iceland and Norway an agreement aimed at extending to these two countries the rules applied by the EU Member States under the Dublin Convention.[544]

How, then, are the two goals of the Dublin Convention—establishment of responsibility and readmission obligations—pursued? Let us look at the issue of responsibility first. The Member State responsible for processing an asylum application is established by means of the following responsibility criteria, listed in order of priority:

1. *Family*: If the applicant's spouse or child under 18 has been recognised as a refugee under the 1951 Refugee Convention by a Member State, and is legally present in its territory, that State shall be responsible for the application, provided the applicant so desires.[545] As the concept of family is a very narrow one, and the group of recognised Convention refugees is limited[546], this criterion has only a minor numerical impact in practice.
2. *Residence and entry permits:* If the applicant has been issued a valid residence permit or a valid visa, the issuing State shall be responsible for the application. This criterion offers a detailed set-up of collision norms for cases where permits have been issued by more than one Member State, including cases where permits have expired. [547]
3. *Illegal entry*: If the applicant arrived irregularly from outside the Union, the Member State through which she first entered the territory of the Member States shall be responsible for the application.[548]
4. *Controlled entry*: The Member State responsible for controlling the entry of the applicant into the territory of the Member States will be responsible for examining the application for asylum. An exception is

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[543] Art. 21 (1) DC.

[544] See text accompanying note 425 above.

[545] Art. 4 DC.

[546] In 1998, this group consisted of 31 248 persons in Europe, which must be contrasted to a total of 352 404 asylum applications. See UNHCR, 1999.

[547] Art. 5 DC.

[548] Art. 6 DC.

made for cases where the applicant first entered a Member State where the visa obligation is waived, before presenting an application for asylum in another Member State where the visa obligation is also waived. In this case, the latter State shall be responsible for examining the application for asylum.[549] Thus, this criterion only applies if there is a differential visa policy between two Member States—a phenomenon which visa harmonisation will eventually put an end to.

5. *State in which the application was first lodged:* If no other contracting State can be made out, the first Member State in which the applicant has lodged her application shall be responsible for it.[550]

It should be stressed that the responsibility criteria only relate to asylum applications—that is, according to the definition spelt out in Article 1 (1) (b) DC, applications for protection under the 1951 Refugee Convention. Therefore, we have to speak of asylum seekers, and not of protection seekers, when alluding to the personal scope of the Dublin Convention in the following.[551]

The first four criteria send out a very clear message to Member States. In general terms, refugee recognition, the granting of visas and residence permits, liberal visa requirement policies and lax controls of external borders may lead to responsibility. The essence of these criteria can be expressed as follows: that state initially causing the presence of an asylum seeker on the territories of Member States shall bear the responsibility for her. Even the fifth criterion falls in line with this message: the Member State in which an applicant has lodged her first claim in Union territory shall see to it that this applicant does not embark on secondary movements. If she does, responsibility under the Dublin Convention will not move with her, but shall rest with the first state. The practical effects of this criterion are illustrated by the case of Bosnian protection seekers in Germany. Faced with the expiry of their toleration permits and the

[549] Art. 7 DC.

[550] Art. 8 DC.

[551] This confinement to persons seeking protection under the 1951 Refugee Convention entails two problems. First Member States disagree as to whether the Dublin Convention also regulates the readmission of recognised refugees. Secondly, as the importance of other forms of protection categories increases, it is unsatisfactory that the Dublin Convention only regulates the allocation of responsibility for a single category. See Dublin Working Paper, paras 47–50.

implementation of return policies, some of the Bosnians moved on to other Member States—which had not yet embarked on return—to seek asylum there. Due to the fifth criterion, the formal responsibility for processing their claims rested with Germany.

However, the Dublin Convention provides for an opt-out clause, allowing a state to assume responsibility for a case filed on its territory, although it is not obliged to do so under the four criteria:

> Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto. The Member State responsible under the above criteria is then relieved of its obligations, which are transferred to the Member State which expressed the wish to examine the application. The latter State shall inform the Member State responsible under the said criteria if the application has been referred to it.[552]

This clause is usually referred to as the 'sovereignty clause'. It can be used either to the benefit or to the detriment of an asylum seeker. It is beneficial when a Member State uses the sovereignty clause to preserve family unity beyond the narrow confines of the first criterion. It is also beneficial when the state using the sovereignty clause maintains a more liberal recognition practice than the state to which allocation would have taken place under the Dublin criteria. This simple equation can be turned around, however. The sovereignty clause has detrimental effects for the asylum seeker when the state invoking it maintains a more restrictive practice than the state to which allocation would have taken place under the Dublin criteria. In certain cases, Germany has used Article 3 (4) DC to achieve rejections and effectuate return to the country of origin rather than feeding the case into the Dublin system.[553] To be sure, Article 3 (4) DC requires that the asylum seeker give her consent to an opt-out from

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[552] Art. 3 (4) DC.

[553] J. van der Klaauw, 'Refugee protection in Western Europe: A UNHCR perspective', in J. Y. Carlier and D. Vanheule (eds), *Europe and Refugees—A Challenge?* (1997a, Kluwer Law International, The Hague), pp. 235–6, giving examples from the period preceding the entry into force of the Dublin Convention, where allocation was governed by Chapter VII SC. The analogy is valid, as the content of Chapter VII SC is almost identical to the content of the Dublin Convention.

the criteria. In the case of Germany, the authorities opined that this consent had implicitly been given when the asylum application was filed with German authorities.[554]

We recall that the Dublin Convention is based on a fictive equality of divergent domestic asylum systems. All too easily, a Member State might see itself confronted with the following situation. If a protection claim were examined in substance by its own authorities, the claimant would be allowed to stay due to the prohibition of refoulement. If, however, the Dublin criteria were to be applied, the claimant would be allocated to another Member State with a more restrictive practice, which would reject her and effectuate return. The conflict is obvious: deviating from the Dublin criteria implies the risk of undermining the Dublin Convention; at the same time, adhering to its criteria means accepting chain refoulement, which would be at odds not only with Article 33 GC, but also with Article 2 DC:

> The Member States reaffirm their obligations under the Geneva Convention, as amended by the New York Protocol, with no geographic restriction of the scope of these instruments, and their commitment to co-operating with the services of the United Nations High Commissioner for Refugees in applying these instruments.

In such situations, the sovereignty clause could be used to avert an outright conflict between Geneva and Dublin.

The sovereignty clause in Article 3 (4) DC is complemented by Article 9 DC, which allows states other than those receiving the application to volunteer for processing the case. This norm is usually referred to as the 'humanitarian clause':

> Any Member State, even when it is not responsible under the criteria laid out in this Convention, may, for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires. If the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.[555]

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[554] Ibid.

[555] Art. 9 DC. Compare also Art. 3 (4) DC.

What does responsibility under the Dublin Convention entail? According to Article 10 (1) DC, the Member State responsible for examining an application for asylum according to the named criteria shall be obliged to:

- take charge of an applicant who has lodged an application for asylum in a different Member State;
- complete the examination of the application for asylum;
- readmit or take back an applicant whose application is under examination and who is irregularly in another Member State;
- take back an applicant who has withdrawn the application under examination and lodged an application in another Member State; and
- take back an alien whose application it has rejected and who is illegally in another Member State.

The responsibility to readmit and to take back encourages Member States to prevent secondary movements and to effectuate the speedy removal of rejected asylum seekers from their territory to the country of origin.

Let us give a brief description of how an asylum claim will be handled by a Member State, taking into account the allocation mechanism set out in the Dublin Convention.

1. An asylum seeker files an asylum application with a contracting State.
2. The contracting State receiving the application assesses whether there is any third State to which it wishes to return the asylum seeker according to its national legislation.[556]
3. The State responsible for the application will be determined by the contracting States along the lines of the criteria given in the Dublin Convention.
4. The asylum seeker and her application are taken charge of by the responsible State.

[556] Art. 3 (5) DC. Paragraph 3 (a) of the Resolution on a harmonised approach to questions concerning host third countries gives prevalence to return to a host third country before considering return to a Member State, 30 Nov./1 Dec. 1992, Doc. No. SN 4823/92. *See* Guild and Niessen, 1996, pp. 121–2.

5. The responsible State carries out an individual determination procedure.

The order of priority is clear: first and foremost, the asylum seeker should be allocated to a country outside the Union. Only where this is not feasible, allocation under the Dublin Convention is considered. This runs counter to the intention, stated in the preamble, to ensure that one of the Member States will examine a protection claim on its merits. Referral to a non-Member State implies the opposite: no material examination shall take place by any of the Member States. Thus, allocation under the Dublin Convention is not a closed, self-contained mechanism with a predictable outcome. After all, Member States have different legal and factual preconditions for allocating asylum seekers to states outside the Union. Domestic legislation on safe third countries varies[557], as does the availability of workable readmission arrangements with third states.

The Dublin Convention has been exposed to massive criticism from the moment of its inception, most of it emanating from a universalist and protection-minded perspective.[558] However, even governments of Member States have voiced concerns about the ineffective functioning of the Convention. Therefore, it is no surprise that Member States assigned themselves to reconsider the suitability of the rules laid down in the Dublin Convention in the next years. By 2004, the EC shall have adopted a measure on the very issue regulated today by the Dublin Convention. We recall that Article 63 (1) (a) TEC obliges the EC to adopt, within a period of five years after the entry into force of the Treaty of Amsterdam, 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States'.

Following the non-binding Action Plan on the Implementation of the Amsterdam Treaty, a 'continued examination of the criteria and conditions for improving the implementation of the Convention and of the possible transformation of the legal basis to the system of Amsterdam'[559]

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[557] See Council of the European Union, Monitoring the implementation of instruments adopted concerning asylum—Summary report of the Member States' replies to the questionnaire launched in 1997, 17 July 1998, Doc. No. 8886/98, ASIM 139, pp. 23–31.

[558] For an outright rejection, see Bolten, 1992.

[559] Action Plan, para. 36 (b) (i).

should take place within two years after the entry into force of the Amsterdam Treaty, shortening the period set out in Article 63 TEC.

In early 2000, the Commission drew up a detailed working paper on the Dublin Convention and its replacement by a Community measure, which elaborates on the goals pursued by the Dublin Convention and attempts to identify whether the content and implementation of the Convention lives up to them.[560] The Dublin Working Paper reflects some of the criticism voiced against the Convention. In the following, we shall summarise pivotal elements of this criticism.

1. Long processing delays

One of the goals of the Convention was to avoid orbit situations, where asylum seekers are left in doubt for too long as regards the likely outcome of their applications or where they are referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine their application. It is quite obvious that this goal is far from being reached. The Commission states that the average time for processing Dublin cases exceeds the target of one month set out in Article 4 (1) of Decision 1/97. For some Member States the average delay is as much as 90 days, which is the maximum allowed under Article 11(4) DC, before the state to which the request was made is automatically deemed to have accepted responsibility. The Commission notes further that the Convention itself sets generous time limits: where all margins are made full use of, the time-span from individual application to transfer to the responsible Member State may take up to nine months. Such long delays cause great insecurity for the asylum seeker and approximate the limbo of the very orbit situations that the Convention was originally set to solve.[561] Paradoxically, the Dublin process may consume more time than a substantial determination procedure would have done, thus harming protection and control interests alike. 'During the process, it is

[560] Dublin Working Paper. See note 525 above.

[561] Dublin Working Paper, paras 14–20.

not practicable to keep the asylum seeker detained' states one U.K. official, admitting that 'it is often very difficult to keep track' of her.[562]

2. Low efficiency of allocation mechanism

Another goal was to prevent asylum applicants from being able to pursue multiple asylum applications, either concurrently or consecutively, in different Member States and thus to deny asylum seekers the possibility of choosing among Member States. Here, the Commission cautiously indicates that the efficiency of the Dublin system cannot presently be assessed due to the lack of statistics, but spells out some hope for improvement if and when the Eurodac system will have become fully operational.[563] The incomplete statistics currently available suggest that some four percent of all asylum applicants are transferred between Member States under the Dublin Convention.[564] The U.K. official quoted earlier suggests that '[t]he reality is that, at present, most asylum seekers can effectively choose their country of asylum within the EU'.[565]

The reasons for the limited efficiency of the allocation mechanism are primarily to be sought in the difficulties of gathering sufficient evidence relating to the responsibility criteria.[566] Referring to U.K. case law, the Commission also takes note of the fact that referrals are also inhibited by the divergent interpretations of the 1951 Refugee Convention among Member States, inducing Courts to declare transfers as unlawful.[567] Given that domestic and international courts are prepared to question the safety

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[562] J. Johnston, 'Dublin Convention', in UNHCR, *4th International Symposium on the Protection of Refugees in the Central European and Baltic States, 27-29 September 1998, Bled/Slovenia. Report and Proceedings* (1999, UNHCR, Geneva), p. 51. This reflects another choice imposed by lengthy Dublin procedures, namely that between detention and defection. The legality of detention is subject to the narrow legal confinements of Article 5 (1) (f) ECHR. See G, Noll, 'Unsucessful Asylum Seekers—The Problem of Return', 37 *International Migration* 1 (1999), pp. 280–1.

[563] Dublin Working Paper, para. 22.

[564] Dublin Working Paper, para. 38.

[565] Ibid.

[566] The Dublin Working Paper gives a detailed account of evidentiary problems in paras 42–5, enumerating the general lack of evidence, the incentives to destroy documents, and the problems experienced in situations where indicative evidence only is available.

[567] Dublin Working Paper, para. 23.

of Member States[568], it is somewhat surprising that UNHCR is apparently not: the Office has refrained from demanding that appeals against Dublin removals have suspensive effect.[569]

3. Splitting of families

As already noted, the family criterion is doubly confined through its limitation to recognised refugees and its very narrow concept of family. As UNHCR has rightly pointed out, the Dublin Convention can, at worst, lead to persistent family splitting.[570] While the sovereignty clause and the humanitarian clause may mitigate this problem somewhat, their use is at the discretion of states. Apparently, there is no quick fix to this problem, as the Article 18-Committee has been unable to agree on a draft decision concerning the transfer of family members under both clauses.[571] By conclusion, the Convention offers neither a legal obligation nor an

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[568] Apart from the U.K. courts named in the Dublin Working Paper and in chapter 12.2 the ECtHR has affirmed its competence to scrutinise Dublin removal decisions with a view to their compliance with the ECHR: 'The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention [...]. The Court has therefore examined below whether the United Kingdom have complied with their obligations to protect the applicant from the risk of torture and ill-treatment contrary to Article 3 of the Convention'. ECtHR, *Decision as to the Admissibility of Application 43844/98, T.I. vs. the U.K.*, 7 March 2000, p.16.

[569] UNHCR suggests that 'the applicant should be offered an opportunity to request a review of the decision on a Member State's responsibility, in so far as the applicant can forward further elements relevant to the application of the Dublin criteria and procedures in his or her particular case'. The limited scope of review in this demand stands out in marked contrast to the requirement that removal to non-Member States should entail a general appeal option with suspensive effect, set out in the same document (see note 613 below). UNHCR, *Implementation of the Dublin Convention: Some UNHCR Observations* (May 1998, Geneva).

[570] UNHCR, *Implementation of the Dublin Convention: Some UNHCR Observations* (May 1998, Geneva). In its observations, UNHCR suggests that Member States use the humanitarian clause (Art. 9 DC) at least in cases where a family member is gravely ill, has a serious handicap, or is of old age, where one of the applicants is pregnant or has a newborn child, and where minors risk being separated and left unattended. Moreover, the Office calls for guidelines encouraging Member States to apply a broader notion of 'family' than has been laid down in Art. 4 DC.

[571] Dublin Working Paper, para. 32.

incitement to preserve family unity.[572] The Amsterdam Action Plan acknowledges this when it spells out that a study 'should be undertaken to see to what extent the [Dublin, GN] mechanism should be supplemented inter alia by provisions enabling the responsibility for dealing with the members of the same family to be conferred upon one Member State where the application of the responsibility criteria would involve a number of States [...]'.[573]

4. Inequitable distribution of asylum seekers among Member States

'The Convention', states the European Commission, 'has been criticised in some quarters on the grounds that it puts too great a burden on Member States which have external borders which are particularly exposed to migratory pressures'.[574] The Commission goes on to state that 'the number of transfers is relatively modest', concluding that, 'at present, the system can not be said to be putting an excessive burden on any Member State'.[575] In a later chapter, we shall look into this critique at greater length, pursue a closer analysis of the statistical material available and contest the moderate conclusion of the Commission.[576]

Concluding on the aggregated critique, the European Commission finally states in its Dublin Working Paper that there 'do not appear to be many viable alternatives' to the Convention.[577] It is noteworthy, though, that two NGOs have launched a proposal for a draft directive replacing the Dublin Convention, which allocates responsibility to the Member State where an application was first filed, allowing for a number of exceptions (family reunion, or close links to another Member State).[578] Accepting this proposal would imply admitting the complete defeat of the Dublin project. Thus, it seems fair to assume that a new Community instrument will refrain from developing an approach radically different from the existing Convention, and that causing the presence of an asylum

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[572] This is also confirmed in paras 32–4 of the Dublin Working Paper.

[573] Ibid.

[574] Dublin Working Paper, para. 35.

[575] Ibid.

[576] See chapter 8.4.1 below.

[577] Dublin Working Paper, para. 59.

[578] ILPA/MPG and S. Peers, *The Amsterdam Proposals. The ILPA/MPG Proposed Directives on Immigration and Asylum* (2000, ILPA/MPG, London, Brussels), pp. 58–9.

seeker on the territory of a Member State will continue to entail responsibility for processing her claim.

5.2.1.2 *Complementing Dublin: The Eurodac Proposal*

In March 1996, Member States began negotiations on a Convention to establish an identification system based on the fingerprints of asylum seekers. The so-called Eurodac system[579] would gather fingerprint data collected by Member States and transmit it to a Central Unit, which would compare individual sets of fingerprints to the data retained in the system at the request of a Member State. In addition, Member States also prepared a draft Protocol, which was intended to further facilitate the application of the Dublin Convention by providing for the collection of fingerprint data relating to persons apprehended in connection with the irregular crossing of an external border. This data would be available for the purposes of comparison with the fingerprints of people who subsequently claimed asylum in one of the Member States. In addition, the Protocol provided a facility for checking with Eurodac in certain circumstances to determine whether a person found illegally within a Member State had previously claimed asylum in another Member State. The text of a draft Convention and a draft Protocol under Title VI of the Treaty on European Union was prepared and consensus was reached within the Council in March 1999 to freeze the text pending the entry into force of the Treaty of Amsterdam.[580]

After the entry into force of the latter, the Eurodac systems falls under EC competence by virtue of Article 63 (1) (a) TEC. On the basis of the frozen texts, the Commission presented a proposal in 1999 aiming at the adoption of a binding and directly effective Eurodac Regulation.[581] The legal form of a regulation was chosen, as the technical nature of Eurodac makes uniform implementation of the system necessary.

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[579] For a brief overview, see M. Toussaint, 'Eurodac: un système informatisé européen de comparaison des empreintes digitales des demandeurs d'asile, *Revue du marché commun et de l'union européenne* 429 (1999).

[580] Explanatory Memorandum to the Draft Eurodac Regulation, para. 1.2.

[581] European Commission, Proposal for a Council Regulation (EC) concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens, 1999/05/26, COM/99/0260 final—CNS 99/0116 [hereinafter Draft Eurodac Regulation].

The draft Eurodac Regulation covers three groups of persons: asylum seekers[582], persons apprehended in connection with the irregular crossing of an external border[583], and persons found illegally present within a Member State[584]. Taking fingerprints from asylum seekers allows for tracking multiple applications and thus offers considerable advantages for the application of the Dublin criteria. By way of example, fingerprinting persons apprehended at external borders facilitates the application of Article 6 DC, linking illegal border crossing to responsibility under the Dublin Convention. Furthermore, fingerprinting persons found illegally present within Member States facilitates the application of Article 10 (1) paras (c) and (e) DC, relating to the obligation to readmit or take back applicants, incumbent on the responsible state.

Upon adoption, Eurodac will have considerable impact on the situation of protection seekers. Circumvention of the Dublin criteria by using multiple identities or by manipulating the travel itinerary will become much more difficult. Inhibiting manipulation may be considered a good thing. It presupposes, however, that the protection offer in various Member States is more or less of the same standard, and that no protection lacunae exist in any of the Member States. While this is not the case, any perfection of the Dublin Convention will modify, rather than solve, the problems attached to its application.

5.2.2 Allocation to Non-Member States

5.2.2.1 *The 1992 Resolution on Host Third Countries*

Allocation between Member States and third countries is addressed in a non-binding resolution on the safe third country concept:

- EC Ministers Resolution of 30 November–1 December 1992 on a Harmonized Approach to Questions Concerning Host Third Countries[585]

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[582] Arts 4–7 Draft Eurodac Regulation.

[583] Arts 8–10 Draft Eurodac Regulation.

[584] Art. 11 Draft Eurodac Regulation.

[585] WGI 1283 [hereinafter STC Resolution].

The STC Resolution sets out a number of non-binding norms on the procedural aspects of the safe third country-concept, including its relationship to the Dublin Convention, and the qualification of third states as safe.

The procedural rules position the safe third country concept—or, in the original language of the resolution, the concept of 'host third countries'—in the asylum procedures conducted by Member States. The overarching interest is one of procedural economy, expressing itself in the following five principles:

> (a) The formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification;
>
> (b) The principle of the host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees;
>
> (c) Thus, if there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country;
>
> (d) If the asylum applicant cannot in practice be sent to a host third country, the provisions of the Dublin Convention will apply;
>
> (e) Any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country.[586]

Principle (a) introduces a split into formal and substantive procedures. By this step, a doubling of substantial assessment is avoided. The referring state limits its assessment to formal aspects, where referral to a safe third country or a responsible Member State can take place. Substantial assessment is catered for by the receiving state. The hierarchy of referral introduced in Article 3 (5) DC is reiterated in principle (d), and a sovereignty clause reminiscent of Article 3 (4) DC is laid down in principle (e).

[586] Art. 1 STC Resolution.

Article 2 of the STC Resolution enshrines the criteria for the qualification of a third country as safe:

> Fulfilment of all the following fundamental requirements determines a host third country and should be assessed by the Member State in each individual case:
>
> (a) In those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention.
>
> (b) The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.
>
> (c) It must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country.
>
> (d) The asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention. [...]

This article is problematic in that it focuses solely on extraterritorial protection under the 1951 Refugee Convention. Other explicit or implicit prohibitions of refoulement[587] are simply not taken into account, although they may offer wider protection in some cases than the prohibition of refoulement under the 1951 Refugee Convention. The criterion offered by paragraph (b) does not cover such forms of extraterritorial protection, as it is limited to mistreatment taking place *in* the third country. Given the wide scope of the instrument's application, as spelt out in Article 1 (b), this omission is of concern. Moreover, the criteria set out in the present article focus solely on *negative* state obligations, oblivious of the importance of *positive* obligations for extraterritorial protection worth its name.[588]

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[587] See chapters 9.1.2 and 9.1.4 below.

[588] Noll and Vedsted-Hansen, 1999, p. 396 with further references in note 122.

Article 3 of the STC Resolution sets out the relationship between the Dublin Convention and the allocation to a safe third country:

> (a) The Member State in which the application for asylum has been lodged will examine whether or not the principle of the host third country can be applied. If that State decides to apply the principle, it will set in train the procedures necessary for sending the asylum applicant to the host third country before considering whether or not to transfer responsibility for examining the application for asylum to another Member State pursuant to the Dublin Convention.
>
> (b) A Member State may not decline responsibility for examining an application for asylum, pursuant to the Dublin Convention, by claiming that the requesting Member State should have returned the applicant to a host third country.
>
> (c) Notwithstanding the above, the Member State responsible for examining the application will retain the right, pursuant to its national laws, to send an applicant for asylum to the host third country.
>
> (d) The above provisions do not prejudice the application of Article 3(4) and Article 9 of the Dublin Convention by the Member State in which the application for asylum has been lodged.

It is made clear that allocation to a safe third country remains a facultative measure, and refraining from it does not entail any consequences for the application of the Dublin Convention. However, it is pointed out in paragraph (c) that allocation among Member States does not preclude *subsequent* allocation to a safe third country outside the EU.

The STC Resolution has been criticised on a number of counts. On the procedural side, some authors have taken the position that removal of a protection seeker to a Non-Member State without a substantial examination of her claim would contravene the 1951 Refugee Convention.[589] Moreover, they have pointed out that the STC Resolution falls back behind the standards set in EXCOM Conclusions.[590] Somewhat

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[589] Standing Committee of experts in international immigration, refugee and criminal law, *Commentary on the Draft Conclusions of the European Ministers responsible for Immigration Affairs meeting in London on 20.11.1992 and the not yet adopted Resolution concerning Family Reunification* (1993, Forum, Utrecht), p. 16.

[590] Ibid., p. 17.

more cautiously, UNHCR has underscored that decisions on removal to host third countries should only be made by the authority normally competent in asylum matters, that the consent of the host third country should be sought before removal, that protection seekers should not be returned to countries where they have been in mere transit and that the availability of treatment according to basic human standards should be taken into account when determining the status of a third country as safe.[591]

5.2.2.2 *Complementing Allocation to Non-Member States: Readmission Agreements*

During the nineties, readmission agreements were concluded at an amazing pace both in and outside Europe, leaving a profound mark on the system of extraterritorial protection.[592] What is a readmission agreement, and what role does it play in the return of protection seekers to safe third countries?[593] The Report on the Implementation of Readmission Agreements elaborated by the Working Group of the Budapest Group contains a working definition of what constitutes a readmission agreement:

> A readmission agreement shall be understood in general as an international agreement stipulating the procedures for the return and readmission of individuals (with the exception of extradition). The objective of such an agreement [...] is to:

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[591] UNHCR, Resolution on a Harmonized Approach to Questions concerning Host Third Countries. UNHCR Position, December 1992, paras 1–5.

[592] The number of readmission agreements involving European states is large, but difficult to specify, as many agreements remain unpublished or are published with a considerable delay. The IGCARMP maintains a non-public directory of agreements, which is available to participating states only. It has been suggested that, since the late 1980s, some 220 bilateral readmission agreements have been concluded world-wide. IGCARMP, *IGC Report on Readmission Agreements* (1999, IGCARMP, Geneva), p. 4.

[593] For a typology of readmission agreements and an overview of the technical solutions used by states see Noll, 1997, pp. 416–24. For the perspective of industrialised goal states, see IGCARMP, 1999.

> - combat illegal migration (and in this sense to maintain public order and political stability in the countries affected by the immigration influx)
> - share the burden of illegal migration by more countries
> - have a preventive influence on the thinking of potential immigrants
>
> and thus to meet one of the conditions for the gradual reduction or abolition of the control on the internal borders of the countries which follow the readmission principles.[594]

This definition stretches over readmission agreements in general. While some agreements exclusively cover nationals of the State Parties, others are applicable to nationals of third countries as well. The rationale for concluding the former type of readmission agreements is to facilitate return of nationals of the receiving state illegally present in the sending state. This type of agreement shall be looked into in a later section dealing with return issues.[595] Readmission agreements of the latter type (also covering third-country nationals), however, have a wider ambit. With respect to third-country nationals, such agreements represent a co-operation between a transit country and a destination country. Returning third country nationals to a country other than the country of nationality or habitual residence presupposes some form of agreement between the two states.[596] Therefore, a readmission agreement of the latter type is a precondition for return to safe third countries. In the present context, we need only deal with such agreements.

Due to the absence of provisions guaranteeing the observance of the prohibition of refoulement, UNHCR has expressly discouraged the use of 'classical bilateral readmission agreements [...] to return asylum-seekers, even where this is technically possible'.[597] Nonetheless, this has had little impact on the determination of Member States to make continued use of

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[594] Working Group of the Budapest Group, Report on the Implementation of Readmission Agreements, Doc. No. BG11/96 C, p. 2.

[595] See chapter 7.2 below.

[596] See chapter 7.2.1 below.

[597] UNHCR Division of International Protection, Note for the Standing Committee of the Executive Committee, Composite Flows and the Relationship to Refugee Outflows, EC/48/SC/CRP.29, 25 May 1998, para. 19.

readmission agreements to remove protection seekers to third countries deemed safe.

5.2.2.2.1 The EU acquis on Readmission

Presently, the EU acquis comprises three instruments relating to the readmission of third-country nationals to transit countries. In 1994, the Council drew up a specimen agreement, covering the readmission of both nationals and third-country nationals, and recommended its use in a non-binding instrument:

- Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country[598]

The specimen agreement was designed to serve as a model to be used flexibly by Member States when negotiating agreements with non-Member States.

A year later, the specimen agreement was followed by guiding principles for drawing up readmission protocols. Readmission protocols are typically concluded simultaneously with readmission agreements. While the agreement regulates the scope and content of the obligation to readmit in a general fashion, the protocol sets out detailed procedural rules to be followed by the authorities seized with readmission. The guiding principles were laid down in the

- Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements.[599]

In 1996, the Council took further steps to disseminate readmission obligations covering both nationals and third-country nationals by adopting the

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[598] OJ (1996) C 274, pp. 20–4 [hereinafter EU specimen agreement]. While earlier drafts of the specimen contained substantial provisions safeguarding rights and interests of protection seekers, those are lamentably absent in the finalised text. See Guild and Niessen, 1996, p. 407.

[599] OJ (1996) C 274/25.

- Council Conclusions of 4 March 1996 concerning readmission clauses to be inserted in future mixed agreements.[600]

Following this instrument, when mixed agreements between the Member States of the EU and third states are negotiated in the future, it shall be considered whether to include an option to future readmission agreements. By virtue of such a clause, the contracting third state would be obliged to conclude a bilateral agreement on the readmission of third country nationals with Member States which so request. This is the first tangible expression of the Council's wish to exploit the accumulated bargaining power of the Fifteen to facilitate the conclusion of readmission agreements with non-Member States.

None of the three instruments adopted in the area are legally binding. In practice, the scope and content of bilateral readmission agreements concluded by Member States and third states continue to vary to a considerable extent.[601]

5.2.2.2.2 Competencies after Amsterdam

After the entry into force of the Amsterdam Treaty, the conclusion of readmission agreements touches upon the competencies of the EC. Article 63 (3) (b) TEC prescribes that the Council shall adopt, within the transitional period of five years, measures on illegal immigration and illegal residence, including repatriation of illegal residents. Article 63 TEC also states explicitly that such measures adopted by the Council shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

This raises the question to what extent the Council, all Member States, or single Member States may still conclude readmission agreements without infringing upon EC competencies. The Legal Service of the

[600] Docs No. 4272/96 ASIM 6 and 5457/96 ASIM 37.

[601] Even within one and the same country, important variations in the chosen solutions may occur. Germany is a case in point. For an overview, see G. Lehnguth, H. Maaßen and M. Schieffer, *Rückführung und Rückübernahme. Die Rückübernahmeabkommen der Bundesrepublik Deutschland* (1998, R.S. Schulz, Starnberg).

Council has attempted to clarify this issue, and its reasoning shall be briefly reflected in the following.[602]

According to the constant case law of the European Court of Justice, an instrument adopted within the Council or by all Member States acting outside the Council may not encroach upon the powers of the EC. Therefore, after the entry into force of the Treaty of Amsterdam, the Council or all Member States jointly may no longer conclude such agreements.[603]

Whether or not the conclusion of readmission agreements by a single Member State with a third country would violate the EC Treaty hinges on two factors.

First the Council and, if necessary, the Court of Justice has to assess whether readmission agreements are inseparably bound up with the achievement of the Community's immigration policy objectives. If this is the case, it should not be possible for one or more Member States alone to continue to conclude such agreements with third countries, on account of the potential resulting distortions for other Member States in the context of an area without internal border controls. This factor is largely considered to be a matter for the Council's political judgement.[604]

Second, it has to be verified whether or not there are any internal Community rules on repatriation which might be affected by the conclusion of such an agreement. To wit, such rules do not exist to date, apart from Article 23 SC. According to the Council's Legal Service, this provision is not incompatible with the conclusion of a readmission agreement by one or more Member States and a third country.[605]

Interestingly, the first factor takes into account that the removal of third country nationals possesses a dimension of solidarity. It would be unfair if single Member States secured readmission by swiftly concluding bilateral readmission agreements with third countries, thereby exploiting their own political or economical leverage at the cost of other, less influential Member States.

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[602] The following presentation is based on an article in Migration News Sheet. *With the Amsterdam Treaty Now in Force, Member States May Not Collectively Conclude Re-Admission Agreements With Third Countries*, Migration News Sheet, June 1999, p. 1.

[603] Ibid.

[604] Ibid.

[605] Ibid.

In later 1999, and reacting on the effects of the Amsterdam Treaty, the Council adapted its earlier position taken on readmission clauses in mixed agreements by means of the following instrument:

- Conséquences de l'entrée en vigueur du traité d'Amsterdam sur les clauses de réadmission dans les accords communautaires et dans les accords entre la Communauté européenne, ses Etats membres et des pays tiers (accords mixtes)—Adoption d'une décision du Conseil[606].

This decision contains specific specimen readmission clauses, which are to be inserted in future community agreements and mixed agreements. The scope of these clauses is indeed the widest possible.[607] First, a reciprocal obligation to readmit nationals and to issue identification documents for that purpose is included. Second, the contracting parties (that is, the Community and a third state) oblige themselves to conclude a agreement upon request, which would contain specific readmission obligations, including the duty to readmit third-country nationals or stateless persons. Third, until such an agreement has been concluded, the third state obliges itself to conclude bilateral agreements with single Member States upon request, which would, again, regulate specific readmission obligations, including a duty to readmit third-country nationals or stateless persons. Thus, the instrument makes clear that bilateral arrangements are provisional, and will cease to apply when a Community agreement or a mixed agreement enters into force.

While the specimen clauses primarily target undocumented migrants and rejected protection-seekers, they could also be used to return protection seekers with pending claims to third countries considered as safe. However, it is reasonable to expect considerable resistance by third states against the octroi of readmission obligations vis-à-vis non-nationals. On the other hand, the accumulated bargaining power of the Fifteen is considerable.

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[606] Adopted on 2 December 1999. Neither an English-language version, nor the document number was available at the time of writing.

[607] Ibid, Annex, Arts A–D.

5.2.3 Conclusion

Certain aspects of the EU acquis related to allocation give rise to concern.

Firstly, it has been noted that states employ different concepts of what constitutes a safe third country. Within the EU, disparities in the understanding and the application of the concept have been documented in a survey prepared by the Council.[608] In Central and Eastern European countries, the prime partners for readmission at present, the concept is interpreted in very different manners by states applying it.[609] This means that it is virtually impossible for the first requesting state to predict where the requested state may return a given protection seeker to a further (fourth) state. She might be sent on to a country that would not have been considered safe by the state starting the return movement. The risk of chain refoulement is systemically aggravated[610], and cases of actual refoulement have been reported.[611] It has been observed with justified concern that '[t]exts of readmission agreements—even the model readmission agreement drawn up by the EU—fail to specify guaranteed access to status determination procedures, nor do they reiterate the obligation of *non-refoulement*'.[612]

Secondly, the lack of communication between requesting and requested state might put the legal certainty of protection seekers at stake. If it is not made clear to the authorities of the requested state that a returned person made a protection claim which has not been decided in substance, the risk prevails that such a case will be treated simply as an

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[608] Council of the European Union, Monitoring the implementation of instruments adopted concerning asylum—Summary report of the Member States' replies to the questionnaire launched in 1997, 17 July 1998, Doc. No. 8886/98 ASIM 139 [hereinafter 1998 Council Survey], pp. 23–30. By way of example, not all Member States have laid down the criteria enumerated in para. 2 STC Resolution in their domestic legislation. Furthermore, the concept of safe third countries is applied to situations of 'mere transit' in five Member States, while eight Member States refrain from doing so.

[609] For an overview of state practice in Central and Eastern Europe, see F. Liebaut, Liebaut, *Legal and Social Conditions of Refugees and Asylum Seekers in Central and Eastern Europe* (1999, Danish Refugee Council, Copenhagen).

[610] See A. Achermann and M. Gattiker, 'Safe Third Countries: European Developments', 7 *IJRL* 19 (1995).

[611] In a 1995 study, ECRE compiled 16 cases of chain refoulement in 1994. ECRE, *'Safe Third Countries'. Myth and Realities* (1995, London), Appendix B.

[612] Landgren, 1999, p. 29, referring to the EU specimen agreement.

illegal migrant which can be returned to the country of origin.[613] Readmission agreements usually do not address this need for communication. Although a non-binding EU instrument demands that '[t]he third country authorities must, where necessary, be informed that the asylum application was not examined as to substance'[614], state practice in the EU diverges widely on this important issue.[615] In this respect, removal among Member States under the Dublin Convention offers an advantage: it is clear from the outset that the claimant thus removed has not enjoyed a substantial determination of her claim.

Thirdly, allocation to another Member State or a safe third country may deteriorate the legal standing of the protection seeker. Within the EU, asylum and aliens legislation still varies considerably, and allocation to a Member State with a restrictive practice can greatly diminish the chances of being protected. Allocation to a safe third country outside the Union may result in even greater protection losses. This is due to a more limited protection offer and a restrictive recognition practice. In general, Western European countries offer various forms of subsidiary protection

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[613] Therefore, UNHCR has suggested that the consent of the receiving country be obtained before a protection seeker is sent to that country, and that it 'be informed in advance of the return of any asylum-seeker whose application has not yet been substantively examined so that appropriate notification can be given to the border officials and the necessary protection guaranteed'. UNHCR, Readmission Agreements, 'Protection Elsewhere' and Asylum Policy, August 1994, para. 5. With regard to the Dublin Convention, UNHCR has demanded that transfers to non-Member States under Art. 3 (5) DC should be goverened by specific guidelines, ensuring that the sending state seeks the consent of the receiving state '(i) to readmit the asylum seeker; (ii) to consider the merits of the claim; and (iii) to provide effective protection as long as required'. Moreover, the sending state should inform the receiving country in writing that no decision of the substance of the claim has taken place, and that the applicant should receive an opportunity to request review of the removal decision, including suspensive effect. UNHCR, Implementation of the Dublin Convention: Some UNHCR Observations, May 1998. One may wish to add that there are good reasons to demand that these guidelines should also govern transfers between Member States (given that Art. 3 (5) entails the risk of transfer to a fourth country outside the Union). However, UNHCR has refrained from this demand, giving the impression that the Office applies double standards.

[614] EU Council Resolution on minimum guarantees for Asylum Procedures, 20 June 1995, Doc. No. 5585/95, para. 22, OJ (1996) C 274/13.

[615] Five Member States inform the third country concerned, although only one does operate a procedure based on written reports. Other Member States do not inform the country concerned. See 1998 Council Survey, p. 30.

in domestic law.[616] In Central and Eastern European states, the protection offer is largely limited to the Convention refugee category.[617] Moreover, recognition rates in the Central and Eastern European Countries are generally lower than in the EU.[618] Thus, reallocation to Eastern neighbours implies a considerable deterioration of protection prospects for the average claimant.

Finally, as the discussion on Eurodac, evidence and time limits has shown, allocation mechanisms are open to manipulation by the individuals subjected to them. It is conceivable that some protection seekers prefer continued illegality in the destination country to being allocated to a safe third country. While they might vanish from the asylum statistics of the destination state, they do not necessarily vanish from its territory. Rather than solving the problem, control measures merely shift it to another arena.

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[616] An overview of diverging practices in Member States is given in European Council, Summary of replies concerning the national instruments of protection falling outside the scope of the Geneva Convention—Subsidiary protection, 6 January 1998, Doc. No. 13667/97 ASIM 267.

[617] For an overview, see F. Liebaut, *Legal and Social Conditions of Refugees and Asylum Seekers in Central and Eastern Europe* (1999, Danish Refugee Council, Copenhagen).

[618] See chapter 8.4.2 below.

6 Access to Full-Fledged Procedures under the EU acquis

GLOBALLY, AS WELL AS REGIONALLY, asylum procedures differ widely. In some EU Member States, the determination of claims is carried out in a two-tiered system by specific authorities[619], while others involve courts at the appeal stage, allowing for up to four tiers.[620] Time limits for appeals range widely, and so do the rules governing repeat applications.[621] To be sure, certain states split up asylum procedures in a so-called admissibility stage and the ordinary procedure. At the admissibility stage, a decision is taken whether a case shall be dealt with in the ordinary procedure, or whether it shall be rejected as manifestly unfounded.

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[619] In Sweden, decisions at first instance are taken by the State Immigration Board, while appeals are decided by the Aliens Appeals Board. Exceptionally, the latter can refer cases to the government.

[620] In Germany, the initial decision is taken by an authority, while appeals are handled by two additional tiers of administrative courts (Administrative Courts as the second instance and Higher Administrative Courts as the third). In certain cases, a fourth tier is available (referral to the Federal Administrative Court or the Federal Constitutional Court).

[621] IGCARMP, 1997, pp. 440 and 436.

Since the eighties, European states have shown concern about the excessive length of asylum procedures resulting primarily from an increasing number of claims unmatched by a proportional rise in states' resources for processing them. Substantial backlogs of cases awaiting decision developed, entailing a long wait for the final decision.

Without doubt, lengthy procedures are detrimental both to the individual and the host state. The individual is left uncertain about her future, and this has a negative psychological impact. Cases clearly falling under one of the protection categories on offer are kept in the inferior status of a protection seeker longer than necessary, thus postponing integration into the host society. The additional costs flowing from postponement—such as delayed entry into the labour market—are also detrimental from the perspective of the host state. Finally, the longer the determination of a claim takes, the more difficult it is to return the claimant upon a negative decision.

In response, European states resorted to what were dubbed 'accelerated procedures'. Taking the example of a car, acceleration can be improved by fitting a more powerful engine or by cutting down weight. Generally, the latter method was chosen—determination procedures were switched to lean production. Depth was traded off for speed by augmenting the use of presumptions. Host states usually made up their own package of measures, serving themselves from a toolbox of restrictive solutions.[622]

The acceleration of procedures by using presumptions made its way to the EU acquis. First, the concept of 'manifestly unfounded applications' was introduced and, second, the concept of the safe country of origin was launched. Nonetheless, the procedural acquis presented below largely failed to produce a harmonisation of both concepts in the domestic law of the Member States.[623] The 1998 Council Survey showed that substantial divergence persisted.[624]

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[622] IGCARMP, 1997, p. 23.

[623] IGCARMP, 1997, p. 23.

[624] 1998 Council Survey, pp. 6–56. The lack of harmonisation was also taken note of by the European Commission. See text accompanying note 684 below.

6.1 The EU acquis Related to Procedure

Manifestly unfounded applications should be singled out and rejected very quickly in a simplified procedure. This is the underlying assumption of the non-binding

- EC Ministers Resolutions of 30 November–1 December 1992 on Manifestly Unfounded Applications for Asylum.[625]

Instead of being rejected after a full determination in substance, manifestly unfounded applications should be rejected at an initial stage.[626] For these ends, Member States could split procedures into two parts. In the 'admissibility stage', manifestly unfounded applications would be rejected, and only the deserving cases would go on to the second stage, involving a full scrutiny on their merits.[627] The resolution suggests that initial decisions on manifestly unfounded applications should be reached within one month.[628] Appeal or review procedures may be more simplified than those generally available in the case of other rejected asylum applications.[629] The procedural guarantees drawn up to balance these intrusions into the depth of scrutiny appear rather cryptic and are worded in weak language.[630]

According to this resolution, an application for asylum shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria under the 1951 Refugee Convention, either because 'there is clearly no substance to the applicant's claim to fear persecution in

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[625] WGI 1282 REV 1 [hereinafter MUA Resolution].

[626] 'Member States may include within an accelerated procedure (where it exists or is introduced), which need not include full examination at every level of the procedure, those applications which fall within the terms of paragraph 1, although an application need not be included within such procedures if there are national policies providing for its acceptance on other grounds.' Para. 2 MUA Resolution.

[627] 'Member States may also operate admissibility procedures under which applications may be rejected very quickly or objective grounds.' Para. 2 MUA Resolution.

[628] Para. 3 MUA Resolution.

[629] Ibid.

[630] 'A decision to refuse an asylum application which falls within the terms of paragraph 1 will be taken by a competent authority at the appropriate level fully qualified in asylum or refugee matters. *Amongst other procedural guarantees* the applicant *should* be given the opportunity for a personal interview with a qualified official empowered under national law before any final decision is taken.' MUA Resolution para. 4 (emphasis added).

his own country', or because 'the claim is based on deliberate deception or is an abuse of asylum procedures'.[631] Both categories exceed the definition adopted by the UNHCR Executive Committee.[632] Under the former category, the resolution lists the following cases:

- applications the terms of which raise no question of refugee status within the terms of the Geneva Convention, inter alia those lacking credibility[633];
- applications where the claimant could have resorted to an internal flight alternative[634]; and
- applications where the claimant resorts from a country of origin presumed as safe.[635]

Some of the listed cases raise grave misgivings.[636] Determining credibility or the availability of an internal flight alternative must not be done solely in a formalised manner. Both hinge on a substantial rather than a formal

[631] Para. 1 (a) MUA Resolution.

[632] See EXCOM Conclusion No. 30 (1983) in which the Executive Committee defined the category of 'manifestly unfounded' asylum applications in a comparably restrictive manner. Available at http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom30.htm.

[633] Para. 6 MUA Resolution. The paragraph gives a number of examples: 'This may be because: (a) the grounds of the application are outside the scope of the Geneva Convention: the applicant does not invoke fear of persecution based on his belonging to a race, a religion, a nationality, a social group, or on his political opinions, but reasons such as the search for a job or better living conditions; (b) the application is totally lacking in substance: the applicant provides no indications that he would be exposed to fear of persecution or his story contains no circumstantial or personal details; (c) the application is manifestly lacking in any credibility: his story is inconsistent contradictory or fundamentally improbable'.

[634] MUA Resolution, para. 7. For the purposes of this work, the term 'internal flight alternative' relates to cases where the claimant fears 'persecution which is clearly limited to a specific geographical area where effective protection is readily available for that individual in another part of his own country to which it would be reasonable to expect him to go' (para. 7 MUA Resolution).

[635] Para. 8 MUA Resolution.

[636] See G. S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (1996, Clarendon Press, Oxford), p. 346; Noll and Vedsted-Hansen, 1999, p. 397.

assessment.[637] Therefore, it seems inappropriate to deal with both types of cases in accelerated procedures.

The resolution exemplifies a deliberate deception or abuse of asylum procedure with the cases where the claimant has

> (a) based his application on a false identity or on forged or counterfeit documents which he has maintained are genuine when questioned about them;
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> (b) deliberately made false representations about his claim, either orally or in writing, after applying for asylum;
>
> (c) in bad faith destroyed, damaged or disposed of any passport, other document or ticket relevant to his claim, either in order to establish a false identity for the purpose of his asylum application or to make the consideration of his application more difficult;
>
> (d) deliberately failed to reveal that he has previously lodged an application in one or more countries, particularly when false identities are used;
>
> (e) having had ample earlier opportunity to submit an asylum application, submitted the application in order to forestall an impending expulsion measure;
>
> (f) flagrantly failed to comply with substantive obligations imposed by national rules relating to asylum procedures;
>
> (g) submitted an application in one of the Member States, having had his application previously rejected in another country following an examination comprising adequate procedural guarantees and in accordance with the Geneva Convention on the Status of Refugees. To this effect, contacts between Member States and third countries would, when necessary, be made through UNHCR.[638]

The listed examples interlock with visa policies, the Dublin Convention and the concept of safe third countries, as described above. If the protection seeker circumvents any of these three norm clusters—e.g. by

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[637] UNHCR thinks it inappropriate to consider applications raising the issue of an internal flight alternative in the same manner as a manifestly unfounded application: UNHCR, UNHCR's Position on Manifestly Unfounded Applications for Asylum, December 1992, para. 2 (iii). Accord: Standing Committee of experts in international immigration, 1993, p. 12.

[638] Para. 9 MUA Resolution.

destroying travel documents revealing her itinerary through a safe third country—she may be punished with an accelerated procedure. However, the resolution adds an important caveat to the decision-makers in paragraph 10, stating that the factors listed above

> are clear indications of bad faith and justify consideration of a case under the [manifestly unfounded, GN] procedure [...] in the absence of a satisfactory explanation for the applicant's behaviour. But they cannot in themselves outweigh a well-founded fear of persecution under Article 1 of the Geneva Convention and none of them carries any greater weight than any other.

Again, to assess the existence of such a fear, a consideration of the merits is required. The resolution seems to be torn between two extremes. On the one hand, it works with the fiction of a clinical cut between form and matter; on the other, it acknowledges that the cases listed as manifestly unfounded cannot be solely determined on formal grounds.

In addition to the two named categories, the resolution also gives leeway to further categories of cases which Member States wish to consider under accelerated procedures. The resolution names cases falling under the exclusion clause—Article 1.F GC—and cases involving a threat to public security as examples.[639] Neither of these categories possesses a clear-cut formal character. Rather, both necessitate complex substantial reasoning.

As earlier mentioned, the MUA Resolution suggested that applications filed by persons coming from a safe country of origin could be dealt with on the presumption that they are manifestly unfounded. The concept of safe countries of origin is developed more fully in the non-binding

- Conclusions adopted on 30 November 1992 concerning countries in which there is generally no serious risk of persecutions.[640]

Before presenting the content of this instrument, let us briefly reflect on the background of the concept of safe countries of origin.[641] Basically, this

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[639] Para. 11 MUA Resolution. UNHCR considers the processing of such cases under accelerated procedures as inappropriate. UNHCR, UNHCR's Position on Manifestly Unfounded Applications for Asylum, December 1992, para. 2 (ii). Accord: Standing Committee of experts in international immigration, 1993, p. 13.

[640] WGI 1281 [hereinafter SCO Conclusions].

concept entails a repartition of labour between the domestic legislator and the authority determining the individual claim. First, the legislator makes an abstract assessment of the general safety from persecution in countries of origin. A country passing certain benchmarks is listed as 'safe'. Second, where a person claims to risk persecution upon return to such a country, this claim is determined in an expedited and simplified procedure. To wit, the abstract assessment by the legislator is complemented by a summary procedure in casu. These procedures are built on the presumption that the claim is 'manifestly unfounded'. In comparison to a full-fledged asylum procedure, the profoundness of scrutiny and the access to legal remedies are substantially reduced.

Generally, a presumption of safety attached to certain countries of origin entails two problems. First, even in states deemed safe on valid grounds, single and exceptional cases of persecution may occur. Due to the general presumption of safety, its victims are exposed to a disadvantageous procedural position when claiming asylum. Second, the institutionalised presumption of safety is dangerous when sudden changes take place in countries of origin. Striking them off the list takes time, which exposes intertemporal cases to augmented risks.

According to the SCO Conclusions, the term 'safe country of origin' denotes a 'country which can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Geneva Convention have ceased to exist'.[642]

Following the text of the Resolution, the purpose of introducing this term was to create a rebuttable presumption that applicants from those countries are not in need of protection.[643] This presumption should assist

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[641] On the manifestation of this concept in the domestic law of European countries, see H. Mårtenson and J. McCahrty, 'Field report. "In general, no serious risk of persecution": safe country of origin practices in nine European states', 11 *Journal of Refugee Studies* 304 (1998) (covering nine countries) and European Parliament, 1997 (covering the EU Member States). For a brief update, see European Parliament, 2000, pp. 18–9, indicating that eleven Member States currently make use of the concept (Austria, Denmark, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the U.K.).

[642] Para. 1 SCO Conclusions.

[643] Para. 2 SCO Conclusions.

in speeding up procedures.[644] The qualification of a country as safe should be based, at least[645], on the previous numbers of refugees and recognition rates, the observance of human rights, the existence of democratic institutions and the stability of these three factors.[646]

Below, we shall be compelled to return to this concept, when dealing with a specific instrument qualifying all Member States as safe countries of origin.[647]

In 1995, the Council adopted a non-binding instrument dealing with asylum procedures in a more comprehensive fashion:

- EU Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures[648]

This resolution starts out with a general deference to domestic law: the regulations on access to the asylum procedure, the basic features of the asylum procedure itself and the designation of the authorities responsible for examination of asylum applications are to be laid down in the individual Member State's legislation.[649] The resolution does offer a number of minimum rules, though, on the instructions given to border authorities and other authorities receiving applications[650], on the qualification of the decision-making bodies[651], on their duty to establish relevant facts ex officio[652], on the right to appeal to an independent body[653] and the resources to be allocated to decision-making bodies[654].

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644 Para. 3 SCO Conclusions.

645 Para. 3 SCO Conclusions.

646 Para. 6 SCO Conclusions. Among the criteria for determining safe countries of origin, UNHCR also lists the accessiblity of a safe country of origin to independent national and international organisations for the purpose of verifying and supervising respect for human rights. UNHCR, UNHCR's Position on Conclusions on Countries in which there is Generally no Serious Risk of Persecution, December 1992.

647 See chapter 6.2 below on the Spanish Protocol.

648 OJ (1996) C 274/13 [hereinafter Asylum Procedures Resolution].

649 Para. 1 Asylum Procedures Resolution.

650 Para. 7 Asylum Procedures Resolution.

651 Para. 6 Asylum Procedures Resolution.

652 Para. 5 Asylum Procedures Resolution.

653 Para. 8 Asylum Procedures Resolution.

654 Para. 9 Asylum Procedures Resolution.

It also lays down a number of procedural rights of the protection seeker: right to lodge a claim, right to data protection, right to information in a language one understands, right to a personal interview and a right to appeal.[655] However, procedures relating to allocation under the Dublin Convention are excluded from the ambit of this instrument, and shall be regulated by the Article 18-Committee instead. So far, the Committee has not come up with any minimum rights.[656]

Of specific interest is the question of whether an applicant may remain on the territory of a Member State until a final decision has been taken. In this question, the Resolution replicates the restrictive innovations in the domestic legislation of the Member States.[657] At the outset, it reaffirms the suspensive effect of an application in paragraph 2:

> In order to ensure effectively the principle of "non-refoulement", no expulsion measure will be carried out as long as no decision has been taken on the asylum application.[658]

In paragraph 17, this protection is extended to the appeal stage, but deference is made to more restrictive domestic legislation:

> Until a decision has been taken on the appeal, the general principle will apply that the asylum-seeker may remain in the territory of the Member State concerned. Where the national law of a Member State permits a derogation from this principle in certain cases, the asylum-seeker should at least be able to apply to the bodies referred to in paragraph 8 (court or independent review authority) for leave to remain in the territory of the Member State temporarily during procedures before those bodies, on the grounds of the particular

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[655] Paras 10–1 and 13–6 Asylum Procedures Resolution.

[656] European Commission, Towards Common Standards on Asylum Procedure, 3 March 1999, SEC(1999) 271 final [hereinafter Asylum Procedures Proposal], p. 8, para. 12.

[657] The relevant provisions seem to be tailor made to accommodate the reformed German asylum law, adopted two years earlier. See Noll, 1997a, pp. 425 and 428 on the non-suspensive effect of appeal against deportation to safe third countries in the German legislation.

[658] See also para. 12 Asylum Procedures Resolution: 'As long as the asylum application has not been decided on, the general principle applies that the applicant is allowed to remain in the territory of the State in which his application has been lodged or is being examined'.

> circumstances of his case; no expulsion may take place until a decision has been taken on this application.

The very core of the suspensive effect of appeal is to be found in the second sentence of the quoted paragraph: even if domestic law permits removal before the appeal is decided on in its totality, the protection seeker always enjoys suspension from removal until her application for leave to remain is decided on. However, the rather confusing language of the provision—not to mention the legal character of the whole instrument—is all too vague to provide effective protection. Connecting the verb 'should' to a stay of deportation approximates this paragraph to a devout plea.

This minimum form of protection from removal also applies to applications considered manifestly unfounded in accordance with paragraphs 21 and 22 of the Asylum Procedures Resolution. Both paragraphs allow for exceptions from the 'principle in paragraph 17'—which refers to its first sentence. But neither paragraph 21 nor 22 touch upon the very core of paragraph 17—its second sentence. As Terlouw and Boeles rightly assert[659], an application for suspensive effect submitted to a review body shall entail non-removal even in cases considered to be manifestly unfounded. This applies also to cases where the asylum application is filed at the border.[660] It is deeply troubling that the European Commission circulates a commentary on the Asylum Procedures Resolution among candidate countries that states precisely the opposite.[661]

The Asylum Procedures Resolution also introduces specific provisions for applications filed at the border of Member States. Curiously, the

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[659] For a comprehensive argumentation, see A. Terlouw and P. Boeles, 'Minimum Guarantees for Asylum Procedures', in B. G. Tahzib, C. A. Groenendijk, M. Vreugdenhill-Klap, and J. M. van de Put (eds), *Democracy, Migrants and Police in the European Union: The 1996 IGC and Beyond* (1997, FORUM, Utrecht), pp. 99–100, involving para. 19 into their contextual interpretation.

[660] The specific provisions in the Asylum Procedures Resolution on applications filed at the border have generated some confusion on this point (para. 24 in particular). However, the second sentence of para. 17 also applies to cases falling under para. 24. Terlouw and Boeles, 1997, p. 101.

[661] European Commission, Commentary on the Resolution on Minimum Guarantees for Asylum Procedures, reprinted in van Krieken, 2000, pp. 233–44, at pp. 242–3. There is no mention made of Terlouw and Boeles' analysis in the commentary, and the Commission does not even attempt to support its reading with some form of analysis.

Resolution exempts the body processing such applications from some of the procedural requirements valid in all other cases.[662] This may lead to the qualitative downgrading of the processing of protection claims in border situations. Moreover, in the interest of expediency, those cases considered as manifestly unfounded are exempted from the requirement that appeal to an independent court should be provided for.[663] Finally, in derogation from a general rule prescribing a written communication of decisions on asylum applications[664], rejections of applications considered manifestly unfounded and applications filed at borders need only be communicated orally.[665] The numerous possibilities for exceptions and deferrals have given rise to concern among observers.[666]

While the Asylum Procedures Resolution features rudimentary minimum standards to protect women and unaccompanied minors[667], the needs of the latter group are more comprehensively addressed in the non-binding

- Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries[668]

The Resolution enshrines the right to apply for asylum enjoyed by unaccompanied minors, and regulates their representation during procedures, the assessment of their age and their placement during procedure.[669] Moreover, the instrument contains specific rules on hearing

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[662] Para. 25 provides that exception may be made from para. 17 in cases where the host third country is applicable. Para. 17, in turn, reads: 'The authorities responsible for border controls and the local authorities with which asylum applications are lodged must receive clear and detailed instructions so that the applications, together with all other information available, can be forwarded without delay to the competent authority for examination'. It is not clear which of the requirements in para. 7 may be derogated from. Terlouw and Boeles, 1997, p. 102.

[663] Para. 19 Asylum Procedures Resolution.

[664] This requirement is enshrined in para. 15 Asylum Procedures Resolution.

[665] Paras 22 and 25 Asylum Procedures Resolution.

[666] 'The psychological effect of these exceptions [...] is the promotion of disrespect for basic principles.' Terlouw and Boeles, 1997, p. 103.

[667] See paras 26 and 27 Asylum Procedures Resolution.

[668] OJ (1997) C 221, pages 23 to 27, [hereinafter Unaccompanied Minors Resolution].

[669] Art. 4 Unaccompanied Minors Resolution.

the unaccompanied minor[670] and reaffirms the validity of non-refoulement rules under the 1951 Refugee Convention, the ECHR and the CAT[671].

All of the four instruments suffer from a substantial shortcoming—the lack of binding force. This shortcoming is equally detrimental for the Union and for the single protection seeker. The harmonisation effect brought about by the four instruments is insufficient, and they cannot be invoked in defence of a protection seeker exposed to domestic practices undercutting the stated rights. Another criticism directed against the procedural acquis, as it stands today, is its comprehensive deference to domestic law.[672] Finally, the procedural acquis is far from complete; important areas, such as the standard of proof required for a positive decision, have not been addressed. The Commission has drawn up a list of shortcomings, the details of which will be presented in the concluding sub-section.

6.2 The Spanish Protocol

At the 1997 Intergovernmental Conference in Amsterdam, the Spanish delegation proposed an instrument qualifying Member States as safe countries of origin.[673] This move has to be seen against the background of a protracted Spanish-Belgian conflict involving asylum claims by Basque separatists in Belgium. In spite of protestations by UNHCR and NGOs, Member States agreed on a specific instrument to this effect.[674] Upon its

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[670] Ibid.

[671] Art. 5 Unaccompanied Minors Resolution.

[672] Noll and Vedsted-Hansen, 1999, p. 399.

[673] One should note that the ground for this proposal was prepared two years earlier in para. 20 of the non-binding Asylum Procedures Resolution: 'The Member States observe that, with due regard for the 1951 Geneva Refugee Convention, there should be no de facto or de jure grounds for granting refugee status to an asylum applicant who is a national of another Member State. On this basis a particularly rapid or simplified procedure will be applied to the application for asylum lodged by a national of another Member States, in accordance with each Member State's rules and practice, it being specified that the Member States continue to be obliged to examine individually every application for asylum, as provided by the Geneva Convention to which the Treaty on European Union refers'.

[674] For an interesting account of the comprehensive diplomatic manoeuvres preceding the adoption of this instrument and the marginalisation of UNHCR's comments in the process, see Landgren, 1999, pp. 8–22.

adoption, the 'Protocol on asylum for nationals of Member States of the European Union'[675] was annexed to the TEC. Within the framework of European integration, this instrument is unique, insofar as the Member States consciously place their own citizens in a *less favourable* position than citizens of third states, raising claims of discriminatory treatment.[676] This runs counter to the legislative *leitmotiv* of the foundational treaties, which seeks to promote integration through entitlement.

The sole article of the Spanish Protocol merits quoting in full:

> Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:
>
> (a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;
>
> (b) if the procedure referred to in Article F.1(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;
>
> (c) if the Council, acting on the basis of Article F.1(1) of the Treaty on European Union, has determined, in respect of the Member State which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article F(1);
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> (d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly

[675] Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/*en* 24 [hereinafter Spanish Protocol].

[676] See chapter 12.3 below for a separate analysis of the discrimination claim with regard to the Spanish Protocol.

> unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

It is not easy to make sense of this construction, which might be explained by the conflict of intentions underpinning the drafting process. First, the instrument sets out with a general rule that an asylum application in a Member State filed by the national of another Member State will not be processed, save for four exceptional cases. Three of these—paragraphs (a) to (c)—define the circumstances during which the presumption of safety is lifted. It is noteworthy that these circumstances are strictly formalised and hinge on either a derogation of rights under the ECHR by the Member State of origin or on proceedings on the basis of Article 7 (1) TEU (formerly Article F.1, as referred to in the text of the Spanish Protocol). Regarding the latter provision, critics have rightly questioned whether the Council's 'politically charged and cumbersome sanctioning procedures will in fact be sensitive enough to identify persecution where it is at an individual level'.[677]

Second, sub-paragraph (d) seems to restore the decision-making power of the Member State with which asylum is sought, obliterating the complex procedures set out in the preceding sub-paragraphs. However, this power is bought at the price of notifying the Council and at an automatic relegation of the claim to the category of 'manifestly unfounded claims'.

The Spanish Protocol is a binding instrument and forms an integral part of the Treaty.[678] What exactly is the bottom line of the obligation Member States have taken upon themselves when adopting it? The answer lies in the last sub-paragraph. Any Member State can process an application falling under the ambit of the Spanish Protocol, regardless of the criteria given in sub-paragraphs (a) to (c). But where it does, it has to inform the Council and to process such a claim on the presumption that it is manifestly unfounded.

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[677] ECRE, Analysis of the Treaty of Amsterdam in so far as it relates to asylum policy, 10 November 1997, p. 9. The criticism voiced by ECRE touches upon a more principal level: 'But of course the main threat of the Protocol is one of principle, as it set a very bad precedent for other regions of the world, linking the legal right to asylum to the political and economic alliance of neighbouring countries'. Ibid.

[678] This flows from Art. 311 TEC.

Through the Spanish Protocol, the Council sends out two messages. The first is that Union citizens have no reason to seek asylum. Suffice it here to note that such a message is structured as a liar's paradox. The second is that those Union citizens disloyal enough to seek asylum within the Union will be sanctioned with procedural disentitlement, as far as it is within the power of the Member States. This is not to claim that the Member States, when deliberating the Spanish Protocol, actually reasoned in terms of betrayed personal loyalty. However, one cannot help but read the outcome as a sanctioning of the unfaithful. To conclude, the Spanish Protocol endows Union citizenship with a Janus face. While Union citizenship was originally conceptualised as a benefit by the Maastricht Treaty, the Spanish Protocol adds the dimension of a fetter to it, impeding the full enjoyment of human rights by the unfaithful. It is all the more to be lamented that the European Commission endorses this perspective when excluding Member State nationals from the personal scope of a proposed burden-sharing scheme.[679]

Finally, the enlargement process sheds its own light on the Spanish Protocol. With Turkey, one of the main refugee-producing countries in Europe is applying for membership in the European Union. Certainly the accession process possesses considerable leverage, and may indeed trigger comprehensive improvements in the human rights records of candidate countries. Yet the conversion from a main producer of displacement into a safe country of origin is an enormous task. With all due respect for the human rights leverage of the enlargement process, it is by no means clear that Membership will wait until the very moment all forms of persecution and violations have been abolished. With enlargement essentially being a tit-for-tat business, the risk of politicising and bartering human rights protection is far from merely hypothetical.

6.3 Competencies after Amsterdam

With the Amsterdam Treaty, competencies in the procedural field have been moved over to the first pillar. Pursuant to Article 63 (1) (d) TEC, 'minimum standards on procedures in Member States for granting or withdrawing refugee status' shall be adopted within the transitional period

[679] See chapter 8.3.6 on the ERF proposal below. Member State nationals do not qualify as 'refugees' or 'displaced persons' under Article 2 of this proposal.

of five years. The Action Plan on the Implementation of the Amsterdam Treaty gives the exercise of this competence higher priority, and states that minimum standards should be adopted within two years of the entry into force of the Amsterdam Treaty.[680]

Hitherto, the issue of which reception standards protection seekers are entitled to during procedures has not been addressed by the existing acquis. The Treaty of Amsterdam put the issue of reception during procedure on the agenda of the EC institutions by assigning them to adopt minimum standards on the reception of asylum seekers in Member States within the transitional period of five years. The Action Plan gives the institutions two years to achieve this goal.[681] Today, reception standards vary widely among Member States[682], and it is feared that this will create unwanted secondary movements by scheming protection seekers.[683] But even from the perspective of the protection seeker the situation is unsatisfactory, as her basic living conditions fluctuate greatly depending on which country she is allocated to.

While the latter competence has not been made use of at the time of writing, the process based on the former has started. In 1999, the European Commission initiated discussions on the drafting of an instrument stipulating minimum procedural standards.[684] Its proposal offers no specific draft text, but draws the attention of the institutions to topical issues, which a future instrument should address. In many aspects, the proposal highlights the shortcoming of the existing acquis. In line with an earlier Communication put forward by the Commission, such an instrument is proposed to take a binding form 'to ensure legal certainty for both asylum applicants and Member States'.[685] The Commission points out that two approaches offer themselves—either a harmonisation

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[680] Action Plan Amsterdam, para. 36 (b) (iii).

[681] Action Plan Amsterdam, para. 36 (b) (v).

[682] For a detailed overview, see Liebaut and Hughes, 1997; and IGCARMP, 1997. A synoptic table is available on p. 447 of the latter publication, suggesting that, in particular, the right to work, the right to social assistance and the right to housing vary considerably among the ten Member States included in the survey.

[683] Noll and Vedsted-Hansen, 1999, p. 399.

[684] European Commission, Towards Common Standards on Asylum Procedure, 3 March 1999, SEC(1999) 271 final [hereinafter Asylum Procedures Proposal].

[685] Asylum Procedures Proposal, p. 3, para. 3, referring to the 1994 Communication to the Council and the European Parliament on immigration and asylum policies, COM (94) 23 final, Brussels 23 February 1994, paras 86–90.

establishing an obligatory minimum set of rules, and the possibility to opt in on measures accelerating procedures, or an all-out-integration, prescribing a single European asylum procedure.[686] Given the two-year time frame stipulated by the Action Plan, the Commission proposes to act on the former approach, without excluding the latter 'in the slightly longer term'.[687] In the eyes of the Commission, the existing acquis 'can be viewed as the first steps towards common minimum standards on asylum procedures'.[688] However, these first steps have apparently been taking a questionable direction, as the Commission deems it fit to draw several parts of the acquis into question. 'The Commission takes the view that it will be necessary to revisit some of the concepts and principles found in the soft law and to propose the removal of some of the exceptions and derogations which weaken these instruments.'[689] After initial observations on the scope of a future instrument, the Commission shares its critical reflections on the existing acquis with the reader.

With regard to the Dublin Convention, the Commission notes the absence of procedural safeguards for the allocation process and believes that such should be included in a binding legal instrument.[690] The Commission also criticises the inadequate separation of formal and substantial grounds for rejecting a claim in the MUA Resolution. In the opinion of the Commission, an 'admissibility procedure' should be restricted to determining whether Member States shall consider an application in substance, or whether the applicant should be reallocated to another Member State or to a safe third country.[691] Furthermore, the Commission underscores that the practices of Member States with regard to the concept of safe third countries vary significantly. In this respect, the Commission would find a clarification of the following issues useful: the need for contacts between Member State and the safe third country, the availability of an effective remedy in the third country, the obligation to reassess the qualification of a third country as safe in the individual case,

[686] Asylum Procedures Proposal, p. 7, para. 9.

[687] Ibid.

[688] Asylum Procedures Proposal, p. 7, para. 10.

[689] Ibid.

[690] Asylum Procedures Proposal, p. 8, para. 12.

[691] Asylum Procedures Proposal, p. 9, para. 13.

the scope for common assessments of third countries as safe and the application of the concept in situations of 'mere transit'.[692]

While the Commission acknowledges that procedures should be sped up to avoid both uncertainty for the individual and the abuse of procedures to prolong the presence of people not in need of protection, it warns that the basic safeguards laid down in the Asylum Procedures Resolution cannot be reduced. Therefore, 'this issue should be approached from the starting point of increasing efficiency rather than weakening existing safeguards'.[693] Streamlining the working practices of decision-making bodies is proposed, but also a simplified two-tier asylum procedure.[694] The latter impacts clearly on the legal safeguards enjoyed by the protection seeker and goes to show that the Commission would accept a watering down of domestic safeguards for the sake of increasing speed—a scenario very much in contrast to its quoted intention.

The Commission furthermore questions the usefulness of the one-month time limit for taking initial decisions[695] set by the MUA Resolution, which has proven to be 'over ambitious [sic] and unrealistic in many cases'.[696] 'The imposition of a time limit', states the Commission, 'does not in itself provide Member States with a tool to reduce the duration of the asylum procedure'.[697] Rather, it is suggested to focus on the adequate provision of resources to decision-making bodies, and to ensure efficient working practices.[698] The acquis left unaddressed such important elements as repeat applications and standards of proof, and the introduction of European legislation on this point should be considered.[699]

On the acquis regarding manifestly unfounded applications, the Commission is rather outspoken. First, it considers it inadequate to term such applications as manifestly unfounded, stating that it is 'inaccurate to describe a case as manifestly unfounded whilst the procedures to determine whether or not the case is well founded are still in operation'.[700]

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[692] Asylum Procedures Proposal, p. 9, para. 14.

[693] Asylum Procedures Proposal, p. 10, para. 15.

[694] Asylum Procedures Proposal, p. 10, paras 16–7.

[695] See note 628 above.

[696] Asylum Procedures Proposal, p. 11, para. 18.

[697] Ibid.

[698] Ibid.

[699] Asylum Procedures Proposal, p. 11, paras 19–20.

[700] Asylum Procedures Proposal, p. 12, para. 21.

Second, the procedural consequences of applying the concept must be specified to a higher degree. Finally, the Commission calls for a reconsideration of placing issues of credibility and exclusion from refugee status respectively in the bracket of manifestly unfounded cases.[701] A clear distinction between manifestly unfounded cases falling under the concept of safe third countries and other manifestly unfounded cases, where substantial elements of an application are examined, is called for.[702]

With regard to the concept of safe countries of origin, the Commission underscores that the relevant qualification practices vary widely between Member States. The Commission proposes a review of the concept, including the option to abolish it altogether.[703] The Commission also reflects on a further elaboration of the protection yielded to vulnerable groups (such as women and children), and recommends that existing safeguards shall be built upon further. Specifically, it should be considered whether dedicated provisions for torture victims and victims of sexual violence should be drawn up.[704] Finally, the Commission states that it is not warranted to regulate the issue of cancellation in a future instrument, but insists that an extension of safeguards relating to cessation should be considered.[705]

Given its insistence on a clear-cut separation of formal and material aspects when singling out cases for accelerated procedures, one would have expected the Commission to criticise a further aspect of the MUA Resolution. We recall that this instrument includes the availability of an internal flight alternative in the list of cases considered to be manifestly unfounded.[706] As this remains a matter of individual assessment, involving material issues of each single case, it is astonishing that the Commission refrained from suggesting a reconsideration of paragraph 11 of the MUA Resolution.

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[701] Ibid.

[702] Ibid.

[703] Asylum Procedures Proposal, pp. 12–3, para. 22.

[704] Asylum Procedures Proposal, p. 13, para. 23.

[705] Asylum Procedures Proposal, pp. 13–4, para. 24.

[706] MUA Resolution, para. 11.

6.4 Conclusion

Essentially, the existing acquis in the area of procedures is unfit to bridge the gap between Member States' determination practices. This is due not only to the non-binding nature of the central instruments comprising the acquis but also to the idiosyncrasies contained in them. The sole binding instrument on procedures, namely the Spanish Protocol, adds further to these idiosyncrasies and must be rated as a particularly badly drafted instrument. For the pursuit of particularist interests, its impact is largely symbolic, as the number of asylum applications falling under it are negligible. Acting as a political dam-breaker, it may very well lead other regions of the world to adopt similar exclusionary orders.

7 Access to Protection under the EU acquis

THE RULES REGULATING ACCESS to material protection are the final filtering device in protection systems. Such protection may take many forms, ranging from formal refugee status under the 1951 Refugee Convention to de facto toleration. This chapter deals with two different manifestations of protection. One is the formal granting of some form of protected status; the other is mere non-return. Thus we shall proceed in two steps. First, those parts of the acquis that have an impact on the granting of a formal protection status shall be scrutinised. Second, we shall look into norms of the acquis regulating the return of rejected protection seekers.

7.1 Protection Categories

Rationally, one would expect that all Member States should answer the questions 'who is a refugee?' or 'who is a beneficiary of extraterritorial protection?' in roughly the same manner. Three reasons support such an expectation.

First, all Member States are State Parties to the 1951 Refugee Convention, to the ECHR and to CAT. To be sure, the paramount

importance of landmark instruments in the field has been acknowledged by the EU Council, when it made clear that the 1951 Convention as well as the 1967 Protocol are part of the EU acquis in the fields of Justice and Home Affairs. The European Convention on Human Rights (ECHR) has been endowed the same status; accession to it now forms a precondition for the admittance of candidate countries into the Union. Protocols Nos 4, 6 and 7 to the ECHR also form part of the acquis, but merely on a non-obligatory basis.[707]

The 1951 Refugee Convention, the 1967 Protocol and the ECHR have been qualified as 'inseparable from the realisation of the Union's objectives', and, consequently, states aspiring for Union membership must have acceded to them before admission.[708] Their guiding function has also been acknowledged in a number of instruments pertaining to the acquis as well as in the foundational treaties.[709] Identical legal obligations under international law, one would believe, should lead to largely converging protection categories.

Second, a requirement of harmonisation also flows from the operation of the Dublin Convention. As expounded above, this instrument denies a claimant the possibility of choosing between different countries of asylum in the EU. From the perspective of the claimant, predictability and equality in treatment requires that Member States operate protection categories under international law with an identical material scope.[710]

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[707] It should be noted though, that the ECHR and its protocols do not figure under the heading of asylum in the Draft List of the *acquis*, but rather under the less specific heading of human rights. Draft List, p. 31, para. XII. A. b. and D. Protocols 4, 6 and 7 to the ECHR are considerered as 'instruments which have not all been signed and/or ratified by all Member States, and the Member States are not mutually bound to ratify them, although in the case of some of them there is a political commitment by their Governments to initiate the internal process of ratification. States applying to join the European Union should endeavour to become parties to these Conventions on the same basis as the Member States'. Ibid., Introduction. Protocol 6 is of special interest in this context, as it contains a provision on the abolishment of the death penalty in Art. 1. See also Final Act of the Treaty of Amsterdam, Declaration on the Abolition of the Death Penalty, CONF 4007/97, AF/TA/en2.

[708] Draft List, p. 7, para. I. A. b.

[709] See Art. 63 (1) TEC, Art. 6 (2) TEU.

[710] This was acknowledged in a discussion paper on subsidiary protection prepared by the Danish delegation for the EU Council. Note by the Danish delegation to the Migration and Asylum Working Parties, 'Subsidiary Protection', Doc. No. 6746/97 ASIM 52 (17 March 1997).

Third, a high degree of convergence would also flow from a purely theoretical point of view. The rationale of harmonised protection categories is to counter an evolving market mechanism, where states compete for minimised reception by means of restricting the categories of beneficiaries. Such competition would be detrimental not only for persons in need of protection, but also for the interest of those Member States whose burden of reception is increased by their more successful competitors.

For all these reasons, it is hardly surprising that the Commission's 1994 Communication on Asylum and Immigration Policy identified three subjects of harmonisation. The first is the refugee definition, the second relates to 'policies concerning those who cannot be admitted as refugees, but whom Member States would nevertheless not require to return to their country of origin in view of the general prevailing situation in that country' and the third to temporary protection.[711]

However, reality defies theory. In the Union, protection categories are far from being harmonised. The most striking indications are delivered by statistics on recognition rates. Among Member States, recognition rates for Convention refugee status range between 0.7 percent (Finland) to 29.6 percent (Italy) in 1998.[712] This is astonishing, as the beneficiaries of this status have been defined in the 1951 Refugee Convention.[713] Adding recognitions under humanitarian status to those for Convention refugees, the percentages stretch from 5.3 (Austria) to 54.5 (Denmark).[714] The term 'humanitarian status' is not defined in international law, which makes the divergence among Member States somewhat easier to explain.

Still, these divergences may also stem from the fact that different Member States are confronted with different groups of protection seekers. Within these groups, actual protection needs can vary to a great extent. Naturally, this may result in diverging recognition rates. Therefore, let us narrow our perspective and look at the recognition rates of a specific

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[711] European Commission, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM/1994/23Final, 23 February 1994, p. 42, paras 6, 8 and 9.

[712] UNHCR, 1999, p. 72.

[713] In a survey including inter alia ten EU Member States, it emerged that Germany and the Netherlands had not incorporated the refugee definition in Art. 1 (A) (2) GC into their domestic legislation. See IGCARMP, 1997, p. 437.

[714] UNHCR, 1998 Statistical Overview, p. 73.

group throughout the Union. The aggregate numbers of asylum applications in Europe in the period 1989–98 show that the Federal Republic of Yugoslavia takes the top position among countries of origin.[715] The recognition percentages of Yugoslav citizens granted Convention status or granted humanitarian status between 1989 and 1998 vary by some fifty percent among Member States. While Spain takes the bottom position with an overall recognition rate of 3.1 percent, Finland tops the list, recognising 53 percent of all applicants under one of the named statuses. Shifting protection needs within the group of Yugoslav asylum applicants can account for certain differences among recognition rates, but hardly for differences of such magnitude. Therefore, it must be concluded that the interpretation of the 1951 Refugee Convention and the protective scope of humanitarian status in domestic law vary to a substantial degree among Member States.[716]

With regard to the interpretation of the refugee definition, this conclusion has been confirmed by comparative research on Member States' domestic approaches.[717] According to the most recent study, the internal law of the Member States diverges with regard to the origins of persecution, the phenomenon of 'refugies sur place', the relationship of the subjective and the objective element in the Convention definition and the understanding of its five grounds of persecution.[718]

Drawing on the three reasons for convergence developed above, and developing the insights of the Commission further, one may state the following. A successful harmonisation of protection categories needs to fulfil three basic requirements: it has to be all-encompassing, binding and precise. It will not do to harmonise some categories, while leaving others to the free interplay of forces. Therefore, in line with the Commission's

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[715] The following percentages are calculated on the basis of statistics made available in UNHCR, 1999, pp. 82–4.

[716] The question why recognition rates differ may be explained in part by the consequences of non-recognition. In some Member States, the probability of removal upon non-recognition is rather high; in others, it is lower. It is reasonable to assume that the probability of removal impacts on the mind-set of the decision-maker. Thus, return policies and recognition rates must be analysed together.

[717] See inter alia Carlier, Vanheule, et al., 1997 and M. Wolter, *Auf dem Weg zu einem gemeinschaftlichen Asylrecht in der Europäischen Union. Rechtsvergleichende Betrachtung des materiellen Asylrechts der EU-Mitgliedstaaten im Hinblick auf eine Vergemeinschaftung der Materie* (1999, Nomos Verlagsgesellschaft, Baden-Baden).

[718] Wolter, 1999, p. 536.

1994 Communication, the harmonisation of categories has to cover not only the 1951 Refugee Convention, but also subsidiary protection and temporary protection. Furthermore, any legal instrument purporting to create uniform definitions of beneficiaries must be formally binding as such. And, finally, the categories defined in it need also to be sufficiently concrete and devoid of any deference to national law in order to be effective.

7.1.1 The EU *Acquis* Related to Protection Categories: Questions of Scope

How has the harmonisation process handled the divergence of protection categories in the EU? Starting out with the Convention refugee category, an attempt to come to terms with the disparity in interpretation among Member States was made in 1996 with the non-binding

- Joint Position Defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'Refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees.[719]

The very existence of the Refugee Joint Position is evidence that Member States wish to avoid an evolving spiral of restriction in defining refugees. It is all the more lamentable that this effort has to fail even on purely formal grounds. A mere look at paragraph 3 in the preamble confirms that Member States were not in a position to revamp their domestic asylum systems for the sake of harmonisation:

> This joint position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member states.

[719] OJ (1996) L 63, p. 2.

Whatever the mandatory force of a Joint Position may be, this paragraph clearly indicates the non-binding nature of the definitional efforts enshrined in the instrument.[720]

The acquis does not contain an instrument harmonising the category of subsidiary protection.[721] Moreover, the discourse on temporary protection has indicated that Member States have been reluctant to define categories of beneficiaries of such an order. This reluctance is expressed quite unambiguously in the 'Council Resolution of 25 September 1995 on Burden-Sharing with Regard to Admission and Residence of Displaced Persons on a Temporary Basis of 25 September 1995'.[722] Its personal scope comprises various categories of vulnerable persons 'whom Member States are prepared to admit on a temporary basis under appropriate conditions in the event of armed conflict or civil war, including where such persons have already left their region of origin to go to one of the Member States'.[723] Clearly, these categories must be taken as mere examples without any definite character. The European Commission's proposal for a 'Joint Action on Temporary Protection'[724] uses the same technique of exemplifying rather than defining. Article 1 of this proposal contains a non-exhaustive list of beneficiary groups, at best serving inspirational purposes. Article 3 regulates how a temporary protection regime is initiated in a given situation. A relevant Council decision shall also determine the groups of beneficiaries. This solution may be characterised as an ad hoc harmonisation of protection categories. While it retains a great margin of discretion for Member States in picking and choosing categories of beneficiaries for a given Temporary Protection regime, Article 3 of the Proposal has the advantage of blocking the spiral of restriction for the period after the launching of the regime.

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[720] Apparently, the cited paragraph was inserted on the initiative of the British and German delegations. See van der Klaauw, 1997a, p. 240.

[721] However, paragraph 4 of the 1997 Unaccompanied Minors Resolution acknowledges that the ECHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 [hereinafter CAT] may have a bearing on the removal of unaccompanied minors.

[722] OJ (1995) C 262/1.

[723] Ibid., Art. 1(a).

[724] Amended proposal for a Joint Action concerning temporary protection of displaced persons (presented by the Commission pursuant to Article 189a(2) of the EC Treaty), COM(1998) 372 final/2, OJ (1998) C 268.

In conclusion, neither the requirement of all-encompassing harmonisation nor the requirement of bindingness has been satisfied hitherto.

7.1.2 The Substantial Content of the Refugee Joint Position

Earlier, we identified definitional precision as a necessary ingredient in the project of harmonising protection categories. Let us now look at the sole achievement of category harmonisation, the Refugee Joint Position, and contemplate some of its material implications. Indeed, the Refugee Joint Position is a comprehensive instrument, albeit it generally maintains a rather high level of abstraction. It contains norms on the individual or collective determination of refugee status, the establishment of evidence, the content of the term 'persecution', the origins of persecution and the grounds underlying it, relocation within the country of origin, the phenomenon of becoming a refugee *sur place*, conscientious objection and related practices, as well as cessation and exclusion clauses.

Fully in line with its non-binding nature, the harmonising effect of the Joint Position has been low. None of the Member States has amended its legislation, with the exception of Sweden, which amended it along its own statement for the Council minutes, made in connection with the adoption of the Refugee Joint Position.[725] In the 1998 Council Survey, Member States also quote examples where their law or practice maintains more inclusive positions than those offered by the Refugee Joint Position.[726] It must be recalled that the stark divergence in recognition rates quoted earlier was based on the 1998 statistics.[727] This divergence mirrors a situation as it existed two years after the adoption of the Refugee Joint Position.

At least with respect to two important issues, the Joint Position fails to offer sufficiently precise guidance. These issues happen to be of utmost practical importance for delimiting the scope of protection offered by the 1951 Refugee Convention. One is the question of the extent to which the

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[725] 1998 Council Survey, p. 57.

[726] 1998 Council Survey, pp. 58–9 and p. 65. France and Ireland do not apply the concept of an internal flight alternative, as related to in para. 8 of the Refugee Joint Position. Belgium, Ireland, Austria and Sweden profess to operate a broader concept of persecution by third parties. On the latter aspect, see text accompanying note 729 below.

[727] See text accompanying note 712 above.

1951 Refugee Convention offers protection to the victims of persecution by third parties.[728] Given the increasing number of persecutory acts carried out by non-state actors, this issue is of enormous numerical importance. The other is the question of whether and when protection can be denied with reference to an internal flight alternative.

When pondering this issue, the following situations must be kept apart:

1. persecution by state agents;
2. acquiescence by state agents of persecution carried out by non-state agents; and
3. incapacity of state agents to hinder persecution carried out by non-state agents.

Cases of direct violations under the first and second category are rather unproblematic in this context, while the third category represents the focal point of the dispute on persecution by third parties. Precisely as in the second category, violations are committed by private actors. Differently from the second category, however, the state is simply unable to protect. In extreme cases, the inability to control is due to the vanishing of state structures altogether.

A comparative analysis commissioned by the Dutch Ministry of Foreign Affairs concludes that for Canada, the U.K., Sweden, Italy, and the Netherlands' District Court governmental complicity in persecution is inessential, while the opposite is true for Germany, Switzerland, France and the Netherlands Council of State.[729]

The Refugee Joint Position mirrors the difference in interpretation between individual Member States in a very graphic fashion. To start with, paragraph 5.2 of the Refugee Joint Position states that:

> Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is encouraged or

[728] See the criticism voiced in UNHCR, Expresses Reservation over EU Asylum Policy, Press Release, 24 November 1995; and in ECRE, Note from the European Council on Refugees and Exiles on the Harmonization of the Interpretation of Article 1 of the 1951 Geneva Convention, June 1995.

[729] B. Vermeulen, T. Spijkerboer, K. Zwaan and R. Fernhout, *Persecution by Third Parties* (1998, University of Nijmegen/Centre for Migration Law, Nijmegen), p. 34.

> permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.

This wording was the result of a French compromise proposal, mediating between inclusionary and exclusionary positions.[730] It suggests deliberateness in state failure to act as the guiding criterion. Does this imply that persecution by third parties not 'permitted' by the state is excluded from the protective ambit of the 1951 Refugee Convention? One reading would be that such cases are indeed excluded. The establishment of a guiding criterion appears meaningless if free choice between inclusion under and exclusion from the scope of the 1951 Refugee Convention was intended to continue. But it could also be argued that the wording does not expressly inhibit states to include such cases under the scope of the 1951 Refugee Convention. Thus, the intention with paragraph 5.2 would be to include at least direct and indirect forms of state persecution. This interpretation would point to the phrase 'in accordance with national judicial practice' in the second sentence and 'in any event' in the third sentence as indicators of a discretionary margin. The fact that paragraph 5.2 condones the existence of irreconcilable interpretations of the refugee definition is most problematic from an integration perspective. As a U.K. Court succinctly stated, the Refugee Joint Position is, indeed, an 'agreement to disagree'.[731]

However, one Member State felt the need to express that the third category may very well be included under the scope of the 1951 Refugee Convention. In a statement for the Council Minutes, the Danish and Swedish delegations declared themselves to be

> of the opinion that persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of

[730] For the drafting history of the Refugee Joint Position, see Vermeulen, Spijkerboer, Zwaan and Fernhout, 1998, pp. 31–2.

[731] U.K. Court of Appeal (Civil Division), *R vs SSHD ex parte Adan and others*, 23 July 1999, [henceforth Adan and others], para. 74.

> the Convention in other cases, when the authorities prove unable to offer protection.[732]

This manifest divergence explains the limited harmonisation potential of the Refugee Joint Position. It gives rise to concern, though, that a restrictive position gained entry into the document, while the inclusive position was relegated to a mere interpretatory statement. The least that can be said about the Refugee Joint Position is that it offers a presumption for the exclusion of cases under the third category. We will be compelled to return to the issue of persecution by third parties in a later chapter of this work.[733]

7.1.3 Competencies after Amsterdam

Article 63 (1) (c) TEC provides an EC competence to harmonise the interpretation of the Convention refugee definition. It stipulates that, within five years after the entry into force of the Treaty of Amsterdam, the Council shall adopt:

> (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
>
> [...]
>
> (c) minimum standards with respect to the qualification of nationals of third countries as refugees.

The Action Plan merely confirms the time-frame of five years.[734] It is worth noting that the wording limits the EC competency to 'nationals of third countries', thus amplifying the questionable exclusionary approach with regard to EU citizens taken in the Spanish Protocol.

However, EC competencies are not exhausted with this entitlement. Article 63 (2) (a) TEC provides a legal basis for the Council to discuss the harmonisation of both subsidiary protection categories and temporary

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[732] Statement for the Council minutes, attached to the Refugee Joint Position.

[733] See chapter 12.2.2 below.

[734] Action Plan, para. 38 (b) (i).

protection practices. This provision stipulates that the Council shall adopt, within the transitional period of five years,

> (2) measures on refugees and displaced persons within the following areas:
>
> (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection

A careful reading indicates that this provision actually covers two groups for which certain minimum standards shall be devised.[735] One would contain certain displaced persons from third countries. This group would be given temporary protection. The other group would consist of persons who otherwise need international protection. The protection to be accorded to them is not qualified in the quoted provision. The non-binding Action Plan envisages that measures '[d]efining minimum standards for subsidiary protection to persons in need of international protection (Article 63(2) (a) second part)'[736] shall be adopted by the Council within five years after the entry into force of the Amsterdam Treaty. It should be noted that there is no express reference to the qualification of beneficiaries as in Article 63 (1) (c) TEC. Moreover, the Action Plan only alludes to standards enjoyed by the beneficiaries of subsidiary protection, and is tacit on the issue of qualifying those beneficiaries. It could be argued that Article 63 (2) (a) TEC would allow for the EC institutions to adopt such a definition, without laying down an obligation to do so.

As a consequence of a Danish initiative within the Council, a questionnaire on protection subsidiary to the 1951 Refugee Convention

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[735] This reading is supported by the wording of the provision, which relates to 'minimum standards *for* giving temporary protection to displaced persons [...] and *for* persons who otherwise need international protection' (emphasis added). For a detailed argumentation drawing on the different language versions of the TEC, see G. Noll and J. Vedsted-Hansen, 'Temporary Protection and Burden Sharing: Conditionalising Access, Suspending Refugee Rights?', in E. Guild and C. Harlow (eds), *Implementing Amsterdam, Immigration and Asylum Rights in EC Law* (2000, Hart, Oxford), (page numbers were not available at the time of writing).

[736] Para. 38 (b) (ii) Action Plan.

has been circulated amongst Member States.[737] Moreover, a study on the same subject has been undertaken by the Secretariat of the Council.[738] It is still too early to predict the outcome of this initiative. The Council is also preparing an instrument on temporary protection, which, however, largely relies on an ad-hoc determination of beneficiaries. Proposals discussed in 1999 suggest that no abstract definition is envisaged.[739]

7.1.4 Conclusion

Harmonisation in the field of protection categories is neither comprehensive, nor binding, nor precise. The market dynamics tempting states to limit recognition under the relatively favourable Convention category remains largely unchecked. For the functional reasons expounded above, the present state of affairs is clearly dissatisfying, as continued divergence between protection categories may effectuate reception inequalities between Member States as well as protection differences for individuals. It follows that future co-operation needs to widen the scope of harmonisation from the refugee definition to other categories and has to be given a binding and concrete form devoid of exceptions.

7.2 Return

Throughout the last decade, individual Member States have sought ways and means to render their domestic return policies more effective. The domestic legislation of all Member States features the principle that undocumented aliens—of which rejected protection seekers form a

[737] Note from the General Secretariat of the Council to the Migration and Asylum Working Parties, Summary of replies concerning the national instruments of protection falling outside the scope of the Geneva Convention—Subsidiary protection, Doc. No. 13667/97 ASIM 267 (6 January 1998).

[738] Note from the General Secretariat of the Council to the Migration and Asylum Working Parties, Study on the international instruments relevant to subsidiary protection, Doc. No. 10175/98 ASIM 178 (13 July 1998).

[739] One of the 1999 Council drafts suggests that it would be for the Council to decide 'the specific group of persons to which the temporary protection regime applies'. European Council, Draft Joint Action concerning temporary protection of displaced persons, 16 February 1999, Doc. No. 5682/1/99 REV1, Art. 3 (3) (a).

fraction—ultimately are under an obligation to leave state territory. Beyond this convergence in principle, 'there is no uniform application of return policy'[740] in the Union.

The reasons for factual divergences among Member States are manifold. First, it must be recalled that the issue of return articulates itself differently in the individual member states. Those who have functioned as countries of destination for some time have been confronted with return issues for a longer period (e.g. Germany and the Scandinavian Member States) than those who have only recently shifted from the role of a transit to that of a destination state (e.g. Italy or Spain). The geographical situation, political ties to third countries and the existence of domestic immigrant communities may all impact upon the specifics of a Member State's return policy. Secondly, stringent return practices require considerable financial, personal and organisational resources—either by creating incentives or by enforcing compliance. Allocating these resources is a matter of available means and political will. Member States differ in the amount of resources earmarked for return purposes. While all of them agree on the importance of return in the abstract, the degree of concrete political commitment is highly individual.

One example is the negotiation of bilateral readmission agreements with countries of origin to render return more effective. While the use of these agreements is rather widespread amongst Member States, there are considerable differences as to the number of agreements negotiated, the countries targeted, the technical solutions chosen and the financial or other benefits linked to the conclusion of such agreements.

So far, EU co-operation reflects an aspiration to increase harmonisation of return policies and practices. This can be derived from the impressive number of EU instruments related to return. However, these instruments have by no means created a harmonised Union-wide approach to return. Technically, the majority of instruments adopted are non-binding, and the monitoring of their implementation is undeveloped.[741] A more

[740] State Secretary Cohen's Note on the Dutch Return Policy, Ministry of Justice [The Netherlands], 25 June 1999, section 1.

[741] Evaluating the asylum and immigration acquis achieved before Amsterdam, the Council has confirmed this criticism: 'However, the instruments adopted so far often suffer from two weaknesses: they are frequently based on "soft law", such as resolutions or recommendations that have no legally binding effect. And they do not have adequate monitoring arrangements'. Amsterdam Action Plan, para. 8.

comprehensive explanation would be that return is probably the most sensitive area in the construction of a state's demos. Hitherto, Member States have simply not been prepared to compromise their sovereignty in this respect. Thus, co-operation in the Council has not altered the array of diverging domestic practices among the Union's Member States.

Notwithstanding these considerations, the need for a co-ordinated approach to return has been consistently stressed within the EU framework. The Commission's 1994 Communication on Immigration and Asylum Policies identified the repatriation of those who are found to be in an irregular situation to be one of four key elements in the countering of illegal immigration.[742] Although the Council has yet to adopt a strategy on migration and asylum issues, a recent position posits return as an important element of a comprehensive policy, underscoring the importance of expulsion, readmission agreements, voluntary return and reintegration.[743]

Generally, in the return policies of destination states, five different considerations can be discerned, which will be briefly presented in the following.[744] A primary consideration of return policies is *to ensure the individual's voluntary compliance* with the obligation to leave the host country. Promotion of voluntary return ranges from simple measures informing on the situation in the country of origin to programmes involving financial assistance. Concerning the latter, states are usually anxious not to create unintended incentives, where return assistance would attract further migrants.[745]

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[742] The other elements are the prevention of entry, the identification of persons illegally resident and the definition of minimum standards of treatment for such persons. Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, 23 February 1994, COM(94) 23 final, paras 111–7.

[743] Council of the European Union, Guidelines for a European Migration Strategy, 1 June 1999, Doc. No. 8815/99 ASIM 23, para. 28.

[744] For a comprehensive overview on the issue of return and a case study on Germany, see G. Noll, *Responding to the Arrival of Asylum Seekers. Unsucessful Asylum Seekers—The Problem of Return* (1998, Geneva), United Nations ACC Task Force on Basic Social Services for All (BSSA), Working Group on International Migration.

[745] See the sixth recital in the preamble to the Council of the European Union Decision of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of third-country nationals, OJ (1997) L 147/3: 'Whereas it should be avoided that such assistance leads to undesired incentive effects;[...]'.

A second consideration for returning states is to devise measures responding to non-compliance with the obligation to leave under domestic law. Some of these measures are intended *to secure the preconditions for removal*; they include measures of identification (i.e. by means of fingerprinting, database checks or language tests), documentation (obligations to assist with travel document procurement), localisation (reporting obligations and detention) and, finally, the actual removal (expulsion orders and escorts).

Disputes on nationality, delays in issuing travel documents or an outright denial of readmission by countries of origin may also inhibit efficient return practices. Thus, a third consideration of returning states is *to ensure the co-operation of the country of origin.*

A fourth consideration is *to secure the co-operation of third states* in return operations. This may take the form of forming negotiating cartels to exert pressure on recalcitrant countries of origin. To give another example, returning states may also approach potential transit states lying *en route* on the migratory trajectory in order to negotiate agreements on readmission, or transit, or both.

Finally, a fifth consideration for returning states is *to secure a sustainable return.* In the individual case, this means alleviating the pressures leading to renewed attempts of undocumented migration. The measures taken vary according to the nature of the emigration pressure. In a wider perspective, this mechanism compels returning states to take an increased interest in the realisation of civic and political as well as economic, social and cultural rights in countries of origin. Ultimately, the returning state assists in the protective tasks of the country of origin.

In the following, we shall look into how these five considerations manifest themselves in the EU acquis as well as in the Schengen acquis.

7.2.1 The EU *acquis* Related to Return

In the EU context, all five categories of return activities listed above have been the subject of continued intergovernmental deliberations. These have resulted in few binding and many non-binding norms. Let us now explore the return acquis along the structure of the five considerations.

Regarding *the promotion of voluntary return*, it is somewhat surprising that the Council did not bother to deal with the most dignified and least costly solution earlier than in 1997[746], when it adopted the

- Council Decision of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of third-country nationals.[747]

This Decision called for the collection of information on Member States' programmes supporting voluntary return for purposes of comparison and dissemination.

The period from 1997 to and including 1999 saw the adoption of experimental instruments that made Community funds available on a yearly basis to facilitate the voluntary repatriation of displaced persons who have found temporary protection in the Member States and asylum-seekers.[748] Formally, these instruments were Joint Actions directed at the Community, and thus legally binding on it. Together with the 1997 Decision, these Joint Actions stand out against the multitude of instruments dealing with implementation of return against the will of the individual.

A considerable number of instruments deal with the second consideration of *securing the preconditions of removal and actually carrying it out*. From earlier discussion, we recall that the Dublin Convention contains an obligation for State Parties to readmit a rejected asylum seeker who has entered the territory of another State Party without being authorised to reside there, provided that it has not expelled the alien (Article 10 (e) DC). It should be noted that, so far, this norm is the only one in the whole EU asylum acquis that is legally binding upon Member States. Clearly, it provides an incentive for a consistent expulsion strategy, as State Parties want to avoid the responsibilities flowing from the obligation to readmit.

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[746] Already in its 1994 Communication, the Commission had called for an approximation of voluntary return schemes, underscoring that such schemes are 'cost-effective, when compared with the costs of involuntary repatriation'. Communication to the Council and the European Parliament on immigration and asylum policies, COM (94) 23 final, Brussels 23 February 1994, 30, at para. 111.

[747] OJ (1997) L 147/3.

[748] For a detailed presentation, see chapter 8.3.5 below. See also chapter 8.3.6 below on the funding of voluntary return projects through the proposed European Refugee Fund.

Moving on to non-binding instruments, we find that two Recommendations, namely the

- Recommendation of 30 November 1992 regarding practices followed by Member States on expulsion[749], and the
- Recommendation of 1 June 1993 concerning checks on and expulsion of third-country nationals rèsiding or working without authorization[750],

spell out the basic rule that persons found to have failed definitively in an application for asylum and to have no other claim to remain should be expelled, unless there are compelling reasons, normally of a humanitarian nature, for allowing them to remain. Two further instruments attempt to mitigate problems with travel document procurement. First, the

- Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the removal/expulsion of third-country foreign nationals[751]

recommends Member States to make use of a one-way travel document to facilitate the expulsion of persons lacking the necessary travel documents.[752] Second, the

- Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control[753]

states that, in case an alien is, or is likely to be, detained before expulsion, the period of detention should be used to obtain the necessary travel documents for expulsion.[754]

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[749] WGI 1266, reprinted in Guild and Niessen, 1996, p. 219, para. 2.

[750] WGI 1516, reprinted in Guild and Niessen, 1996, p. 275, para 1.

[751] OJ (1996) C 274/18.

[752] For a critical commentary, see Guild and Niessen, 1996, p. 388.

[753] OJ (1996) C 5/1.

[754] Ibid., para. 10.

In this area, important normative lacunae remain. Member States have largely failed to address issues related to the rights and interests of rejected asylum seekers.[755] By way of example, the tragic deportation incidents of 1998 and 1999 have shown that the use of force is insufficiently regulated among Member States.[756] After the three fatal incidents in connection with forcible removals, the relevant Member States amended their guidelines unilaterally. Interestingly, border police authorities started to make contact with each other spontaneously to compare existing guidelines.[757] A benevolent observer would find this to be a practical expression of the subsidiarity principle. However, one might also ask if a Council instrument on the use of force during deportation might have contributed to prevent the fatal incidents from happening.

With regard to *securing the co-operation of countries of origin*, the existing acquis offers further non-binding norms, most of them in the area of readmission. The

- Recommendation of 22 December 1995 of concerted action and cooperation in carrying out expulsion measures[758]

states that Member States should implement specific mechanisms to improve the procurement of the necessary documentation from the consular authorities of the third state to which third-country nationals are

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[755] This has been observed by the Commission in its 1994 Communication, where it recommended Member States to sign and ratify the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, adopted by GA Res. 45/158 (1990). This instrument has a bearing on the matter, as it also covers illegal migrant workers. Up to now, no Member State has followed this suggestion.

[756] On 22 September 1998, a rejected Nigerian asylum seeker, Ms. Semira Adamu, died of asphyxia, after Belgian police officers had pressed a cushion in her face during a deportation attempt at Brussels Airport. Less than half a year later, on 1 May 1999, Mr. Marcus Omofuma died during a deportation attempt by the Austrian authorities. His death was caused by suffocation; his mouth had been covered with adhesive tape and he had been tied to his passenger seat. Twenty-eight days later, a rejected Sudanese asylum-seeker, Mr. Aamir Ageeb, died due to suffocation during a deportation attempt by German authorities. A full-faced motorcycle helmet had been placed on his head to prevent him form hurting others and himself, and a German border guard held down his head during take-off.

[757] Interview with Lieutnant Dirk Beersmans, Dutch Border Police, Zaventem, 6 August 1999.

[758] OJ (1996) C 5/3.

to be expelled when they lack travel or identity documents.[759] It should also be noted that the instruments of the acquis dealing with readmission agreements have a direct bearing on return of rejected protection seekers, as they also affirm and specify the obligation to take back one's own nationals. We recall that the Council has drafted a bilateral specimen agreement and guidelines for readmission protocols. Moreover, the insertion of readmission clauses into future mixed agreements and Community agreements plays an important role in the return process. These parts of the acquis have been presented earlier.[760]

Finally, the creation of the High Level Working Group on Asylum and Migration (HLWG) in 1998[761] has brought about an interesting institutional change impacting the area of return. The HLWG has been established as an integrated cross-pillar approach targeted at the situation in the most important countries of origin of asylum seekers and migrants. Its task is inter alia to identify these countries and to establish a plan concerning some of them.[762]

Amongst the elements which could be part of such plans, the terms of reference name

a) the insertion of readmission clauses in an association agreement or a mixed agreement or both,[763] and
b) the conclusion of an EC readmission agreement with the country in question.[764]

Moreover, the HLWG has also been tasked to explore measures aimed at favouring voluntary return to the named countries.[765]

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[759] Ibid. para. 1.

[760] See chapter 5.2.2.2 above.

[761] The HLWG was established by a Council Decision on 8 December 1998. See Council of the European Union, Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum-seekers and migrants, 25 January 1999.

[762] Afghanistan, Pakistan, Albania and the neighbouring region, Morocco, Somalia and Sri Lanka have been selected for the preparation of an action plan. Council of the European Union, Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum-seekers and migrants, 25 January 1999, para. 3.

[763] Ibid, para. 1 (c) (v).

[764] Ibid, para 1 (c) (vi).

Concerning *the co-operation of third states*, it should be noted, first, that the whole array of EU instruments adopted in the field and the institution of the HLWG represent an effort to co-operate among the Member States. More specifically, provisions for the transit of removed persons through other Member States are made in the

- Recommendation of 30 November 1992 regarding transit for the purposes of expulsion.[766]

In addition, Member States are recommended to carry out expulsions, in appropriate instances, as a concerted effort with other Member States.[767] An example of such co-operation is the exchange of information among Member States on available seats on expulsion flights.

Another instrument is dedicated to the monitoring of the return acquis:

- Decision of 16 December 1996 on monitoring the implementation of instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third country nationals and cooperation in the implementation of expulsion orders.[768]

The fifth consideration of *securing the sustainability of return* has not yet spawned an instrument of its own. However, the terms of reference given to the HLWG indicate that this consideration could be integrated into the action plans regarding single countries of origin, which the group is tasked to draft. On a more general level, the efforts by the EU to promote human rights in third countries by means of its external relations should be named.[769]

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[765] Ibid, para. 1 (c) (x).

[766] WGI 1266. Reprinted in Guild and Niessen, 1996, p. 239.

[767] Conclusion of 4 March 1996, note 600 above, at para. 6.

[768] OJ (1996) L 342/5.

[769] For an overview of EC support to democratic transition and human rights, see B. Simma, J. B. Aschenbrenner and C. Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EC', in P. Alston (ed.), *The European Union and Human Rights* (1999, OUP, Oxford), pp. 595–614. For a general analysis of the role of human rights in the external relations of the EU, see A. Clapham, 'Where is the EU's Human

7.2.2 The Schengen *acquis* Related to Return

The Schengen acquis adds a few elements, mainly related to securing co-operation among Schengen states, to what has already been elaborated within the Union. The cornerstone is a binding norm: Article 23 SC spells out the principle that an alien without permission to stay on the territory of a State Party must leave the common territories without delay. The same provision obliges State Parties to expel such an alien.[770] Compared to the Dublin Convention, there is no 'responsibility principle' to the effect that Non-Schengen-nationals are transferred to a Schengen state considered to be responsible for their illegal presence.[771] In addition, the Schengen Convention comprises a comprehensive information exchange by means of the Schengen Information System (SIS), facilitating inter alia the identification of aliens illegally staying on the territories of State Parties.[772]

Apart from general affirmations on the importance of return[773], the Schengen Executive Committee has also agreed on specific forms of co-operation. Through a 1998 Decision, the Schengen states agreed on a transit document to be used in connection with the expulsion of foreign nationals by air.[774] Another decision, taken the same year, attempts to

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Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?', in P. Alston (ed.), *The European Union and Human Rights* (1999, OUP, Oxford).

[770] Art. 23, para. 3 SC.

[771] Compare Art. 10 (e) DC. However, Art. 23 para. 2 DC makes an exception for those aliens admissible in other Schengen states: 'An alien who holds a valid residence permit or temporary residence permit issued by another Contracting Party must enter the territory of that Contracting Party without delay'. —At present, a Finnish draft Regulation is discussed in the Council, which aims at establishing readmission obligations between Member States for the readmission of third-country nationals. Initiative of the Republic of Finland with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals, 7 December 1999, OJ (1999) C 353, pp. 6–9.

[772] Art. 38 SC.

[773] By way of example, the Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration calls for '[i]mmediate and systematic return of third-country nationals who have entered the Schengen States without authorization provided no right to stay exists and there are no obstacles based on compelling humanitarian grounds or international law' in its para. 12.

[774] Schengen Executive Committee, Decision of the Executive Committee of 21 April 1998 on cooperation between the Contracting Parties in returning foreign nationals by air, 21 April 1994.

tackle difficulties in document procurement for the purposes of return caused by recalcitrant consulates of the country of origin in Schengen capitals. In such cases, Schengen states have agreed to make use of each others' ambassadors in the country of origin for mounting local pressure there.[775]

7.2.3 Competencies after Amsterdam

Return is included in the legislative agenda set by the Treaty of Amsterdam. According to Article 63 (3) (b) TEC, the Council shall adopt measures on 'illegal immigration and illegal residence, including repatriation of illegal residents' within the five-year transitory period.[776] According to the Action Plan on the Implementation of the Treaty of Amsterdam, the establishment of 'a coherent EU policy on readmission and return' should be achieved in an even shorter period, namely two years.[777] Furthermore, the Action Plan confirms that, within a five-year period, 'the possibilities for the removal of persons who have been refused the right to stay through improved EU co-ordination implementation of readmission clauses and development of European official (Embassy) reports on the situation in countries in origin'[778] is to be improved.

7.2.4 Assessment of the EU *acquis* Related to Return

The assessment of return policies is mainly hampered by the lack of coherent statistics. For many countries, relevant data are simply unavailable. This is all the more surprising, as return has been high on the agenda of asylum countries in the industrialised world. While the number of protection claims as well as recognitions under various categories are

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[775] Schengen Executive Committee, Decision of the Executive Committee of 23 June 1998 on measures to be taken in respect of countries posing problems with regard to the issue of documents required for expulsion from the Schengen territory, 23 June 1998.

[776] Art. 63 (3) (b) TEC. Measures adopted under this paragraph do not prevent Member States from maintaining or introducing national provisions that are compatible with the Treaty of Amsterdam and with international agreements.

[777] Ibid., para. 36 (c) (ii).

[778] Ibid., para. 38 (c) (i).

known and eagerly disseminated[779], it remains largely obscure how many rejected claimants return voluntarily and how many move on to third countries.[780]

Existing domestic statistics suffer from the absence of a coherent methodology, making Europe-wide comparisons impossible.[781] However, neither the number of removals nor the number of voluntary departures tells us anything as such. To make sense, they have to be related to the total number of rejected protection seekers. Counting this group involves two problems.

First, there is only a slim chance of specifying the number of those with whom the authorities do not maintain any contact. Have they left for another country? Have they remained in-country? Or did they return home? It is extremely difficult to estimate how many rejectees actually remain in the territory of the state where the determination procedure was carried out.

Second, to provide a base for measuring the efficiency of control policies, only those whose removal is not inhibited by reasons related to protection must be counted. Let us take the example of a person whose asylum claim has been rejected in Germany. Although this person is formally under an obligation to leave, he or she may still benefit from a stay of removal (*Duldung*). As a decision on stay of removal is based on considerations of protection, this person should not be counted in among the group of removables, as long as the decision on stay of removal remains valid. This example goes to show that the German statistics on undocumented migrants under an obligation to leave cannot be taken as data according to which actual departures can be measured. Before measuring actual departures, that is, categories that cannot be removed due to protection-related considerations must be subtracted. Otherwise, any assessment of efficiency will be distorted.

This lack of information has been acknowledged in a strategy paper drafted by the EU presidency stating that 'the Union is still not able to

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[779] For a compilation, see UNHCR, *Asylum-Seekers and Refugees in Europe in 1998: A Statistical Assessment with a Special Emphasis on Kosovo Albanians* (1999, UNHCR, Geneva).

[780] This is acknowledged in a strategy document prepared by the Austrian Presidency for the K.4 Committee. Note by the Presidency to the K. 4 Committee, 'A Strategy for Migration and Asylum Policies', Doc. No. ASIM 170 (1 July 1998), at para. 72.

[781] In one country, the number of expulsions might relate to legal decisions, while another will count persons actually removed from its territory.

give accurate information regarding the number of third country nationals illegally on the territory of its Member States or exact details of asylum-seekers and immigrants who have disappeared to an unknown destination'.[782] The absence of data is in stark contrast to the existing political rhetoric of return, taking for granted that the numbers are sufficiently high to call the credibility of the asylum system into question. By consequence, it is impossible to assess whether the measures taken by Member States hitherto are efficient or proportional to the importance of the problem.

Apart from inquiring into the magnitude of the return problem, one might also ask whether the strategy taken by Member States is appropriate. To yield maximum effect, *which actor should be targeted*—the individual, the country of origin, or transit states? In other words, is it self-evident that the reluctance of the individual is at the core of the problem? Of course, the overall lack of statistics prohibits a generalised answer to this question. However, a look at domestic statistics allows us to derive some valuable indications.

A recent paper by the Dutch Ministry of the Interior attempts to identify the scope of the return problem in the Netherlands.[783] Indeed, the Netherlands is, in some respects, representative. It remains one of the most important destination countries for protection seekers in Europe, and the return of rejected cases has acquired increasing prominence in domestic politics.

As of 1 May 1999, 63 116 aliens were registered as inhabitants in the Dutch reception system. Of those, some 58 000 persons were seeking asylum or another form of protection.[784] The remaining 5 046 persons were 'removable persons', i.e. persons without any claim for a continued presence on Dutch territory.

Of those 5 046 persons, 4 013 persons could not be removed due to either political or technical impediments. For the purposes of the Dutch

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[782] Council of the European Union, Strategy paper on migration and asylum policy, Date unavailable. This paper represents the second revision of the draft of 1 July 1998, and has been officially 'noted' by the JHA Council as a basis for the Union's future migration policy.

[783] State Secretary Cohen's Note on the Dutch Return Policy, Ministry of Justice, 25 June 1999. The following presentation of statistics is based on subsections 2 and 3 of the Note.

[784] The quoted document states the number of 58 000 persons. However, provided that the number of persons not in procedure is identical with the number of removable persons, the exact number of persons in procedure must be 58 070.

statistics, 'political impediments' means that return is not implemented due to the general situation in the country of origin. As of 1 May 1999, such impediments existed for removal to Afghanistan, Angola, Burundi, the Democratic Republic of Congo, the Federal Republic of Yugoslavia and Rwanda. To be sure, the 779 persons whose return was impeded due to the general situation in their country of origin benefit from a rudimentary form of protection. As refugees and other categories of protected persons are not considered part of the return problem as delimited here, these 779 persons would also fall outside its limits. The reasons inhibiting their return are neither connected to their own recalcitrance, nor to that of their country of origin, but flow from the human rights situation in the latter.

Further, 3 084 persons originate from countries to which return is difficult to achieve due to 'technical impediments'. Such impediments are usually connected to the lack of travel documents and difficulties in obtaining them. This group is composed of people of 13 nationalities.

No such impediments existed in the remaining 1 033 cases. To conclude, in only about one fifth of the screened cases, is it evident that the implementation of removal can be decisively facilitated by targeting the individual will of the migrant.[785] In the majority of cases, the critical actor is not necessarily the individual, but rather the country of origin, which retains de facto power over the formal preconditions of return.[786]

Provided the Dutch situation is sufficiently representative of the whole of the EU, the efforts of Member States *would first and foremost need to target countries of origin.*

As we have seen above, the Union's activities have remained relatively weak in this area, with the majority of instruments relating to the second

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[785] Following our reasoning above, these 1 033 cases should be contrasted with the total of 4 017 cases where return was not barred by reasons related to the human rights situation in the country of origin. This means that the fraction increases to roughly one fourth of the cases in point. —It is of interest that the State Secretary explicitly denies that removable persons go underground to a substantial extent: 'I have no indications that this would be substantially the case'. State Secretary Cohen's Note on the Dutch Return Policy, note 783 above, section 2. Thus, the conclusion made here is not invalidated by the fact that a large number of removable persons defect from the reception system.

[786] This is not to say that the individual's willingness to return is without importance for the actual possibilities of return. In some cases, diplomatic representations issue a travel document for willing return migrants, but refrain from doing so when their citizen is unwilling to return. Nonetheless, such cases show that the ultimate decision on return lies de facto with the country of origin.

consideration—securing the preconditions of return—rather than to the third, which concerns securing the co-operation of the country of origin. The latter consideration has been for the most part dealt with unilaterally by certain Member States, and the degree of co-operation or harmonisation has been rather limited. Depending on the outcome of its work, the establishment of the HLWG could represent a paradigm shift, however.

Targeting countries of origin is not an easy task, and the reach of single Member States as well as the EU is limited. As international relationships are based on the sovereign equality of states, it is obvious that a sensitive approach is needed. Compared to securing the co-operation of countries of origin, targeting individuals is of secondary importance. Notwithstanding this, it may be politically convenient for some returning states to single out individuals as the primary target of return policies. As it is not within the returning state's power to rectify the recalcitrant behaviour of countries of origin, it turns to recalcitrant individuals. In doing so, it demonstrates to the domestic electorate that something is being done about the return problem. Even from an efficiency-oriented particularist perspective, however, such behaviour remains questionable.

The thrust of the above analysis is confirmed in an EU strategy document drafted by Austria: 'The speeding up of the voluntary return of illegal immigrants was as strikingly unsuccessful throughout Europe (although there were major repatriation initiatives in individual cases) as the steps taken to establish the widest possible network of readmission agreements [...]. A problem hardly referred to in the 1994 paper [the Commission Communication on Asylum and Migration Policies, GN] was the increasing refusal of a growing number of States of origin to take back their own nationals from the country which they had entered illegally'.[787]

What does this imply for the rejected protection seeker? In single cases, return may be facilitated through joint transport arrangements or co-ordinated pressure on third countries, but it is too early to assess the impact of the EU acquis on the probability of return. The importance return policies have acquired on the political agenda of the Member States is reflected by the number, but not the quality, of legal instruments

[787] Council of the European Union, Strategy paper on migration and asylum policy, Date unavailable, para. 20. This paper represents the second revision of the draft of 1 July 1998.

dealing with return. The absence of an instrument laying down minimum standards of treatment for forcible removals is particularly striking. In other words, return is still a national affair. A rejected protection seeker would better look to the domestic authorities, and not to Brussels, when calculating the probability of return in her case.

7.3 Intermediary Conclusion: Access to Protection in the EU

European integration in the area of immigration and asylum suffers from a double fragmentation: one is institutional, the other normative, in nature.

Institutionally, immigration and asylum issues were fully exposed to the tension created by the two speeds and two pillars of integration. Consider the 1992 Maastricht treaty, which moved visa issues to the supranational first pillar, whereas asylum and migration issues were hosted in the intergovernmental third pillar. The normative tool-box of the third pillar was rather disappointing and a far cry from what the first pillar had on offer. Formally, this tension was mended with the 1997 Amsterdam Treaty, providing for a transfer of asylum and migration issues to the first pillar. However, both issues remained entangled in a strait-jacket of intergovernmental decision-making, at least for the duration of the transitional period. Effectively, a veto is retained for all Member States during this period. Therefore, it is questionable to celebrate the Amsterdam Treaty as a victory of supranationalism.

However, the potential of Amsterdam for overcoming material fragmentation should not be underestimated. It made binding EC instruments available in the field of asylum and migration and opened a window for judicial review by the ECJ. Amsterdam also succeeded with the integration of the avant-garde: the Schengen Group and its achievements were merged with the Union framework. Due to the special status of Denmark, the U.K. and Ireland, this did not mean the complete abolishment of two speeds, however.

Within the institutional world, the tendency is clear. Although a slow move towards limited supranationalism is taking place, it is hampered by the perseverance of veto and a variety of formal opt-outs. Still, the Community will remain unable to react with the same swiftness as a state or a minor state grouping.

The regulation of competencies through the treaties is not the sole factor impacting the institutional setting. The circle of participants, determined by the ongoing enlargement process, must be regarded as equally important. Although the candidates are required to implement the EU *acquis* as it stands on the day of accession, they will, of course have a voice in decisions taken after that day. It is too early to predict exactly how this reconfiguration will affect the efficiency and profundity of co-operation. But the variables are clear. To what extent will Member States succeed in the abolishment of the remaining veto on migration and asylum issues during the five-year period? Which candidates shall be admitted? Will they be admitted under or after the veto era? Undoubtedly, the enlargement process has a potential for exacerbating the existing fragmentation tendencies.

Apart from the institutional setting, fragmentation persists in the normative world as well. If we look into the topics dealt with at the multilateral level, the following pattern emerges. First, the period 1985–92 stood for a rather successful development of deflection tools.[788] From 1992 onward, deflection was continuously refined, but saw few innovations[789]. This made room for the discussion of protection-related issues such as temporary protection, burden-sharing, and, most radically, the intervention into root causes.[790] *However, it is striking that fourteen years of co-operation yielded only four major instruments of binding nature laying down specific rules for the management of migration and asylum.*[791] All of them deal with control rather than protection, and all of them have an impact on the protection seeker's access to territory: 1990 saw the conclusion of the Schengen and Dublin Conventions, setting the overall framework for

[788] Apart from the Schengen and Dublin Conventions, the non-binding 1992 London Resolutions should be named in this context.

[789] In this context, the Pre-frontier Joint Position is relevant.

[790] Those debates found their expression inter alia in the 1995 Resolution on Burden-sharing (see text accompanying note 882 below), the 1996 Refugee Joint Position (see text accompanying note 719 below), the Commission Proposal on Temporary Protection and Solidarity (see text accompanying note 910 below), and, finally, the discussions on the root causes of migration within the HLWG (see text accompanying notes 762 and 763 below).

[791] We are not considering Joint Positions and Joint Actions here, as the scope of their binding force is very limited. See chapter 1.4.2.6 on legal effects of Joint Positions and Joint Actions. Further, we disregard from the binding Decisions by the Schengen Executive Committee, as these are intrinsically linked to the implementation of the Schengen Convention.

deflecting unauthorised migrants and allocating asylum claims. Furthermore, in 1995, the Council issued a regulation determining those countries whose nationals must be in possession of a visa when crossing the external borders of the Union.[792] And, finally, in 1997, the Member States agreed on a binding instrument governing procedures—the Spanish Protocol. *The discussion of protection-related issues by EU institutions did not yield a single binding instrument.* In a later chapter, we shall subject central elements of these four instruments to closer scrutiny with a view to their conformity with international law.[793]

The divide between protection and control is further exacerbated by the schedule set for future measures in the field of asylum and immigration. Both the Amsterdam Treaty itself and the Action Plan drawn up by the Council prioritise mostly control-oriented measures.[794] Thus, control continues to enjoy a first mover's advantage over protection.

Why is this so? We recall that one determinant of protection systems has hitherto not been dealt with: the availability of burden-sharing. In the following chapter, we shall look into the way burden-sharing is regulated in international law, and the law of the European Union. As shall emerge, this determinant is the key to understanding the persistent divide between protection and control, and, consequently, the perseverance of *l'Europe à deux vitesses* in the immigration and asylum area.

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[792] This instrument was replaced by a new one in 1999, and is presently merged with the Schengen visa list. See text accompanying note 455 below.

[793] See chapter 12 below.

[794] We recall that Art. 63 TEC exempted measures on burden-sharing, on long-term visas and residence permits and on mobility rights for legally present aliens from the mandatory five-year time-frame. See also paras 36, 37 and 38 of the Action Plan.

8 Sharing the Burden?

8.1 The Concept and Function of Burden-sharing

INDISPUTABLY, RESPONSIBILITY FOR refugee protection is unequally shared—whether among the States of the North and South or at regional level. Globally, one could mention Iran, which has been at the top of reception statistics for seven years, sheltering nearly two million refugees.[795] Regionally, Germany hosts 1.2 million refugees, which is more than all other Western European States taken together.[796] Both examples are absolute numbers, and it goes without saying that relating those to the size of the host economy or the host population will produce quite different results.[797] Whatever the measurement adopted, it is reasonable to assume that receptive inequalities impact on law. Moreover, it is also reasonable to assume that actors seek to influence these inequalities through the instrument of law.

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[795] UNHCR, 1997, pp. 286–9.

[796] Ibid.

[797] Comparing the number of annual asylum applications with the total national population leaves Sweden as the largest receiver, while Germany is pushed back to eighth rank among European countries. UNHCR, *Asylum in Europe: Arrivals, Stay and Gender From a Data Perspective* (1998, UNHCR, Geneva), p. 12.

In spite of its obvious importance, the issue of burden-sharing[798] has triggered comparatively little research. Before touching upon single contributions in the course of this chapter, it is worthwhile to note the broadness of the approaches within this limited corpus of research, spanning over analogies to military alliances, environmental regulation and development co-operation. The case studies of burden-sharing in larger refugee crises offered by Hans and Suhrke[799] are an excellent starting point. Later, Suhrke has complemented this overview with a critique of the underlying logic from the perspective of the political scientist.[800]

Lawyers, on the other hand, seem to have been attracted to a de lege ferenda approach to burden-sharing. First attempts to draw up a blueprint for a fairer redistribution of protection obligations were advanced as early as the Sixties.[801] Probably the most elaborate and best known work on burden-sharing is that carried out within the interdisciplinary Reformulation Project. Based on the knowledge accumulated within the project, Hathaway and Neve proposed nothing less than a new refugee regime. Its centrepiece was the concept of 'common but differentiated responsibility' to be assumed by states and it rested largely on a communitarian approach with strong self-regulatory elements.[802] On the market-liberal side of the spectrum, we find Schuck's model, according states quota-like protection obligations, which they may trade at a form of

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[798] In spite of its prejudicial timbre, the term 'burden-sharing' will be used as an overarching concept throughout the text. Better terminological alternatives have failed to gain entry into the language used by actors of international law on the global level. Moreover, it is questionable to speak about 'international solidarity' or 'responsibility sharing' when the object of this solidarity is de facto dealt with as if it were a burden.

[799] A. Hans and A. Suhrke, 'Responsibility Sharing', in J. Hathaway (ed.), *Reconceiving International Refugee Law* (1997, Martinus Nijhoff Publishers, The Hague).

[800] A. Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action', 11 *Journal of Refugee Studies* 4 (1998).

[801] See A. Grahl Madsen, 'Wege und Chancen zu Internationaler Zusammenarbeit, *AWR Bulletin* 2-3 (1983), for a reworked version of his 1965 proposal.

[802] J. Hathaway and A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', 10 *Harvard International Law Journal* (1996). Of all normative proposals stemming from academic discourse, this one has probably commanded most attention. For an outright adaptation in the burden-sharing discourse among industrialized governments, see IGCARMP, 1998. For an example of academic discipleship, see C. J. Harvey, 'The European regulation of asylum: constructing a model of regional solidarity?', 4 *European Public Law* 4 (1998).

international stock exchange.[803] His model trusts in the invisible hand of the market and is largely reminiscent of emission rights trading within the environmental regulation sector. By proposing that the United Nations should lease territories for refugee reception, Einarsen makes a pragmatic attempt to decouple access to territory from burden-sharing.[804] In many respects, his Kantian approach is marked by the lawyer's belief in institutionalized solutions; lamentably, it begs the question of who is going to foot the bill.[805]

However, for all their merits, none of the approaches cited above devotes much attention to the potential of the existing legal framework and its implications for the prospects of burden-sharing. Furthermore, academic, governmental and institutional actors tend to link the issue of burden-sharing to the concept of mass influx, thus adopting an unnecessarily narrow perspective. By contrast, we would like to underscore that the redistribution of responsibility among states will *always* impact—in one way or another—the remaining parts of the migration and protection systems, irrespective of whether the number of protection seekers is large or small. Against this background, the present chapter aims to explore the relationship between the actual sharing of responsibility for protection seekers and the normative framework on asylum and immigration offered on the global as well as on the EU level.

8.1.1 The Objective of Burden-sharing

The logic of burden-sharing rests on the axiom that an equitable distribution of costs and responsibilities in protection will generate not only a maximum of fairness among states, but also a maximum of openness vis-à-vis protection seekers. Where a collective of states shares

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[803] P. H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 22 *Yale Journal of International Law* 2 (1997).

[804] T. Einarsen, 'Mass Flight: the Case for International Asylum', 7 *IJRL* 4 (1995).

[805] Without elaborating further details, Einarsen suggests that the G7 States should pay for the proposed scheme (Einarsen, 1995, p. 572). This can be countered with a quote from Suhrke: 'Unlike international environmental regimes which typically address the causes of a problem, asylum regimes only address the symptoms. This makes the costs of participation in formalized sharing schemes over time uncertain and beyond the control of individual states. States are customarily reluctant to commit themselves to pay for developments over which they have no control; [...].' Suhrke, 1998,p. 413.

the task of protection, peak costs will be avoided, while existing resources will be fully exploited. There are two beneficiaries to such arrangements —host States and protection seekers. First, states engaging in burden-sharing cut their total costs. Second, the number of protection seekers finding haven is larger than it would be in the absence of burden-sharing arrangements. In analyzing actual burden-sharing schemes, these two beneficiaries should be kept apart. Indeed, we are once more faced with a triangular relationship; the protection seeker is first opposed with a state of first arrival, which in its turn is opposed with other states; finally, the protection seeker is opposed with those other states.

To wit, the core desideratum of any burden-sharing arrangement is the creation of predictability. Like an insurance contract, burden-sharing arrangements allow states to calculate maximum costs in future crisis situations. The insurance parallel suggests that burden-sharing cannot be an ad hoc affair. Predictability presupposes that principles of distribution are agreed upon in a sufficiently detailed fashion *before* a crisis materializes.[806] From that perspective, a major problem of present approaches to burden-sharing is the absence of such predetermined distributive principles.[807]

On the other hand, it can be argued that states would take an unnecessarily cautious approach, if pushed to predetermine principles of distribution for all conceivable crises of the future.[808] By contrast, a mere negotiating framework, allowing for flexible and situation-adapted solutions, might yield a better, i.e. more generous, outcome. This argument disregards, however, that states had ample opportunity to practise such ad hoc burden-sharing, and that they made insufficient use of this option.[809] The persistent discussions on burden-sharing and the

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[806] Further exploiting the insurance metaphor in the following, we shall distinguish between *underwriting*, i.e. the selection of risks to be covered, and *rating*, i.e. the pricing system used to compensate for accidental losses. See 'insurance' *Encyclopædia Britannica Online*, <http://www.eb.com:180/bol/topic?idxref=86242&pm=1> [Accessed March 17, 1999].

[807] See chapter 8.3 below for an analysis of instruments and proposals within the EU framework.

[808] 'If the states choose to institute a sharing formula, the temptation would be to peg commitments at low admission levels and restrictive rights. Ambitious sharing schemes, particularly if they were institutionalized with long-term time horizons, might encourage states to define a refugee flow out of existence by declaring it to consist of "migrants".' Suhrke, 1998,p. 414.

[809] See chapter 8.2 below.

tendency towards measures of deflection support this assessment.[810] Moreover, it should be underscored that predetermined principles of distribution represent a minimum common denominator of assistance. Nothing inhibits states from agreeing on more generous aid in single cases, exceeding the exigencies of an underlying burden-sharing arrangement. A fixed normative framework prevents states from remaining completely passive when others are struck by a crisis. They are free to do so, though, under a negotiating framework. In light of these arguments, the ensuing analysis is based on the assumption that regulating burden-sharing beforehand is better than negotiating it ad hoc.[811]

8.1.2 The Scope of Burden-sharing

But what exactly does it mean to distribute costs and responsibilities more equitably? The malleability of the burden-sharing-concept makes it simultaneously attractive and repulsive. While its underlying axiom is generally accepted, states do not necessarily agree on how to frame the burden to be shared. Recurring to insurance terminology, we can assert that determining the scope of burden-sharing is a first, rough selection of risks as part of the underwriting process.[812]

This selection process may be split into two steps. The first is about determining the circle of participants in a burden-sharing scheme, and the second is about delimiting the specific risks these participants are willing to share with each other.

Regarding the first step, most actors in the North agree that regional burden-sharing is a more realistic option than a global scheme. One of the reasons is precisely that risks in a regional scheme are a priori more

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[810] The analysis of the receptive unwillingness persisting in Europe is facilitated by looking back to the South Asian refugee crisis of the seventies and eighties. At the time, the reluctance by countries in the region to receive refugees could be mitigated by launching an elaborate and predictable burden-sharing scheme. It could be argued that a European burden-sharing scheme could mitigate the tendency towards ever more deflective policies proliferating among European asylum countries.

[811] The divergence between proponents of a negotiation solution and a prescription solution in burden-sharing is only one manifestation of this argumentative topos in law. The argument between proponents of framework legislation and proponents of detailed regulation depicts the same underlying opposition.

[812] See note 806 above.

circumscribed than those in a global one, which increases predictability and facilitates consensus among would-be participants. Thus, the question of which states should participate in any given scheme is of the utmost importance for its problem-solving capacity.[813]

At any rate, we have confined this work to the regional context of the EU, which entails a fixed circle of participants and obviates the need to explore global burden-sharing. Let us therefore move on the delimitation of the specific risks that participating states could share.

For our needs, it makes sense to distinguish between

- sharing the burden of preventing and resolving refugee crises;
- sharing the burden of preventing and deflecting arrivals; and
- sharing the burden of reception.

The first item stretches from diplomatic efforts to the expenditures of military intervention.[814] While the linkages to refugee reception are clear, the scope of such burden-sharing is extremely large and difficult to delimit. Would U.S. defence expenditures be deductible at large under a scheme sharing the burdens of prevention, because the military deterrence

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[813] Again, the insurance analogy is enlightening. Each new participant admitted to a given scheme changes both the collective risk prognosis and the resource base of that scheme. The composition of the circle of participants is something of a water-shed between the various models proposed in contemporary discourse. Global schemes often involve a development perspective (see e.g. A. Acharya and D. B. Dewitt, 'Fiscal Burden Sharing', in J. Hathaway (ed.), *Reconceiving International Refugee Law* (1997, Martinus Nijhoff Publishers, The Hague) and Einarsen, 1995), while regional ones typically endorse an alliance perspective (again, the negotiations within the EU may serve as an excellent illustration, as will emanate below in this chapter). On the threat-focused characteristics of an alliance perspective, see Acharya and Dewitt, 1997,p. 127.

[814] It should be recalled that intervention raises a number of intricate legal and practical issues. For an analysis of five options of intervention (punishment, safe zones, safe havens, enforced truce and offensive war), see B. Posen, 'Can Military Intervention Limit Refugee Flows?', in R. Münz and M. Weiner (eds), *Migrants, Refugees and Foreign Policy. U.S. and German Policies towards Countries of Origin* (1997, Berghan Books, Providence). For an overview of preventive intervention, see P. Freedman, 'International intervention to combat the explosion of refugees and internally displaced persons', 9 *Georgetown Immigration Law Journal* 565 (1995). Arguing that states have a right to use force to defend themselves against a massive influx of refugees: B. K. McCalmon, 'States, Refugees, and Self-Defense', 10 *Georgetown Immigration Law Journal* 215 (1996). *See also* S. P. Subedi, 'The legal competence of the international community to create "safe havens" in "zones of turmoil"', 12 *Journal of Refugee Studies* 1 (1999).

potential of the USA might play a decisive role in pacifying refugee-creating conflicts?

Preventing and resolving refugee crises is probably the most complex of the three issues listed above. It is highly reminiscent of the discussion on distributing defence burdens within the framework of NATO[815], and links the availability of refugee protection to the inconsistently regulated area of international peace and security. This form of preventive burden-sharing will certainly remain on the agenda, but given its complexity, it is problematic to make other forms of burden-sharing contingent on its availability. Therefore, it is highly questionable that the 1995 EU Resolution deals with military action and refugee reception under one single sharing criterion.[816] Crowding these intrinsically different contributions into one and the same instrument risks weakening its focus and diminishing prospects for its negotiation and practical functioning.

Regarding the second item, persuasive examples of the feasibility of burden-sharing already exist. The areas of visa requirements, the control of aliens' movements within a group of states and border control at large have been made the subject of such sharing. Consider the rather inexpensive instrument of common visa lists (as devised within the Schengen co-operation and the EU).[817] Consider also the Schengen Information System, a costly computer network jointly financed by the Schengen Parties. A further example is provided by the 1993 agreement on co-operation in migrational movements between Germany and Poland[818], under which Poland received 120 Million DEM to reinforce 'technical equipment for preventing uncontrolled migratory movements'.[819] Finally, consider the array of 'flanking measures' ensuring

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[815] J. Khanna, T. Sandler et al., 'Sharing the financial burden for U.N. and NATO peacekeeping, 1976-1996', 92 *AJIL* 2 (1998); H. Weber, *Lastenteilung in Verteidigungsbündnissen: ein anwendungsorientierter Ansatz zur Verteilung von Lasten in militärischen Bündnissen auf der Grundlage der ökonomischen Theorie der Allianzen* (1994, Peter Lang, Frankfurt am Main).

[816] Para. 4 1995 Resolution. See chapter 8.3.2 below for a detailed analysis.

[817] See chapter 5.1.1 above.

[818] Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen [Agreement between the Federal Republic of Germany and the Republic of Poland on co-operation regarding the effects of migratory movements], 7 May 1993, BGBl. 1997 II, pp. 1734–6.

[819] Ibid., Art. 3.

control of external borders of the European Union as well as its financial and training support to Central and Eastern European neighbours' border control under the PHARE, TACIS and ODYSSEUS programmes. While the costs of these co-operations were not trivial, their sharing could be successfully negotiated. To conclude, governments seem to find little difficulty in acting 'in a spirit of solidarity' when it comes to the burden of deflection.

Precisely as for the two forms of preventive burden-sharing, co-operation on the actual reception of refugees may take many forms. It is reasonable to distinguish between three main approaches.

- Harmonizing refugee and asylum legislation (sharing norms);
- reallocating funds (sharing money); and
- distributing protection seekers (sharing people).

As this work focuses on the access of protection seekers to protecting territories, we shall limit our inquiry to the sharing of reception burdens. In the following, each of the three main approaches will be analyzed in greater detail.

8.1.2.1 *Sharing Norms*

A comparatively simple step is to *harmonize domestic refugee and asylum legislation* within a group of States, thereby neutralizing inequalities in distribution due to differences in the protection offer made by single countries. In this sense, binding instruments such as the 1951 Refugee Convention as well as non-binding instruments such as the UNHCR EXCOM Conclusions can be understood as a rudimentary starting point for burden-sharing. In the EU context, variations in the protection offered by Member States have been perceived as creating distortions in an equitable distribution of protection seekers among the Fifteen.[820] Consequently, the Council has launched a number of instruments to promote normative harmonization.[821] Apart from protection categories

[820] Cf. the Explanatory Memorandum to the 1998 Commission Proposal, ascribing differences in protection levels under temporary protection to 'distortionary effects'.

[821] See chapters 5 to 7 above.

and procedural aspects, variations in social rights offered to asylum seekers have also been presumed to impact on their distribution.

Why is the adoption of common norms a form of burden-sharing? By agreeing to sustain a minimum level of protection, states make a commitment not to minimize reception by means of normative dumping. Let us suppose that the prohibition of refoulement had not been laid down as a legally binding norm in the 1951 Refugee Convention. Apart from moral and political restraints, states would then be free to compete with each other in the area of returning refugees to persecution, thus exonerating themselves from protection costs. Stipulating a prohibition of refoulement pacifies the area of return from interstate competition. The state commitment made by accepting this norm is costly. It can be regarded as an insurance fee paid to a solidarity system, guaranteeing refugees as well as states a minimum level of protection.

Harmonizing the protection offered is a liberal solution, drawing on the idea of self-regulation and trusting the protection seeker's capacity to make rational decisions. However, a caveat should be issued—harmonization can merely address those forms of unequal distribution based on differences in domestic legislation. Refugee legislation is but one determinant affecting the choice of destination made by a person seeking haven. Other factors—geographical proximity of a potential destination country or the availability of social networks there—could be of far greater importance. Further, harmonization may indeed amplify the concentrating effects of such factors. Where a more remote country offers better protection to a certain group of persons in need, these may opt for reaching this country, thus exonerating states closer to the crisis region.[822] Obviously, a 'marketplace of protection' may also level out inequalities in distribution. The spiral of restriction dominating contemporary European asylum legislation relegates this reflection to the realm of pure theory, though. Finally, given the situation of existential distress a refugee is in, it would be naïve to frame her as a perfectly rational customer, picking and choosing on a market of varying protection offers.

[822] It must be noted, though, that such freedom of choice is impaired by safe third country-mechanisms. See chapter 5.1.3 above.

8.1.2.2 *Sharing Money*

In contradistinction to the other two approaches, harmonizing the protection offer is largely a preventive approach in that it seeks to avoid the emergence of unequal distribution. The *reallocation of funds*, on the other hand, is reparative in nature, as it seeks to level out existing inequalities through various forms of financial transactions. A major difficulty in fiscal burden-sharing is the establishment of a distributive key. This involves decisions about what shall be regarded as a loss under the scheme[823] and how such loss should be rated. In the present context, defining a loss means determining the level of reception and expenditure, where other states are obliged to assist. Rating such losses means translating refugee reception into fiscal terms. And, finally, based on these deliberations, the contributions which participating states need to offer to the common scheme have to be specified.

Are there any examples of fiscal burden-sharing as it is? In fact, UNHCR could be described as such a reallocation mechanism, albeit in an imperfect form. Donors make means available to UNHCR, enabling the office to run various forms of assistance programmes in refugee hosting countries. Ultimately, this form of distribution is contingent upon, first, yearly decisions to be taken by the Executive Committee and the General Assembly and, secondly, the charity of donors.[824] In all, this allows for considerable fluctuations in funding, thus diminishing the predictability of such burden-sharing. Moreover, funding is inequitably distributed among regions and crises.[825] On the other hand, UNHCR

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[823] Further drawing on the insurance analogy, a loss means a situation in which assistance is yielded under a burden-sharing scheme.

[824] For a brief overview over the financing of UNHCR, see V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR)* (1992, Duncker & Humblot, Berlin), pp. 127–34.

[825] The main group of donors consists of industrialized countries. As of 12 March 1999, the USA, the Netherlands, Norway, Denmark, Sweden, Switzerland, Australia, Germany, Belgium and the European Commission were the top 10 non-private donors to UNHCR (ordered according to the size of their contribution). With all due respect for the commitments of industrialized countries towards programmes targeted at the South, it must be acknowledged that funding follows a clear preference for refugee issues in the North. In the UNHCR budget for 1999, the operations in Former Yugoslavia and Albania remain the most resource consuming item with some 156 million US$. At a distant second place, one can find the Great Lakes Operation with some 97 million US$. If regional allocation is related to the number of refugees assisted, the preferential treatment of refugees in Europe emerges even more clearly. UNHCR Funding Overview

operations boast an almost global coverage, which gives the mechanism a universal potential. It must be recalled, however, that UNHCR was not conceived as a burden-sharing mechanism and should not necessarily be judged as one.

Fiscal burden-sharing also takes place through other channels. States may support other states on a bi- or multilateral basis. States or non-state actors fund NGOs which support refugees in other countries, thus exonerating public expenditure there. Even in that case, fluctuation in funding is a considerable threat, preventing receiving countries from trusting the availability of assistance in the long term. The persistence of the burden-sharing debate indicates that reallocations through UNHCR as well as other channels are perceived as insufficient to secure openness in the reception of refugees.

8.1.2.3 Sharing People

The underlying presumption of fiscal burden-sharing is that reception costs are quantifiable. Obviously, this is not entirely true. While it is comparatively easy to determine the costs of food and housing in terms of Euros, Dollars or Yen, setting numbers on the costs of integration is much more difficult, if not impossible. This is why some major receiving countries militate for sharing schemes involving the redistribution of protection seekers.[826] From a state perspective, the attraction of people-sharing lies in the redistribution of the perceived source of all conceivable costs linked to reception, be they fiscal, social or political. Clearly, redistributing protection seekers is more intrusive vis-à-vis the individual than sharing money. First, people-sharing may lead to an undesirable second uprooting. Second, the presence of family members or the existence of social networks in a specific country can play a crucial role in the protection seeker's prospects for integration. Where a sharing scheme

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1999, available at <http://www.unhcr.ch/fdrs/weekover.htm> (accessed on 15 March 1999). Therefore, allocating funds to UNHCR remains an imperfect form of burden-sharing, which manages to level out reception inequalities only to a limited degree.

[826] However, people sharing also has its academic proponents. Already in 1965, Grahl-Madsen presented an elaborate people sharing proposal, featuring a distributive key based on per capita GNP and population. He has later modified and adjusted the model. Grahl Madsen, 1983.

denies the protection seeker access to this advantage, it may augment the total cost of protection in the group of receiving states.

By sending and receiving protection seekers under such schemes, states share responsibility rather than mere cost. Therefore, these forms of co-operation are properly designated as responsibility-sharing. Precisely as for fiscal burden-sharing, the viability of responsibility-sharing hinges on the establishment of a distributive key.

In the context of responsibility-sharing, it is advisable to recall experiences with the institution of resettlement. Resettlement implies that special categories of persons, who cannot find adequate protection in their country of first arrival, are moved to a third country willing to receive them. A limited number of countries regularly offer resettlement places, which they distribute by their own initiative, or through the intermediary of UNHCR.[827] Resettlement has been used as a protection tool in Africa, Latin America, South East Asia and Europe. Since the conclusion of the Comprehensive Plan of Action for Vietnamese refugees, however, the role of resettlement has declined.[828]

It should be underscored that resettlement is oriented to the needs of refugees, not those of states. This is clear from Conclusion No. 67 adopted by the UNHCR Executive Committee in 1991:

> The Executive Committee,
>
> Reaffirming the link between international protection and resettlement as an instrument of protection and its important role as a durable solution in specific circumstances,
>
> (a) Calls on governments in a position to assist, to establish refugee admission ceilings, in the context of international burden-sharing;
>
> [...]
>
> (g) Emphasizes that UNHCR pursues resettlement only as a last

[827] The following countries are currently offering resettlement places via UNHCR: Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Switzerland, Sweden and the USA.

[828] In the late 1970s, UNHCR assisted over 200 000 refugees to resettle. In 1996, the corresponding number was down to 27 000 refugees. UNHCR, 1997, p. 86

> resort, when neither voluntary repatriation nor local integration is possible, when it is in the best interests of the refugees and where appropriate.[829]

Presently, resettlement states offer quotas on an annual basis, and these quotas do not meet the actual resettlement need. Resettlement has typically involved industrial countries as receivers and developing countries or countries in transition as senders. Irrespective of the low numbers, the institution of resettlement still provides a valuable example of interstate co-operation in protection. Due to its exceptional character, it is not practised within an economically homogenous group of states such as, e.g., the European Union. For all these reasons, resettlement features only a very limited degree of predictability. It does not represent an overall solution to the concentration of refugee reception. As a consequence, it may contribute to, but cannot safeguard, long-term openness by countries of first arrival.

8.1.3 Assessing Burden-sharing Schemes

The preceding synopsis of various approaches to burden-sharing has shown that the creation of predictability has many facets. They all impinge upon the fundamental choice between politics and law. Which issues should be solved by applying predetermined norms laid down as law, and which should be tackled through ad hoc negotiations of a predominantly political character? The conflict between rigidity and flexibility is fought out in two arenas, and the outcome is obviously of crucial importance for the practical value of any scheme.

The first is the question of underwriting: which risks should be included and which excluded? Where the scope of burden-sharing is set too wide, doubts can be raised about the stability of the system in extreme situations. A comprehensive scheme might cope with one refugee crisis in the vicinity of participating states, but what if two crises coincide? On the other hand, if the scope is set too narrowly, those risks excluded from the

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[829] Executive Committee, Conclusion No. 67 (XLII) Resettlement as an Instrument of Protection, 42nd Session (1991). For a recent affirmation, see Executive Committee, General Conclusion on International Protection, 47th Session (1997), No. 81, para. (r), and Executive Committee, Conclusion on International Protection No. 85 (XLIX), 48th Session (1998), para. (jj).

scheme may trigger insecurity with participating states. Where burden-sharing is limited to a certain subgroup of protection seekers, states are left with unpredictable costs for other subgroups. In other terms, the underwriting issue calls for a balance between the comprehensiveness and the stability of a given scheme.

The second issue is the establishment of a distributive key. The spectrum of proposals spans from mathematically determined equality[830] to the freedom of pledging[831]. The degree to which states choose to specify this key impacts heavily on the degree of predictability produced by the scheme. Where a distributive key is formulated in abstract or vague terms, its frictionless adoption may be more likely, but the probability of interpretive conflicts increases. Where a distributive key approaches mathematical formalism, such conflicts may be avoided, but states will have a hard time committing themselves in a binding fashion. Thus, both solutions place the conflict differently—either at the moment of negotiation, or at the moment of interpretation.

Determining contributions might be the most intricate issue, as contributive capacities vary among states. Obviously, Luxembourg and Germany are not on an equal footing with regard to their 'absorptive capacity' vis-à-vis refugees. Proposals for sharing schemes typically revert to such parameters as total population, population density and gross national product when determining the contributive capacity of states. However, the successful protection of refugees relies heavily on factors much more difficult to measure. The importance of ethnic and religious ties between host community and refugee community has been highlighted[832], but remains difficult to translate and incorporate into models relying on a formal equality of all participating states.

Underwriting and the establishment of a distributive key are interrelated issues. Quite obviously, it is hard to specify a rating system and a distributive key for a scheme encompassing not only physical

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[830] For the academic discussion, see, e.g. Grahl Madsen, 1983, proposing a distributive key based on GNP and population, as well as the recent and thoughtful elaboration of criteria for proportional redistribution in Schuck, 1997, pp. 279–82. In the EU context, see the German proposal described in chapter 8.3.1 below.

[831] Among academics, see Acharya and Dewitt, 1997, who suggest a distributive-developmental framework financed by donors. In the EU context, see the pledging procedure proposed by the German presidency in 1999 (described in text accompanying note 931 below).

[832] Hathaway and Castillo, 1997, p. 16.

protection, but also preventive diplomacy and intervention. Limitations in underwriting pay off in facilitating consensus on a specified distributive key. When evaluating burden-sharing schemes, it is reasonable to focus on the degree of specification attained in both arenas.

8.2 Burden-sharing and International Law

While it is undisputed that each state is responsible for the protection of its citizens and persons otherwise under its jurisdiction, the responsibility for refugees is not as clearly attributable. The 1951 Refugee Convention contains no individual legal claim vis-à-vis a receiving state to be granted asylum. However, as a result of Convention obligations and practical circumstances, such a state may find that it has no choice but to keep a refugee once she has set foot on its territory. To wit, the prohibition of *refoulement* contained in Article 33[833], in addition to the unwillingness of third states to receive a certain refugee amounts to a stalemate in which a refugee's stay on its soil has to be accepted by a state. As long as a state cannot hermetically seal its borders and a redistribution scheme for the exoneration of heavily burdened states does not exist, one has to live with an uneven distribution of refugees and asylum-seekers. The drafters of the 1951 Refugee Convention were very much aware of this. This flows inter alia from the following passages in its preamble:

> *Considering* that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,
>
> *Expressing* the wish that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent this problem from becoming a cause of tension between States, [. . .]
>
> Have agreed as follows: [. . .]

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

The 'international co-operation' required for sharing the burden of refugees was, however, not the subject of the Convention. Nevertheless, the pressing need for regulation was clearly perceived. In the Final Act adopted by the 1951 United Nations conference of plenipotentiaries on the Status of Refugees and Stateless Persons, the topic of burden-sharing emerges once more:

> The Conference, [. . .]
> *Recommends* that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.[834]

According to this document, continuing refugee reception and international co-ordination and co-operation to exonerate heavily burdened states are indispensable elements of a global protection order. This conception still appears to demarcate the state of the art with respect to burden-sharing.

In 1967, the need for implementation of this insight persisted, as Article 2 (2) of the non-binding Declaration on Territorial Asylum reveals:

> Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.[835]

Similar wording, nonetheless conceived as a binding rule as part of a treaty instrument, can be found in Article 2 (4) of the 1969 OAU Refugee Convention[836]:

> Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other

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[834] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, 2–25 July 1951, section IV, D, UN Doc. A/Conf.2/108.

[835] GA Res. 2312 (XXII) of 14 December 1967.

[836] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 14 UNTS 691 [hereinafter OAU Refugee Convention].

> Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

In Paragraph 5 of the same article, the linkage between temporary reception, burden-sharing and resettlement surfaces:

> Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

However, as the verb 'may' indicates, the Contracting Parties avoided stipulating an individual right, which would have put systemic pressure behind international burden-sharing efforts. It must be acknowledged that the implementation of these norms has not been a success.[837]

Apart from this regional pioneering effort to elaborate on the content of international co-operation in a binding manner, no corresponding clarity has been attained on a universal level. The problem of sharing the burden flowing from persecution and flight has been handled in practice with varying degrees of success. Burden-sharing has repeatedly been alluded to in the Conclusions of the UNHCR Executive Committee. As widely acknowledged, these are not binding by themselves, but may provide argumentative support when determining customary law obligations.[838]

Suffice it here to cite recent Conclusions in order to reflect how the concept of burden-sharing is conceived by states participating in the Executive Committee.

The 1995 General Conclusion on International Protection[839] adopted by the Executive Committee of the UNHCR indicates that there is still a need for action:

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[837] The massive refoulement practices during the Great Lakes crisis may serve as a recent example. See Executive Committee, Note on International Protection (submitted by the High Commissioner), UN Doc. No. EC/48/SC/CRP.27, 25 May 1998, para. 13.

[838] Apart from EXCOM Conclusions quoted below, references to burden-sharing and international solidarity are made in the following Conclusions: No. 15 (XXX) 1979; No. 22 (XXXII) 1981; No. 52 (XXXIX) 1988; No. 61 (XLI) 1990; No. 67 (XLII) 1991; No. 68 (XLIII) 1992; No. 71 (XLIV) 1993; No. 74 (XLV) 1994.

[839] UNHCR EXCOM Conclusion No. 77 (XLVI) 1995.

> The Executive Committee, [. . .]
>
> (o) Calls on all States to manifest their international solidarity and burden-sharing with countries of asylum, in particular those with limited resources, both politically and in other tangible ways which reinforce their capacity to maintain generous asylum policies, through cooperation in conjunction with UNHCR to support the maintenance of agreed standards in respect of the rights of refugees; reiterates the critical importance of development and rehabilitation assistance in addressing some of the causes of refugee situations, as well as their solutions, including voluntary repatriation when deemed appropriate; and also in the context of development of prevention strategies.

In the 1996 General Conclusion on Protection[840], burden-sharing and international solidarity figure as 'principles'.

> The Executive Committee [. . .]
>
> (h) Recognizes that countries of asylum carry a heavy burden, including in particular developing countries with limited resources and those which, due to their location, host large numbers of refugees and asylum-seekers; reiterates in this regard its commitment to uphold the principles of international solidarity and burden-sharing and calls on governments and UNHCR to continue to respond to the assistance needs of refugees until durable solutions are found.

If there is to be any consistency in the terminology of EXCOM Conclusions, the drafters' intention must have been to express that burden-sharing is the object of a binding norm of international law. The prohibition of *refoulement*, generally regarded as a customary law norm, is usually referred to as the principle of *non-refoulement* in EXCOM Conclusions. In that particular context, the term 'principle' seems to refer to the fundamental nature and legally binding character of the norm. While it must be reiterated that EXCOM Conclusions are not of a binding character, the language of state representatives in EXCOM could be indicative of states' opinio juris regarding burden-sharing. However, even if one interprets these statements as manifestations of opinio juris, it

[840] UNHCR EXCOM Conclusion No. 79 (XLVII) 1996.

would still prove difficult to trace a clear and consistent practice. State behaviour during the Bosnian conflict is indicative in this regard. For the time being, the quoted 1996 General Conclusion can be taken as support for the existence of a hortatory norm prescribing burden-sharing. To what extent this position is a tenable one shall be discussed at the end of this section.

The 1996 Conclusion on Comprehensive and Regional Approaches within a Protection Framework[841] places *non-refoulement* and burden-sharing in a catalogue of elements constituting such approaches:

> The Executive Committee [...]
>
> (e) Encourages States, in coordination and cooperation with each other, and with international organizations, if applicable, to consider the adoption of protection-based comprehensive approaches to particular problems of displacement, and identifies, as the principal elements of such approaches: [...]
>
> (iii) respect for the institution of asylum, including the fundamental principle of non-refoulement, and ensuring international protection to all those who need it
>
> (iv) measures to reinforce international solidarity and burden-sharing.

The discussions on burden-sharing culminated at the 48th Session of the Executive Committee. Burden-sharing had been selected as the 'Annual Theme' of the session[842], and the whole array of contentious issues resurfaced with unmitigated force. UNHCR's budget was exposed to massive cuts, hitting hardest in host countries of the South. While countries of the North signalled interest in regional solutions, countries of the South feared that the latter might be at the detriment of sharing at the global level.[843] Some Southern countries underscored that fiscal sharing

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[841] UNHCR EXCOM Conclusion No. 80 (XLVII) 1996.

[842] See e.g. UNHCR, Annual theme: international solidarity and burden-sharing in all its aspects: national, regional and international responsibilities for refugees, 7 September 1998, UN Doc. No. A/AC.96/904.

[843] To a degree, this concern was shared by a senior UNHCR official, underscoring that regional solutions must not be at the expense of international solutions. Interview with Erika Feller, Director, Division for International Protection, UNHCR, 98-10-05.

was not enough, as the actual reception of refugees created social, political and, not least, environmental consequences which could not be levelled out by sending money. Moreover, some countries voiced their discontent with the restrictive policies in the North, which were perceived as promoting concentration tendencies.[844] In the light of these diverging interests, the Conclusions adopted could hardly achieve more than they had in earlier years. They contained a recognition that burden-sharing was indeed important, that heavily burdened countries should be assisted, and that the absence of burden-sharing must not be used as a pretext for *refoulement*:

> The Executive Committee,
>
> [...]
>
> (d) Reiterates that refugee protection is primarily the responsibility of States and that it is best achieved through effective cooperation between all States and UNHCR, as well as other international organizations and pertinent actors, in a spirit of international solidarity and burden-sharing; [...]
>
> (o) Reiterates its commitment to uphold the principles of international solidarity and burden-sharing, reaffirms the need for resources to be mobilized to assist countries receiving refugees, particularly developing countries who host the large majority of the world's refugees and bear a heavy burden in this regard, and calls upon Governments, UNHCR and the international community to continue to respond to the asylum and assistance needs of refugees until durable solutions are found;
>
> (p) Recognizes that international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection principles; stresses, however, in this regard, that

[844] 'The bottom line is: should developing countries ever be seen to show reluctance to welcome asylum seekers, it would be more out compulsion than design. [...] It would, therefore, be unfair to patronize the refugee hosting developing countries to carry on with the burden for the sake of human rights, while there are continuing incidences of refoulement, through summary expulsion of asylum seekers, occasionally en masse, and detention often under inhuman conditions in certain countries. The situation becomes even more bleak when we perceive a steep decline in financial contributions to humanitarian bodies and agencies, leading to a large-scale downsizing of humanitarian operations.' Ms. Ismat Jehan, Counsellor, Permanent Mission to the United Nations Office of Geneva, Bangladesh, Statement at the 49th EXCOM 1998. On file with the author.

> access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community; [...].

In practice, burden-sharing remains a challenge with regard to both reception in the region and resettlement. The critical assessment contained in the High Commissioner's 1995 Note on International Protection is still valid today:

> Over recent years, despite the broadening of State involvement with refugee issues, the lack of tangible international solidarity has remained an obstacle to the positive development of the international refugee protection regime. Successive Executive Committee Conclusions, endorsed by the General Assembly, have called for international solidarity and burden-sharing, enjoining all States to take an active part, in collaboration with UNHCR, in efforts to assist countries, in particular those with limited resources, that host large numbers of refugees and asylum-seekers. It remains the shared responsibility of the international community to support the capacity of host States to receive and protect refugees, including States lacking the necessary resources and those where domestic concerns, including anti-immigrant sentiment as well as social, economic, political and environmental concerns, militate against effective protection. Issues of national security are also increasingly relevant in this respect, particularly in regard to the political and related consequences of a prolonged stay of large groups of refugees.[845]

To sum up, it can be stated that an obligation to share the burden of reception has no ground in international treaty law. However, Fonteyne asserts that states are obligated to practice burden-sharing by international customary law.[846] His argument is based on Article 14 of the Universal Declaration, Articles 55 and 56 of the UN Charter, observations on the

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[845] Executive Committee of the High Commissioner's Programme, Forty-sixth session, Note on International Protection, International Protection in Mass Influx (submitted by the High Commissioner), UN Doc. No. A/AC.96/850, 1 September 1995, para. 14.

[846] J. L. Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees', 8 *Australian Yearbook of International Law* 162 (1983), pp. 175 et seq.

opinio juris of states as expressed in UNHCR EXCOM and UN bodies, and deductions from state practice. Against his position, weighty counter-arguments can be adduced. To start with, the UDHR is no binding instrument of international law, and neither is the content of its Article 14.[847] Therefore, it is fallacious to argue for the existence of a burden-sharing obligation on its basis. Second, turning to state practice as part of a possible custom, case studies reveal that far from all refugee crises have been met with burden-sharing initiatives. In those cases where assistance indeed materialized, it was highly contingent on specific political constellations.[848] These academic findings are further backed up by the assessment of the High Commissioner quoted earlier.[849] Given these inconsistencies, the requirement of practice is hardly satisfied. With respect to opinio juris, we have noted earlier that the language of non-binding EXCOM instruments fails to lend unambiguous support to a hortatory norm of burden-sharing. However, if states were indeed consenting on the existence of such a norm, the EXCOM Conclusion would be the ultimate forum for spelling out such an opinio juris.

Fonteyne's assessment is, to say the least, open to doubt. Most certainly, it could be supported by other voices asserting that solidarity is a fundamental principle of international law.[850] But if one accepts this line of argument as valid, the resulting norm is a fairly abstract one. Keeping in mind the insurance function of burden-sharing, this inhibits its proper functioning as a stabilizing factor in a real-world refugee crisis.

By contrast, Perluss and Hartman argue that the international community chose not to mould burden-sharing into an obligatory form, as this would risk weakening rather than strengthening protection. Had there been an obligation to share the burden, front-line states would abuse it as an excuse for *refoulement* if no assistance from less affected states

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[847] See chapter 9.1.1 below.

[848] The successful case of burden-sharing following the Vietnamese refugees crisis is probably most indicative. Suhrke describes it as an essentially hegemonic scheme, resting on the pressure exerted on other countries by the United States. A. Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action', 11 *Journal of Refugee Studies* 396 (1998), p. 413.

[849] Note 845 above.

[850] R. J. Macdonald, 'Solidarity in the Practice and Discourse of Public International Law', 8 *Pace Int'l L.Rev.* 259 (1996), p. 259, claiming that this principle is 'gaining both recognition and importance in the structure of the contemporary international legal order'.

materialized.[851] Interestingly, both positions trespass the legal-technical level and expand into their own theory on the international protection regime. Fonteyne claims that burden-sharing is obligatory, as the telos of the 1951 Refugee Convention cannot be secured otherwise. And Perluss and Hartman hold that the very same telos militates against the obligatory character of burden-sharing.

To conclude this section, it can be established that burden-sharing has been understood as a functional prerequisite for the observation of the norm prohibiting *refoulement*[852], the preservation of protection capacities, and access to territory of potential host states. As this prerequisite has been identified in an early stage of the development of the current protection regime, states have had ample opportunity to develop a normative framework securing burden-sharing. Hitherto, this has been done in the African context, although this framework does not work well in practice. On a universal level, international law does not contain an obligation to share the burdens incurred by refugee protection. The following section will examine whether normative developments within the EU have filled this void at the European level.

8.3 Burden-sharing and the EU acquis

The dismantling of the Iron Curtain and the violent dissolution of the Federal Republic of Yugoslavia were two issues of utmost importance for the migrational agenda of Western European States. The Balkan crisis had set off the largest refugee flow in Europe since the end of the Cold War, and the number of asylum applications filed with European states peaked in 1992.[853] European asylum infrastructures were allegedly not prepared to cope with the situation. The harmonization project pursued by Member States had not moved fast enough to provide infrastructures on the regional level that could cope with the situation. This is not surprising, as

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[851] D. Perluss and J. F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm', 26 *Virginia Journal of International Law* 572 (1986), p. 588.

[852] *See* Fonteyne, 1983, p. 175. Perluss and Hartman, 1986, p. 588. For affirmation of the necessity of burden-sharing without taking position on its normative quality see J. Thoburn, 'Transcending Boundaries: Temporary Protection and Burden-sharing in Europe', 7 *IJRL* 459 (1995), p. 467 et seq.

[853] See chapter 4.1 above.

the goal of the Member States was to create an area without internal borders rather than to launch a regional protection regime.

The largest populations of protection seekers from Bosnia were found in those countries of Western Europe which were either geographically proximate or already hosting immigrant communities from former Yugoslavia. In descending order per capita, Austria, Sweden, Germany and Switzerland[854] received most of these persons. In total numbers, Germany alone accommodated 58 percent of all Bosnian refugees hosted by EU Member States.[855] Together, Austria, Germany and Sweden, being the three largest receivers within the EU, hosted 84 percent of all Bosnian refugees who found shelter in the EU.[856] This provides ample proof of the fact that no steering instruments existed to ensure equitable burden-sharing in Western Europe.

In terms of solidarity, the Bosnian refugee crisis represents an outright failure. The same must be said of the Kosovo crisis.[857] First, the distribution of so-called 'spontaneously arriving' protection seekers was highly unequal among European States. From the start of the military and police operations by Serbian authorities in early 1999 to the deployment of NATO ground troops in Kosovo, more than 778 300 displaced persons from Kosovo were received in the region or within the Federal Republic of Yugoslavia.[858] This may be contrasted to 69 650 spontaneous protection

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[854] At the time, Austria and Sweden had not acquired membership of the European Union. Switzerland was not and is not a member of the European Union.

[855] Statistical source: UNHCR (1997), as reproduced in Black, Koser and Walsh, 1998, p. 7, table 1.1. By 1997 Germany had received 342 500 Bosnians out of an EU total of 584 017.

[856] Ibid. By 1997, Austria had received 88 609 Bosnians, while the corresponding number for Sweden was 60 671.

[857] For the present purposes, the term 'Kosovo crisis' is meant to apply only to that period during which military and police activities took place in the province of Kosovo—i.e. the first and second quarter of 1999. For a comprehensive assessment of burden-sharing related to persecution and hostilities in Kosovo, one would need to look at the flow of protection seekers during the years preceding the crisis phase, as well as the post-crisis phase.

[858] 778 300 displaced were hosted by Albania, the Former Yugoslav Republic of Macedonia, the Republic of Montenegro (part of the FRY) and Bosnia-Hercegovina. An unknown number was received by the Republic of Serbia (part of the FRY). Statistics as of 15 June 1999. Source: UNHCR, Update: Kosovo Emergency, 15 June 1999. KFOR troops were dispatched in Kosovo in mid-June, which demarcated the end of outflow.

seekers from Yugoslavia[859] arriving in Western and Central European countries, excluding those in the immediate region, during the first and second quarter of 1999.[860] Of these 69 650 persons, 41 820 sought protection in EU countries. This means that the region took the brunt of protection obligations, with some five percent of spontaneous arrivals being taken care of by EU Member States.

Within Europe[861] and the EU, spontaneous arrivals were distributed in a very asymmetrical manner. In the first and second quarter, Switzerland topped the list of European countries with 21 280 arrivals, while Germany took the lead among EU countries with a total of 17 840 cases.[862] We recall that both countries had been heavily burdened during the Bosnian crisis.

By means of the Humanitarian Evacuation Programme (HEP) and financial assistance, the receiving countries in the region were to a certain extent exonerated. Paradoxically, the HEP amplified the unequal distribution of spontaneous arrivals by increasing the load of those EU Member States whose burdens were already the most onerous. Some 90 000 persons were evacuated to countries outside the immediate region within the framework of the HEP, designed to prevent the Former Yugoslav Republic of Montenegro from being overburdened.[863] Table 2 shows that the reception of the evacuees was highly inequitable. Again, Germany stood out as the largest receptor.[864]

During the handling of the Kosovo crisis, the interdependence between the number of protection seekers and the level of accorded rights emerged once more. In Germany, less than one percent of all Kosovar protection

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[859] It should be noted that those statistics not only refer to citizens of the Federal Republic of Yugoslavia originating from Kosovo. Statistics broken down to regional provenience are not available.

[860] Source: UNHCR, Asylum Application Statistics in Europe. Third Quarter 1999, available at <http://www.unhcr.ch/statist/9910euro/text.htm> (accessed 991105).

[861] Excluding the countries named in note 858 above.

[862] See note 860 above.

[863] As of 28 June 1999, 89 982 persons had been evacuated under this programme. UNHCR commenced return movements on 28 June 1999.

[864] As pointed out elsewhere, Germany contributed to a much lesser degree than the U.K. or France to military operations. The Economist, *Guns or refugees—an unequal alliance?*, 8 May 1999, p. 28. However, as explained earlier, the two parameters are not necessarily commensurable. One reason is that states outside NATO contributed to HEP. Another is that far from all protection problems connected to the Kosovo crisis were solved by intervention, as the flight movements of Serbians and Roma from Kosovo after June 1998 proved.

seekers were formally granted refugee status. Those who benefited from toleration were denied the right to work, and the return phase—including forcible removals—was introduced relatively early.[865] By contrast, Denmark granted refugee status to the majority of spontaneous arrivals in the period between August 1998 and March 1999. Moreover, those accorded temporary protection were also given the right to family reunification.[866]

EU Member States		European Non-EU Member States		Other States	
Receiving country	**HEP Total**	Receiving country	HEP Total	**Receiving country**	**HEP Total**
Austria	5 079	Croatia	370	Australia	3 969
Belgium	1 223	Czech Republic	824	Canada	5 350
Denmark	2 823	Iceland	70	Israel	206
Finland	958	Malta	105	United States	8 549
France	6 139	Norway	6 072		
Germany	14 689	Poland	1 049		
Ireland	1 033	Romania	41		
Italy	5 829	Slovakia	90		
Luxembourg	101	Slovenia	745		
Netherlands	4 060	Switzerland	1 687		
Portugal	1 271	Turkey	8 340		
Spain	1 426				
Sweden	3 675				
United Kingdom	4 209				
Total	**52 515**		19 393		**18 074**
Grand Total					**89 982**

Table 2: UNHCR/IOM Humanitarian evacuations of Kosovar refugees from the FYR of Macedonia from 5 April through 25 June 1999[867]

[865] ECRE, ECRE Kosovo/Kosova Returns survey, February 2000, available at <http://www.ecre.org/archives/rpt/kreturn.doc> (accessed 22 March 2000).

[866] Ibid.

[867] Source: UNHCR, Update: Kosovo Emergency, 28 June 1999.

The Bosnian experience had already put burden-sharing on the Council's negotiation table, and the Kosovo crisis gave the issue a new momentum. In the Council, comprehensive and protracted deliberations have taken place on how to ensure a more equitable distribution in future cases. These deliberations shall be depicted in four steps, the first leading to the adoption of a resolution in 1995, the second exposing the role of burden-sharing in the Treaty of Amsterdam, the third elaborating on the experimental instruments conceived in 1998, and the fourth focusing on the negotiations following a specific burden-sharing proposal by the European Commission. Finally, in a fifth step, a recent initiative of the Commission on a limited form of burden-sharing shall be expounded.

8.3.1 Negotiations Preceding the 1995 Resolution

To understand the steps taken within the EU, it is indispensable to track the broader European discussion on solidarity triggered by the Balkan crisis. A first mention of burden-sharing was made during the International Meeting on Victims of the Humanitarian Crisis on 29 July 1992. In a common position taken by the European Community and its Member States[868], it was held that a just and lasting solution 'will not be assisted by movements of people outside the boundaries of the former Yugoslavia'. The strategy envisaged was to contain the conflict as well as flight from the conflict area. Furthermore, the position holds that 'the burden of financing relief activities should be shared more equitably by the international community'. No allusion was made to a more equitable sharing of the responsibility for arriving refugees.

At the London meeting of the EU ministers responsible for immigration on 30 November and 1 December 1992, a Conclusion on People Displaced by the Conflict in the Former Yugoslavia was adopted.[869] In its paragraph 5, reference is made to certain categories of vulnerable persons, which the Ministers are 'in principle willing to admit temporarily on the basis of proposals made by UNHCR and the ICRC in accordance with national possibilities and in the context of co-ordinated action by all the Member States'. In the same paragraph, Ministers 'call

[868] Reiterated in Art. 1 of the Conclusion on People Displaced by the Conflict in the Former Yugoslavia, Doc. No. 10518/92, 30 Nov./1 Dec. 1992.

[869] Ibid.

upon the Presidency, in cooperation with UNHCR, to negotiate with other States, to create the necessary conditions to enable these States also to be involved in the reception of nationals of the former Yugoslavia in the context of temporary admission arrangements'.

Simultaneously, Member States were eager to involve Non-Member States. At the time, Non-Member States such as Austria, Sweden and Switzerland were already offering protection to a much greater extent than the majority of Member States. The willingness 'in principle' did not correspond to willingness in practice. Immediately before the London meeting, the UNHCR and the ICRC had appealed to the international community to receive camp prisoners from former Yugoslavia. In spite of earlier promises, the international community reportedly proved to be reluctant.[870]

As an attempt to break the stalemate of vagueness and non-compliance, Sweden launched a proposal on burden-sharing in the autumn of 1993. According to the Swedish under-secretary of State, the 'strategy of giving support near the conflict areas may well be completely inadequate when the winter sets in'.[871] Austria, Denmark, Germany, Norway, and Switzerland supported the Swedish effort. Together, the six countries presented a draft resolution at the Fifth Conference of Ministers responsible for immigration affairs in Athens on 18–19 November 1993.[872]

It was stated in the draft that 'a more equal distribution of the outflow caused by the present situation in former Yugoslavia would facilitate protection to be given to all those forced to leave their homes'. Furthermore, the proposed text contained an appeal to all states of the world 'to offer shelter and to host, on a more equitable basis, in particular displaced persons and war refugees from Bosnia and Hercegovina who cannot avail themselves of protection in the region'. As the draft was

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[870] Migration News Sheet, *European countries are reluctant to accept more refugees from the former Yugoslavia*, November 1992, p. 5.

[871] Migration News Sheet, *Sweden calls for burden-sharing of Bosnian refugees*, November 1993, p. 5. Sweden had earlier sought to raise support for a more equitable distribution of Bosnians in need of protection, inter alia by means of the 'Scandinavian Initiative' proposing a quota system for the reception of vulnerable persons and persons having certain links to the Scandinavian countries. The Scandinavian Initiative did not lead to a concerted reception mechanism.

[872] Migration News Sheet, *Member States refuse a proposal to assist Bosnian refugees on a more equitable basis*, December 1993, p. 4. This conference was arranged under the auspices of the Council of Europe.

resisted by a number of states, among others France, the United Kingdom and the Netherlands, it was never put to a vote at the Athens meeting. However, the ministers agreed to ask the Vienna Group on East-West migration to study the draft 'as a matter of urgency'.[873]

Accordingly, the draft was discussed again at the Vienna Group plenary meeting in Strasbourg on 27–28 January 1994. Even at this forum, the idea of burden-sharing met firm resistance. According to the Swedish Immigration Minister, the United Kingdom motivated its unwillingness to accommodate Bosnian refugees with the expenses deriving from its military presence in Bosnia-Herzegovina.[874]

Earlier in the same month, the European Parliament had passed a Resolution on the General Principles of a European Refugee Policy[875], which underscored that all Member States share responsibility for a common refugee policy. Accordingly, 'it should follow that the much heavier burden borne by some of them due to geographical or other reasons should be equally shared by all Member States'.[876] In its operative part, the European Commission is urged to elaborate an emergency plan for refugee reception on the basis of an equitable distribution among the Member States.[877]

The 1994 Communication from the Commission to the Council on Immigration and Asylum Policies[878] attempted to offer a more specific solution by proposing the '[d]evelopment of a monitoring system for absorption capacities and creation of a mechanism which would make it possible to support Member States who are willing to assist other Member

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[873] Ibid.

[874] Migration News Sheet, *Idea of burden-sharing for Bosnian refugees is dead*, February 1994, p. 4.

[875] Resolution on the General Principles of a European Refugee Policy, adopted 19 January 1994, Doc. No. A3-0402/93. OJ (1994) C 044/106.

[876] Ibid., preamble, Art. J.

[877] Ibid., Art. 16. Already in its 1992 Resolution on the Harmonization within the European Community of Asylum Law and Policies (adopted on 15 Nov. 1992, Doc. No. A3-0337/92), the European Parliament had urged 'that in the event of an influx of refugees, each Member State should take refugees in proportion to its capacity' (Art. 19) and 'that arrangements be made and formalized for Member States to come to the assistance of one Member State which is receiving a large number of refugees' (Art 21).

[878] European Commission, Communication from the Commission to the Council on Immigration and Asylum Policies, COM (94) 23 final, 23 February 1994.

States faced with mass influx situations'.[879] According to the Communication, such a matching system would fall short of a formal burden-sharing arrangement, but would increase the probability of support among Member States in situations of 'absorption problems'.[880]

Among Member States, burden-sharing continued to be an issue causing dissent on the intergovernmental level. The informal meeting of Ministers responsible for immigration in Salonika on 6–7 May 1994 gave further proof of the divergent interests of more affected States, facing large inflows, and other States. The Priority Work Plan for 1994 declared burden-sharing to be one of the issues to be examined by the Council. Accordingly, the German presidency presented an ambitious

- Draft Council Resolution on Burden-sharing with Regard to the Admission and Residence of Refugees[881]

in July 1994. However, the German Draft had difficulties in attracting the necessary support.

On 8 September 1994, the German Draft was discussed at an informal meeting in Berlin without signs of progress on the issue. Obviously, the detailed provisions setting out a distributive key were causing controversy. Accordingly, the German Draft was replaced by a less detailed proposal launched by France, which was discussed at the Paris meeting on 6 April 1995. A further draft initiative was launched by Austria, Germany and the Netherlands, followed by a simplified Spanish draft.

During the Spanish presidency, a limited consensus on burden-sharing had finally begun to develop, as the adoption of a

- Council Resolution of 25 September 1995 on Burden-sharing with Regard to Admission and Residence of Displaced Persons on a Temporary Basis[882]

indicated. Let us draw up a brief comparison between the German Draft of 1994 and the 1995 Resolution.

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[879] Ibid., 42, para. 10.

[880] Ibid., 26, paras 98 and 99.

[881] Doc. No. 7773/94 ASIM 124 [hereinafter the German Draft].

[882] OJ (1995) C 262/1 [hereinafter the 1995 Resolution]. According to the Draft List, this instrument is part of the *acquis*.

8.3.2 Comparison of the German Draft and the 1995 Resolution

The most daring feature of the German Draft was the proposal of a specific distributive key which 'could be used by Member States'.[883] This key was based on Member States'

- percentage of the total Union population;
- percentage of Union territory; and
- percentage of the Gross Domestic Product of the Union.

Each of these criteria should be given equal weight. The German Draft contained a table of indicative figures[884] for each Member State which were to be revised every five years by joint agreement. The possibility to depart from these figures by joint agreement was expressly provided for in Paragraph 8 of the German Draft.

The centrepiece of the envisaged redistribution mechanism was contained in Paragraph 9:

> Where the numbers admitted by a Member State exceed its indicative figure under paragraph 8, other Member States which have not yet reached their indicative figure under paragraph 8 will accept persons from the first Member State.

Accordingly, the German Draft intended to introduce compulsory resettlement relying on a distributive key. It envisaged, however, a reduction of reception obligations based on two factors: military

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[883] Para. 7 of the German Draft. This solution was obviously inspired by the distributive order in domestic German legislation, which stipulates a distributive key for asylum seekers in federal legislation. This key may be modified by a unanimous decision of the *Länder*. See Asylverfahrensgesetz [Asylum Procedure Act], Section 45.

[884] Ibid. A look at these figures might help to understand both the German urge and the failing support of other large Member States. In descending percentage order, the figures read as follows: Germany (21.58), France (19.40), Italy (15.83), United Kingdom (14.28), Spain (13.63), Netherlands (3.55), Greece (3.20), Portugal (2.65), Belgium (2.42), Denmark (1.78), Ireland (1.54), Luxembourg (0.12).

expenditure triggered by intervention in the refugee-producing crisis[885] and the population of Convention refugees already present in a Member State.[886]

In terms of *realpolitik*, resistance to the German Draft can be explained by the fact that Germany would have been its first beneficiary, with additional reception responsibilities falling upon all other Member States.

Turning to the 1995 Resolution, it is striking that the indicative figures have vanished and the stipulated distributive key is devoid of any precision[887]:

> 4. The Council agrees that the burden in connection with the admission and residence of displaced persons on a temporary basis in a crisis could be shared on a balanced basis in a spirit of solidarity, taking into account the following criteria [...]:
>
> - the contribution which each Member State is making to prevention or resolution of the crisis, in particular by the supply of military resources in operations and missions ordered by the United Nations Security Council or the Organization for Security and Cooperation in Europe and by the measures taken by each Member State to afford local protection to people under threat or to provide humanitarian assistance,
>
> - all economic, social and political factors which may affect the capacity of a Member State to admit an increased number of displaced persons under satisfactory conditions.

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[885] Paragraph 9 of the German Draft states: 'Member States which are helping, by means of particular foreign and security policy measures in the country of origin of the persons referred to in paragraph 1, to control the refugee situation in the State in question, need not admit the full figure assigned to them under paragraph 8. The resulting shortfall should be covered by the other States in proportion to their indicative figures. Measures of this nature include in particular peace-keeping or peace-making initiatives in the framework of the United Nations, NATO or the Western European Union.'

[886] According to paragraph 11 of the German Draft, Convention refugees are set off against the indicative figure in paragraph 8.

[887] With regard to the vagueness of the given criteria, we omit a detailed discussion of their implications. For a critical analysis, see ECRE, Comments from the European Council on Refugees and Exiles on the 1995 'Burden-Sharing' Resolution and Decision adopted by the Council of the European Union, March 1996.

A footnote linked to the first paragraph of this article, specifies that '[t]hese criteria are norms of reference that may be supplemented by further criteria in the light of specific situations'.

To wit, this statement reveals the self-contradiction contained in the present instrument. In the preamble, it is correctly stated that 'situations of great urgency [...] require prompt action and the development beforehand of principles governing the admission of displaced persons'. However, these principles are developed ex post facto by the Council. The 1995 Resolution has been followed by a

- Decision on Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis[888]

which lays down the procedural framework for Council decisions and monitoring in burden-sharing situations.

In short, burden-sharing is initiated as follows. On the initiative of the Presidency, a Member State, or the Commission, an urgent meeting of the Coordinating Committee under Article K.4 of the Treaty on European Union is convened with the task of establishing whether or not a given situation necessitates burden-sharing as envisaged in the 1995 Resolution.[889] Given such a necessity, the Coordinating Committee prepares a proposal for submission to the Council for approval.[890] If the Coordinating Committee fails to reach consensus within a month, the provisions laid down in the Council's Rules of Procedure for urgent cases may be applied, implying inter alia that the Council may adopt a relevant act by a written vote.[891]

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[888] OJ (1996) L 063/10.

[889] Ibid., para. 1.

[890] Ibid., para. 3.

[891] Ibid. The relevant rules are contained in Council Decision of 6 December 1993 adopting the Council's Rules of Procedure, OJ 93/662/EC.

This ex post facto-framework clearly fails to provide the predictability necessary for fair burden-sharing. Consequently, a cautious state would rather block access for refugees than trust in the outcome of this ad-hoc exercise in the Council.[892]

Who are the beneficiaries of a burden-sharing exercise under the 1995 Resolution? Its personal scope comprises various categories of vulnerable persons 'whom Member States are prepared to admit on a temporary basis under appropriate conditions in the event of armed conflict or civil war, including where such persons have already left their region of origin to go to one of the Member States'.[893] These categories were also contained in the German Draft, and comprise former camp internees, medical evacuation cases, persons exposed to direct threat of loss of life or limb, cases of sexual violence, and war refugees having come directly from a combat zone to the territory of a Member State. In the 1995 Resolution, an exclusion clause similar to Article 1 F (a) and (b) of the 1951 Refugee Convention has been inserted. It emerges clearly that no state obligation to admit is envisaged. Any decision on admission remains within the discretion of the relevant Member State.

Furthermore, the 1995 Resolution does not apply retroactively, i.e. to persons admitted before its adoption.[894] The responsibility for persons applying for refugee status under the 1951 Refugee Convention will be distributed according to the rules laid down in the Dublin Convention.[895] Interestingly, and in contradistinction to the 1995 Resolution, the German Draft contained a provision allowing the reduction of a certain State's reception obligations with the number of persons residing there under the 1951 Refugee Convention or the ECHR.[896]

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[892] The importance of a detailed and predictable burden-sharing framework seems to have been realized by the authors of the German Draft. See paragraph 5 of the German Draft: 'The Council is convinced that if Member States are to be able to react promptly in emergencies, they must first devise an appropriate range of measures for the admission of refugees from war or civil war. Such measures must include prior agreement on principles for distributing refugees. Otherwise there is a risk that, in situations in which prompt action is necessary to avert serious danger to human life, decisions which need to be taken urgently will be delayed by the fact that complicated consultation procedures must first be initiated.'

[893] Art. 1(a) of the 1995 Resolution.

[894] Art. 7 of the 1995 Resolution.

[895] Preamble of the 1995 Resolution

[896] Para. 11 of the German Draft.

As the remaining personal scope is imprecise and ultimately refers back to the assessment made by each Member State, it is not clear how Member States are to single out a group of persons which could be the subject of burden-sharing according to Article 4 of the 1995 Resolution. Finally, it must be recalled that a resolution is a so-called atypical instrument of Union law, which is not binding per se.[897] This detracts further from the degree to which the 1995 Resolution may stabilize Member States' expectations in a crisis situation.

A practical illustration of the persisting stalemate regarding solidarity arose at the same meeting at which the resolution was adopted. The Ministers discussed a UNHCR request for the long-term admission of 50 000 internees from Kuplensko Camp in Croatia. Not a single State declared itself willing to admit persons from this group.[898]

Both the German Draft Resolution and the 1995 Resolution relied heavily on what has been identified as a control strategy.[899] In the 1995 Resolution, however, the steering principles had been watered down to a degree at which the whole instrument became dysfunctional.[900]

8.3.3 The Impact of the Treaty of Amsterdam

As expounded elsewhere in this work, the Treaty of Amsterdam represented a singular opportunity to restructure faltering co-operation in the area of asylum and migration. Yet ultimately, in these areas, Amsterdam was about form rather than substance. At large, Member States consented on procedures and competencies for future deliberations on visa, asylum, migration and other policies related to the free

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[897] See chapter 1.4.2.6 above.

[898] Migration News Sheet, *Most Member States Unwilling to Take in Ex-Yugoslav Refugees*, October 1995, 4.

[899] See van der Klaauw, 1997a, p. 244, who criticises the EU approach to burden-sharing as too narrow-minded and focused on immigration control.

[900] But see J. Hathaway and A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', 10 *Harvard International Law Journal* 115 (1996), p. 143, who acknowledge the importance of the 1995 Resolution and the following Decision, as they provide for a consultative mechanism ('the meeting'), which is said to be crucial for burden-sharing processes. In the absence of a pre-established distributive key, we would argue, negotiations will simply lead to a stalemate described below in chapter 8.5.2 on game theory.

movements of persons. Nevertheless, the agenda thus set is binding upon Member States as primary EC law and it certainly predetermines outcomes. The following shall analyze how the issue of burden-sharing is affected by Amsterdam.

After the entry into force of the Treaty of Amsterdam, Title IV of the TEC contains two articles on burden-sharing. First, Article 63 (2) TEC offers a broad entitlement to take action, subjugated to unanimity voting under the transitional period:

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

> (2) measures on refugees and other displaced persons within the following areas:
>
> [...]
>
> (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and other displaced persons
>
> [...]
>
> Measures to be adopted pursuant to points 2(b) [...] shall not be subject to the five year period referred to above.

Which classes of beneficiaries are covered by the provision on burden-sharing in Article 63 (2) (b) TEC? The drafters chose a comprehensive solution by including both 'refugees' and 'displaced persons'.[901] The importance of that choice should not be underestimated. Let us imagine for a moment that burden-sharing had been limited to displaced persons, while refugees had been excluded from its ambit. That would have incited Member States to minimize the group of persons defined as refugees and to maximize the group of persons defined as displaced persons. As the precise scope of the refugee definition is a contested issue, this would be a rational and feasible strategy to avoid incalculable costs.

From a protection perspective, the inclusive wording of Article 63 TEC is a positive feature. It provides the Council with a basis for

[901] Chapter 7.1.3 elaborates on the precise content of these terms in the context of the present Treaty.

counteracting the concentration effects brought about by the Dublin Convention.[902]

In this context, it is worth noting that the introduction of qualified majority voting might have facilitated the adoption of an effective measure on burden-sharing. However, as expounded earlier[903], there shall not be an automatic transition to qualified majority voting for the issues covered by Title IV. If Member States disagree on burden-sharing, they will, simply and logically, refrain from shifting this issue to a procedure of majority voting.

Another negative aspect of Article 63 is the exemption of burden-sharing from a temporally confined legislative agenda. It emanates from the very wording of Article 63 TEC that measures relating to burden-sharing are not included among those which must be adopted within a five-year period. To be sure, this implies that the Council may take as much time as necessary for reaching consensus, at the risk that consensus might never be reached. Essentially, this makes the content of Article 63 (2) (b) TEC a mere reminder that burden-sharing should be on the agenda, without imposing an obligation to adopt measures within a certain timeframe.

The very disparity of the temporal limits set is a telling example of '*l'intégration à deux vitesses*'. Recalling that openness towards persons in need of protection and cost distribution are interrelated[904], this disparity may have detrimental consequences for the level of protection offered through EU measures.[905] As for Article 63 TEC, the deliberations on cost distribution—i.e. the measure on burden-sharing—are open-ended, while openness—i.e. the measures relating to the granting of protection—is to be determined within five years. This keeps protection costs uncertain. As long as this uncertainty prevails, a rational state will opt for a minimum

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[902] See chapter 5.2.1.1 above for a detailed account of the Dublin Convention and chapter 8.3.6 below for a description of the concentration of protection seekers in a number of countries effectuated by it.

[903] See chapter 4.2.5.2 above.

[904] See chapter 3.1 above.

[905] Compare also Bank's assessment: 'However, it was exactly the prospect of burden-sharing which encouraged hopes that the Europeanisation of asylum policies in turn would provide for opportunities of having a keen eye on fair procedures and conditions granted to asylum seekers and recognised refugees. By disconnecting the harmonisation of laws from the task of burden-sharing these hopes have suffered a significant blow.' Bank, 1999, p. 29.

level of protection. Translated back to practice, this promotes the spiral of restriction in EU asylum policies further. When adopting measures under Article 63 (1) and (2) (a) TEC, Member States will attempt to minimize the scope of protective burden—by reinforcing deflection and seeking to lower the level of rights enjoyed by protection seekers who manage to enter their territories.

The temporal disparity has been affirmed by and fortified in the 1998 Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice.[906] The Action Plan makes up a more detailed schedule for the adoption of measures under Article 63. In spite of the fact that Article 63 TEC allows for five years, some measures are considered so important that they shall be adopted within two years.[907] Burden-sharing does not belong to these measures. It is listed among the measures 'to be taken as quickly as possible in accordance with the provisions of the Treaty of Amsterdam'.[908]

Apart from Article 63 TEC, another provision of Title IV also impacts on burden-sharing. Article 64 (2) TEC transgresses unanimity in decision making in a carefully delimited area:

> In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.[909]

This provision offers a facilitated procedure for deciding on provisional measures to be taken when one or more Member States are exposed to 'a

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[906] Council of the European Union, Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, 7.12.1998, Doc. No. 13844/98, OJ (1999) C 19/1. The Action Plan is a non-binding instrument.

[907] Ibid, para. 36.

[908] Ibid, para. 37 b).

[909] Paragraph 1 of the same article reads: 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

sudden inflow of nationals of third countries'. A vote by qualified majority is sufficient in such cases. However, the commitment of Member States under this norm is limited. Among other factors, the difficulty of predicting when refugees can return home constitutes a major obstacle to accurate quantification of the reception costs. Where measures are limited to a maximum of three months, the costs entailed are calculable. Therefore, majority voting was deemed acceptable to the drafters of the Treaty of Amsterdam.

It is reasonable to assume that measures of short duration are confined to fiscal burden-sharing. It is neither ethically nor economically defensible to move protection seekers among Member States to provide shelter for such a brief period.

8.3.4 The Solidarity Drafts: Merging Admission and Burden-sharing?

The topic of burden-sharing in the EU is not exhausted with the dysfunctional 1995 Resolution and the framework provisions launched with the Treaty of Amsterdam. Initiated by the Commission, a proposal for a twin instrument regulating both admission to temporary protection and solidarity with regard to such protection was negotiated from 1997 until early 1999.

Different stages of the negotiation process illustrate in a very graphic fashion how decisions of access, level of accorded protection, fiscal burden-sharing and redistribution of physical protection responsibilities are intertwined. As this process may be of decisive value for tracking the intent of the Union as well as Community legislator, we shall deal with it at some length.

In March 1997, the European Commission launched a proposal on a Joint Action concerning Temporary Protection of Displaced Persons.[910] It was the first time the Commission had made use of its right to initiative in relation to asylum, pursuant to Article K.3 (2) (b) TEU/Maastricht. On a strategic level, this proposal signalled a certain caution with regard to the demanding paradigm of redistribution. Rather, its drafters returned to the

[910] European Commission, Proposal to the Council for a Joint Action based on Article K.3 2 (b) of the Treaty of European Union concerning Temporary Protection of Displaced Persons, OJ (1997) C 106/13 [hereinafter the 1997 Proposal].

proven technique of harmonization, i.e., sharing norms. The 1997 Proposal's main goal was to eliminate distortional effects[911] flowing from differences among national regimes of Temporary Protection.

With the proposal, the Commission sought to frame a Union-wide 'Temporary Protection Régime', containing a number of minimum rights[912] and a mechanism for the common opening up and phasing out of such a régime.[913] Interestingly, the binding decisions on opening up and phasing out were proposed to be taken by qualified majority in the Council.[914]

Article 5 of the 1997 Proposal addressed the question of assistance to particularly affected States:

> On the basis of the report of the Commission referred to in Article 4 [on the Commission's reporting obligations, GN], the Council shall examine how best to support Member States which have been particularly affected by the mass influx of persons in need of international protection.

The Explanatory Memorandum attached to the 1997 Proposal underscored that

> one of the very purposes of the joint action is precisely to create conditions for an effective sharing of the responsibility with regard to situations of mass influx of persons in need of international protection. Article 5 reflects the content of the Council resolution on burden-sharing which foresees the possibility of taking measures based on solidarity if one or more Member States are particularly affected by mass-influx situations. Such measures may for example take the form of financial compensation and/or, if that is not sufficient, a fair allocation of the persons who are fleeing from the crisis region.[915]

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[911] See paras 7 and 8 of the Explanatory Memorandum attached to the 1997 Proposal.

[912] Arts 6–9 of the 1997 Proposal.

[913] Arts 3 and 4 of the 1997 Proposal.

[914] Art. 12 of the 1997 Proposal.

[915] Para. 21 of the Explanatory Memorandum attached to the 1997 Proposal.

Under the consultation procedure, the European Parliament introduced a number of amendments to the 1997 Proposal.[916] The readings in the Council focused inter alia on the issue of burden-sharing, where Article 5 of the 1997 Proposal drew most of the fire, apparently being wholly unacceptable to certain Member States.[917]

Therefore the Commission changed tactics. In June 1998, it presented two draft joint actions for adoption by the Council. One joint action would deal with a Union-wide 'Temporary Protection Regime', containing a number of minimum rights[918] and a mechanism for the common opening up and phasing out of such a regime.[919] Another joint action would be entirely devoted to burden-sharing, or rather, according to the terminology of the Commission, 'solidarity'.[920] Primarily, Member States would share the burden through a system of financial compensations. Firstly, a fixed emergency aid is proposed, limited to the first three months of a crisis and intended to cover accommodation, means of

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[916] European Parliament, Legislative Resolution embodying Parliament's opinion on the proposal to the Council for a Joint Action based on Article K.3 (2) (b) of the Treaty on European Union concerning temporary protection of displaced persons (COM(97)0093 - C4-0247/97 - 97/0081 (CNS)), A4-0284/97, 23 October 1997. These amendments reinforce the language of the original Proposal, stress the exceptional nature of temporary protection, and underscore the importance of complying with international law and of consulting the UNHCR in the context of temporary protection.

[917] See the Explanatory Memorandum attached to the 1998 Temporary Protection Proposal, note 918 below, paras 1.1.3 and 2.12 and the Explanatory Memorandum attached to the 1998 Solidarity Proposal, note 920 below, para. 1.

[918] European Commission, Amended proposal for a Joint Action concerning temporary protection of displaced persons (presented by the Commission pursuant to Article 189a(2) of the EC Treaty), COM(1998) 372 final/2, OJ (1998) C 268 [hereinafter the 1998 TP Proposal], Arts 6–9. If the goal of harmonization is to be taken seriously, a deviation from these minimum rights in favour of beneficiaries is rather improbable.

[919] Arts 3 and 4 of the 1998 TP Proposal. A provision on burden-sharing was retained in the 1998 TP Proposal in a rephrased form (Art. 5). It prescribed that the future means of implementing solidarity were to be included in the reports on which a decision under Arts 3 and 4 would be based. Further, it stipulated that '[s]uch solidarity shall be implemented in accordance with the provisions of the 1998 Solidarity Proposal'.

[920] European Commission, Proposal for a Joint Action concerning solidarity in admission and residence of beneficiaries of the temporary protection of displaced persons (presented by the Commission pursuant to paragraph 2(b) of Article K3 of the EU Treaty), COM(1998) 372 final/2, OJ C 268, 27 August 1998 [hereinafter the 1998 Solidarity Proposal].

subsistence and emergency medical assistance.[921] Secondly, reception projects could be financed by using an existing item in the EU budget.[922] This longer-term measure would cover accommodation, social assistance and education.

Explicitly termed a *secondary measure*, a Council decision may also define the rules allowing the beneficiaries of temporary protection to be distributed among Member States, before or on arrival in their territory.[923] This form of people sharing shall, however, not prejudice the rules laid down in the Dublin Convention, as long as Member States do not suspend the examination of asylum applications.[924] To wit, in the 1998 Solidarity Proposal, fiscal burden-sharing is endowed with a rather specific framework, while people sharing remains formally on the agenda, but lacks a specified normative framework.

If the Solidarity Proposal had been adopted, its efficiency would have been hampered by important limitations. Clearly, it did not contain a general authorization to share costs. Firstly, sharing was confined to specified items, which only cover a fraction of total reception costs. Secondly, a precondition for sharing measures was that Member States take a unanimous decision under Article 2 of the instrument. One recalcitrant Member State would have been enough to block this limited form of burden-sharing. In fact, the joint action would have represented a framework mechanism, to be activated ad hoc by a consensus decision. As noted earlier, this makes burden-sharing highly contingent upon the political situation.

The subordination of the sharing of people to the sharing of money was reversed in a revised draft presented in November 1998 by the

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[921] Art. 4, 1998 Solidarity Proposal; Financial statement attached to the 1998 Solidarity Proposal.

[922] For 1998, the Proposal assumes a need for ECU 3 750 000 for these measures targeted at reception projects. Financial statement attached to ibid. As the reader will note, this part of the Proposal was consumed by the 1998 Joint Action on Improving Admission, note 940 below.

[923] Art. 4 (1), 1998 Solidarity Proposal.

[924] Art. 4 (2), 1998 Solidarity Proposal. However, it cannot be excluded that single Member States might prefer to process protection seekers in a Dublin procedure (in order to shift responsibility to another Member State) rather than accord temporary protection to them.

Austrian Presidency.[925] This initiative represented a renewed approximation to a strict insurance model with highly predictable outcomes, albeit moulded in a slightly softer form than the German Draft. It is no coincidence that one of the main recipient countries of Bosnian protection seekers signed as its drafter. Article 3 read:

> The decision [on implementing solidarity mechanisms, GN] shall provide for beneficiaries of temporary protection to be distributed between Member States in accordance with an allocation scale established in the decision on the basis of information provided by Member States. This allocation scale should be met as far as possible with the beneficiaries' consent, for example through resettlement projects or through direct admission from the crisis area.

The observer will note that the 1994 German Draft was more radical in that it already featured a distribution key. According to the quoted Article 3 of the Austrian Draft, such a key would be established ad hoc in each single reception case. It goes without saying that outcomes are less predictable under the Austrian Draft.[926] A step forward taken by the latter was to imply that forcible reallocations are, in principle, undesirable.

In Article 4, the Austrian Draft stipulates that the decision on implementing solidarity mechanisms

> shall also provide for financial assistance from the Community budget to cover certain costs generated by the admission of beneficiaries of temporary protection. The assistance shall include in particular contributions towards the cost of housing, welfare and education measures

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[925] Council of the European Union, Note from the Presidency, Draft Joint Action concerning temporary protection of displaced persons, Draft Joint Action concerning solidarity in the admission and residence of beneficiaries of the temporary protection of displaced persons, 9 November 1998, Doc. No. 12617/98 [hereinafter the Austrian Draft].

[926] It must be recalled that a Joint Action of the proposed kind is not legally binding upon Member States. This should be kept in mind when judging its potential of stabilising Member States' expectations to be assisted in situations of crisis. That potential is wholly incumbent on whether or not Member States actually adopt a decision under Art. 2 of the 1998 Proposal or Art. 2 of the Austrian Proposal. Pursuant to Art. 249 TEC, decisions are binding instruments of Community law.

in accordance with the norms laid down in the 1998 TP Proposal as revised by the Council in 1998.

Another decisive difference between the Austrian Draft and the 1998 Solidarity Proposal was the latter's introduction of an obligatory linkage between temporary protection and burden-sharing. While the 1998 Solidarity Proposal *authorised* the Council to take a decision on burden-sharing when temporary protection was to be phased in, the Austrian Draft *required* the Council to decide on how to share the burden.[927] The quorum for such a decision had not been fixed in the said proposal.[928] Actually, what the Austrian Presidency did was to make burden-sharing a precondition to admission.[929] Without solidarity, there shall be no temporary protection regime. It is clear that those hurt most by such a blockage would be those persons in need of protection rather than other Member States.

In spite of its compromise character, the Austrian Draft did not muster the necessary support among Member States. In early 1999, the whole stream of deliberations, negotiations and drafts set off with the Commission proposals had simply got stuck. Therefore, the German Presidency proposed a fresh start. The discussions of various drafts were discontinued and replaced by a principle debate, drawing on elements of consensus from the preceding discussions.[930]

The core elements of the 1999 discussions were

- a linkage between the admission decision and solidarity measures;
- a pledging procedure, by which Member States would indicate their reception capacities in a given crisis situation;
- fiscal burden-sharing as an incentive for reception; and

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[927] Art. 2 of the Austrian Draft: 'When temporary protection regimes are adopted, [...] the Council shall adopt decisions implementing solidarity mechanisms [...]'.

[928] The preference of the Austrian and German Presidencies had been a majority vote, lowering the threshold for a decision on burden-sharing. Obviously, other Member States bearing a lower protection burden will opt for a requirement of unanimity.

[929] The German Presidency taking over after the Austrian Presidency continued to uphold this linkage. See e.g. Note by the Presidency, Temporary Protection of displaced persons and solidarity in the admission and residence of such persons in the EU, 29 January 1999, Doc. No. 5645/99, para. 1.1.3.

[930] Table Document presented by the German Presidency at the JHA Council Meeting of 11./12. February. On file with the author.

- the harmonization of residence rights and conditions of beneficiaries.[931]

In brief, burden-sharing would take place as follows. The Council would confirm the existence of a crisis and the need for joint action. Next, the Commission would draw up a report on the number of persons already protected in Member States and the number of persons still in the crisis area. Then, the Council would 'ascertain how many refugees [sic!] Member States were prepared to admit'.[932] It would decide to admit them only if enough places were made available by Member States to meet the known needs. 'Any possibility of taking the admission decision without coming close to covering the known admission needs would have to be ruled out, in order in particular to ensure that the number of places made available by the Member States was not restricted to the number of persons already residing in their territory.'[933]

After a Council decision, the persons already protected in a given Member State would be counted against the number of reception places that State had pledged. Spare places could be occupied by beneficiaries selected in admission procedures in the region of origin. Moreover, admission could also take place at the external borders of Member States. Where the Member State in question still had spare places, persons would be admitted to its territory under a temporary protection arrangement. If it had no more spare places, 'the person seeking admission would be asked' to proceed to a Member State willing to grant them admission.[934] Finally, financial support would depend on the number of persons admitted by a Member State. The level of social assistance guaranteed by a given State to its own nationals was proposed as a criterion for the calculation of such support. However, the Note does not take a stand on whether the support percentage is to be fixed abstractly in the basic legal instrument, or contextually in the admission decision by the Council. To avoid secondary movements between Member States, the residence rights

[931] Council of the European Union, Note by the Presidency to the Asylum Working Party, Practical application of the principle of solidarity in burden-sharing with regard to the admission and residence of displaced persons, 31 March 1999, Doc. No. 7157/99.

[932] Ibid., II (A) 3.

[933] Ibid.

[934] Ibid. II (B) 1.c.

and conditions granted to beneficiaries must be harmonized throughout the Union.

Quite obviously, the linkage of admission and burden-sharing is highly problematic. To make sense, it would require an almost perfect system of migration control. After all, the underlying idea is that Member States are free to choose whether to admit potential beneficiaries or not. This implies that the common external borders will simply be closed if Member States cannot agree on a sharing scheme in a specific crisis situation.

This begs various questions. On the practical level, it is all too clear that borders cannot be sealed hermetically. Whatever Member States do to deflect flows, there will be ways and means to circumvent such measures. In the absence of a burden-sharing decision by the Council, the distribution of protection seekers would continue to be determined by geographical proximity and the availability of efficient smuggling routes.

On the legal level, the idea of voluntary admission is simply irreconcilable with the prohibition of refoulement. The Note by the German Presidency veils this ugly truth in a pretty formulation, when it ponders what to do when the reception system becomes numerically overstretched. 'If no Member State was willing to admit them [the persons seeking admission, GN], the Member State at whose external border the displaced persons were waiting would check whether it could admit them on the basis of national measures.'[935] To wit, the Member State hosting the external border in question has no choice. It suffices that the persons 'waiting at the border' invoke the prohibition of refoulement, and the Member State in question has to admit them for the duration of determination procedures.[936]

There is a moral-political dimension to the arrangement as well. Consider the following situation. The Council acknowledges the existence of a crisis, and the Commission has assessed the number of persons in need of protection. Now, the Member States cannot agree on a sharing scheme. In such a situation, it is politically troublesome to argue that the potential beneficiaries already counted by the Commission should not be admitted after all. If Member States go ahead and enforce non-admission, this is a slap in the face of a humanitarian interest formerly recognized by

[935] Ibid.

[936] This flows from the fact that Art. 33 GC is applicable already at the border. See chapter 10.2.2.1 for a comprehensive argumentation. Compare also Art. 3 DC.

the Commission and the Council. If they do not, the linkage between admission and burden-sharing is dissolved. The Council might avoid this embarrassing dilemma by never acknowledging the existence of a crisis, which is the precondition for the whole exercise outlined in the Note.

In its proposal, Germany had given up for lost the prospect of a predetermined insurance mechanism involving the sharing of people, which had been at the base of the 1994 German Draft. It is to be doubted whether it had won any gains in return, apart from keeping the issue of burden-sharing on the table. Presently, deliberations continue, and the fate of temporary protection and burden-sharing on the EU level remains undecided.

8.3.5 The Experimental Instruments of 1997 to 1999

Parallel to the deliberations on a comprehensive solution described in the preceding section, the Council, the Commission and the Member States gathered experience with small-scale burden-sharing by means of various pilot programmes on the reception and voluntary repatriation of specific categories of protection seekers. Typically, these programmes were endorsed for the duration of one year and operated with relatively moderate budgetary means.[937] Their importance lies not so much in the practical impact achieved with these limited resources, but rather with the testing of a new method of burden-sharing. In brief, the redistribution of means was channelled through the Community budget and subjected to a quite complex decision-making procedure, which makes the re-distributionary effects rather difficult to predict and reconstruct. The project management was vertical and centralized, and the European Commission played the role of the administrator.

The first couplet of instruments was launched in 1997, comprising the

- Joint Action of 22 July 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the

[937] 23.75 million Euro in 1997, 26.75 million Euro in 1998 and some 35 million Euro in 1999. See Financial statement attached to EFR Proposal, para. 7.1.

financing of specific projects in favour of asylum-seekers and refugees[938], and the

- Joint Action of 22 July 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the financing of specific projects in favour of displaced persons who have found temporary protection in the Member States and asylum-seekers.[939]

In March 1998, the Council prolonged the experiment by adopting a corresponding couplet of Joint Actions. They were the

- Joint Action of 27 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the financing of specific projects in favour of asylum-seekers and refugees[940], and the
- Joint Action of 27 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the financing of specific projects in favour of displaced persons who have found temporary protection in the Member States and asylum-seekers.[941]

The first instrument in each year's couplet was explicitly designated as implementing the 1995 Resolution[942] and dealt with projects intended to improve admission facilities for asylum-seekers and refugees in the Member States. The second instrument in each couplet was seized with supporting projects intended to facilitate the voluntary repatriation of displaced persons as well as asylum-seekers. As spelt out in the preamble of the 1988 Joint Action on Improving Admission, 'taking action in favour of asylum-seekers and refugees in the Member States is likely to improve facilities for the admission of such persons and to encourage the sharing of responsibility between the Member States'. The nature of

[938] OJ (1997) L 205, pp. 5–6. The aggregate cost under this joint action was not to exceed ECU 3.75 million in 1997.

[939] OJ (1997) L 205, pp. 3–4. The aggregate cost under this joint action was not to exceed ECU 10 million in 1997.

[940] OJ (1998) L 138, pp. 8–9 [henceforth 1998 Joint Action on Improving Admission].

[941] OJ (1998) L 138, pp. 6–7 [henceforth 1998 Joint Action on Facilitating Repatriation].

[942] See Art. 1 (2) of the 1998 Joint Action on Improving Admission.

projects was not further specified. Under the 1998 Joint Action on Facilitating Return, where a corresponding objective of burden-sharing and facilitation is expressed in the preamble, the scope was set to cover education for minors, vocational training, information on the country of origin, twinning of local administrative areas and transport costs.[943]

In 1999, and partly in reaction to the ongoing Kosovo crisis, the Council adopted the

- Joint Action of 26 April 1999 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo.[944]

Compared to earlier instruments, the 1999 Joint Action is much more detailed and features some new approaches. In it, reception and voluntary repatriation are dealt with under one and the same instrument, and emergency assistance is added to its material scope. The 1999 Joint Action offers financial contributions from the Community budget to long-term structural improvements of Member States' protection systems as well as emergency measures in the context of the Kosovo crisis. The beneficiaries of programmes and actions financed under the 1999 Joint Action are defined[945], and the three areas of assistance (improvement of reception conditions and the asylum procedure, voluntary repatriation, emergency assistance) are carefully circumscribed.[946] Projects to be financed under the 1999 Joint Action are to be selected along a number of rather flexibly worded criteria[947], while the eligibility decision is conferred upon a Committee composed of one representative of each Member State and chaired by the European Commission.[948]

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[943] Art. 1 (2) of the 1998 Joint Action on Facilitating Repatriation.

[944] OJ (1999) L 114, pp. 2–5 [henceforth 1999 Joint Action].

[945] See Art. 3 Kosovo Joint Action, offering definitions of the terms 'refugees', 'displaced persons' (interestingly, persons offered subsidiary protection are included under this category) and 'asylum seekers'.

[946] Arts 4–6 of the 1999 Joint Action.

[947] Art. 7 of the 1999 Joint Action.

[948] Art. 13 of the 1999 Joint Action.

As all five Joint Actions enumerated above are directed at the Communities rather than the Member States, they are binding. Irrespective of their very limited ambitions, at the time of writing the experimental instruments represent the only tangible expression of a concrete will to share burdens.

8.3.6 The Proposal on a European Refugee Fund

While the Council still quibbled about grand schemes, the European Commission prepared a new document, drawing on the experiences gathered with the experimental instruments in the period 1997–9. In December 1999, the Commission launched a

- Proposal for a Council Decision creating a European Refugee Fund[949],

making use of its competencies under Article 63 (2) (b) TEC. At the time of writing, the Proposal was still being negotiated in the Council. However, given that it continues the innovative line of thought introduced by the aforementioned experimental instruments, there are good reasons to take a closer look at some of its features.

To start with, the Proposal replicates the comprehensive approach of the 1999 Joint Action by merging the separate items of earlier experimental instruments into one single framework. Thus, the ERF Proposal spans from the reception of asylum seekers, to the integration of refugees, to measures promoting voluntary return. Second, it introduces pluriennial planning by shifting from the one-year time frame of the experimental instruments to a five-year period.[950] Third, the Proposal seeks to inhibit that emergencies cannibalize on long-term development by separating structural measures intended for long-term improvements

[949] COM (1999) 686, 14 December 1999.

[950] This move was primarily motivated by the difficulties to run and evaluate integration projects within twelve months only. ERF Proposal, Explanatory Memorandum.

and capacity-building from emergency funds.[951] Moreover, as a novelty, a maximum of ten percent of the funds earmarked for structural measures may be used for evaluative studies on best practices.[952] The largest part of the total budget is dedicated to stuctural measures (26 million Euro in 2000), while a substantial sum is reserved for emergency measures (10 million Euro in 2000).

Compared to the experimental instruments, the ERF Proposal distinguishes itself by introducing a decentralized management structure[953], drawing on the model of EC Structural Funds.[954] While the European Commission maintains a supervisory role, it is up to the Member States to draft, select and administer the funded programmes. These programmes are co-financed by the ERF and the Member State. Programme objectives are agreed upon by the Commission and the relevant Member State, while the latter is solely responsible for implementation.

How, then, are the funds to be distributed among Member States? In contrast to the rather lofty criteria given in the 1999 Joint Action, the ERF Proposal seeks to operate with a predominantly mathematical approach. Resources for structural measures will be distributed in proportion to the number of applications for some form of international protection registered by each Member State and the number of people granted refugee status or temporary protection in the last three years. The number of applications for protection will be given a 65 percent weighting, against 35 percent for the number of refugees accepted and displaced persons receiving temporary protection.[955] 'This is', says the Commission in its Explanatory Memorandum,

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[951] Art. 5 ERF Proposal. The European Commission motivates this innovation as follows: 'Experience in 1999 has also shown that the aim of financing "structural" measures in the area covered by Article 63 of the EC Treaty can be completely undermined by the sort of mass influx of refugees that occurs in the event of a crisis. In the absence of a specific budget heading to cater for emergencies, the entire financial allocation originally earmarked for heading B5-803 was spent on emergency measures for people who had fled from Kosovo.' ERF proposal, Financial statement, para. 7.1.

[952] Art. 4 ERF Proposal.

[953] Art. 6 ERF Proposal.

[954] Council Regulation (EC) No. 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, OJ (1999) L 161/1.

[955] Art. 9 ERF Proposal.

> because refugees start out by seeking protection before they are granted refugee status. Furthermore, most [of] them are entitled to support for the duration of the procedure, which, given the scope for appeal, can be very long. Lastly, integration measures concern only recognised refugees and displaced persons. These groups account for only a relatively small proportion of applicants and, as the integration measures take effect, they are expected to become gradually less dependent on benefits.[956]

Different is the solution chosen for emergency measures, for which 80 percent of the available resources shall be distributed on the basis of the number of persons having entered each Member State, and 20 percent on the basis of the quality of proposed projects.[957]

Interestingly, UNHCR[958] and ECRE[959] greeted these allocation criteria with scepticism. Both actors proposed that even Member States whose asylum systems need upgrading should benefit from reallocation under the ERF. It is noteworthy that this proposal reverses the order of gratification. From a protection perspective, burden-sharing should motivate the large receivers of protection seekers to keep their doors open and to refrain from introducing restrictive measures, since the latter would cause ripple effects all over Europe, enticing even minor receivers to close their doors. In such a context, it is questionable whether a redistribution of resources to minor receivers of protection seekers makes

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[956] ERF Proposal, Explanatory Memorandum. Commentary on single articles, Article 9.

[957] Art. 20 (5) ERF Proposal.

[958] UNHCR, UNHCR Observations on the Commission Proposal for a Council Decision creating a European Refugee Fund (COM (1999) 686 final), 29 February 2000. In its observations, UNHCR proposes additional support for Member States with less developed asylum systems, suggests a clear inclusion of persons enjoying complimentary forms of protection among the group of beneficiaries and shows concern that funded tasks and activities are overtly focused on the avoidance of secondary movements rather than based on the need for measures to improve the fairness and efficiency of the asylum process.

[959] ECRE, Comments by the European Council on Refugees and Exiles on the Commission Proposal for a Council Decision creating a European Refugee Fund, February 2000. ECRE is largely supportive of the ERF Proposal, but points out that a) persons granted complementary forms of protection seem to be excluded from the scope of the proposal, b) individual legal counselling is not clearly covered, c) partnership arrangements with NGO's are neglected, and d) the proposal favours countries which already have received large numbers of refugees in the past, whereas stronger investments in such countries as Greece, Italy, Portugal and Spain would be needed.

sense; it would not in any case keep the minor receivers from participating in the spiral of restriction, while carrying the additional risk of alienating larger receivers. From a political perspective, though, a redistribution to minor receivers might facilitate consensus on future, more comprehensive schemes, sweetening the pill of growing protection obligations.

Thus, the ERF Proposal is all about fiscal burden-sharing, and its redistributionary effects are confined to a budget roughly equivalent to those of the experimental pilot programmes in the phase 1997–9. As an example, its total budget amounted to 26 million Euro for the year 2000. A look at the Financial Statement of the ERF Proposal confirms that this is but a drop in the ocean. The average annual amount disposed under the experimental instrument in 1997–9

> fell far short of what was needed on the ground. As regards aid measures for reception and voluntary repatriation in particular, the financial assistance requested in 1997 exceeded the allocation available by 30%. This rose to 45% in 1998 and 850% in 1999 (as a result of the Kosovo crisis). The Commission estimates that more than half of the requests which could not be satisfied qualified for Community joint financing.[960]

This alone makes clear that the ambitions of the ERF Proposal are limited, and that its impact on the problem of inequitable burdens is marginal.[961] After all, a 1995 ICMPD study has indicated that care and maintenance costs in the Swedish protection system alone amounted to 1 144 million US$ in 1994.[962]

Why this modesty? From earlier discussions in the Council, the Commission had learnt the lesson that people sharing is difficult to achieve, and that Member States are not easily lured into comprehensive

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[960] ERF Proposal, Financial statement, para. 7.1.

[961] ECRE qualifies this budget as 'inadequate to the daunting task of ensuring that all Member States achieve success in integration and a high standard of fairness and efficiency in reception of refugees'. ECRE, Comments by the European Council on Refugees and Exiles on the Commission Proposal for a Council Decision creating a European Refugee Fund, February 2000, p. 1.

[962] M. Jandl, *Structure and Costs of the Refugee and Asylum Systems in Seven European Countries* (1995, ICMPD, Vienna), p. 138. In 1996, 64 300 persons were benefiting from the Swedish system. Ibid. p. 137.

schemes. Nonetheless, the ERF Proposal further develops the rather innovative approach of institutional burden-sharing adopted with the experimental instruments. Compared to an unregulated state of affairs or a mere pleading procedure, it offers the advantage of greater predictability. On the other hand, it is far from being as rigid as the mathematical approach of the 1994 German Draft.

Exactly how it will strike fiscally is difficult to predict, because the redistributionary mechanism built into it is quite complex. To track whom is footing the bill in a particular refugee crisis many factors must be brought together. First, the various contributions of Member States to the community budget have to be taken into account. Second, recourse must be made to the rules of proportional redistribution in the ERF Proposal as well as to the actual numbers of protection seekers and refugees in a given year and the quality of the projects proposed. The aggregate redistribution is, accordingly, a function of the payments by a Member State into the community budget and the funding it receives from structural as well as emergency funds.

This much is clear—the institutional detour taken by the ERF Proposal makes it more arduous to predict gains and losses for single Member States. The question is whether this insecurity actually furthers or hinders willingness to consent to the scheme. The rationale of the ERF Proposal is to test whether the model of the experimental instruments can be expanded to a larger time-frame without endangering the consensus among Member States. Against this background, it makes sense that its budget is still rather limited, inciting reluctant Member States to take on the gamble.

8.4 Concentrating the Burden

Elsewhere, we have outlined that burden-sharing and admission norms are interdependent.[963] We have also depicted the rather elaborate mechanism for deflecting movements to the Union's territories created by EU institutions and the Member States. Such mechanisms comprise pre-entry measures—carrier sanctions, pre-exit immigration controls, technical assistance to third countries' exit control, interdiction and containment of

[963] See chapter 3.1 above.

asylum seekers in third countries—as well as post-entry measures, such as norms of reallocation to safe third countries.[964]

Here, we have a concrete example of interdependence: As we shall see in the following, reallocation along the concept of safe third countries aggravates the unequal distribution of protection seekers in Europe. Thus the mechanism of deflection impacts not only on single asylum-seekers, but also on the protection responsibilities in single Member States. The flagship of the acquis, namely the Dublin Convention, will be the first test case to prove our point, while the reallocation from Member States to safe third countries in Central Europe shall serve as the second.

8.4.1 Concentration Effects of the Dublin Convention

The rules laid down in the Dublin Convention serve inter alia to eliminate the processing of multiple applications filed in different Member States. A Member State responsible for a certain application will take over the task of processing the application together with the obligation to take charge of the applicant.[965] With regard to allocation, two stages must be distinguished. After the responsibility of a given state has been established, an applicant is temporarily allocated to that state. After a positive status decision by that state, the latter will normally allow an applicant to remain on its territory subject to its national legislation. A positive status decision will turn the temporary allocation into a more permanent one. In a formal sense, the Dublin Convention only has a bearing on temporary allocation. But in cases falling under some of the protection categories of the responsible state, more permanent allocation measures may be indirectly triggered.

At this stage, it could be objected that burden-sharing, as understood by the Member States of the European Union, mainly focuses on other categories of protection seekers than refugees, while the application of the Dublin Convention explicitly has been limited to applicants for asylum under the 1951 Refugee Convention.[966] In other words, it would be unnecessary to deal with the Dublin Convention within the framework of this chapter. Such an objection would, however, disregard the fact that

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[964] See chapter 5 above.

[965] Arts 10 and 11 DC.

[966] Art. 1 DC. On the Resolution on Burden-Sharing, see chapter 8.3.2 above.

even protection seekers not falling under the 1951 Refugee Convention to a very large extent apply for asylum. Moreover, as shown above, the mandate of Article 63 (2) (b) TEC covers both refugees and other categories of protection seekers. In this respect, the Dublin Convention must be scrutinized even with a view to its effect on cases in need of protection, which do not necessarily fulfil the criteria of the 1951 Refugee Convention definition.

Furthermore, it is difficult to see how the categories of Convention refugees on one hand and other protection seekers on the other can be kept apart before an individual assessment is carried out. The development of temporary protection practices and the postponement of individual status assessment vis-à-vis protection seekers from former Yugoslavia illustrates the problem of mixed categories in a very graphic fashion. Affected states claimed that the process of breaking up that group along different categorizations in an individual procedure would have consumed too much time and too many resources. Suffice it to note that neither the 1995 Resolution nor the various Solidarity Proposals provide a solution to this problem.

We cannot but conclude that an analysis of protection schemes for other categories than Convention refugees must include the factual allocation effected by the Dublin Convention, which is, in that respect, of importance for any burden-sharing mechanism to be developed.

This is so because the allocation criteria contained in the Dublin Convention risk stabilizing an inequitable distribution of processing and reception burdens. An assessment of this risk motivates a closer look at the distributive key immanent in both instruments, namely the criteria along which the responsibility for examination is allocated.

We recall that, in order of priority, the following criteria will steer the allocation of responsibility:

1. family,
2. residence and entry permits,
3. entry, and
4. state in which the application was first lodged.[967]

[967] See chapter 5.2.1.1 above.

It has been stated earlier that geographical proximity to crisis regions and family ties were among the factors leading to the inequitable distribution of protection seekers fleeing the Balkan crisis.[968] In this respect, it must be asked how the responsibility criteria relate to these factors. Do they counteract concentration tendencies, or do they reinforce them?

The top priority of family ties is indispensable from a human rights perspective. From a distributive point of view, however, it must be acknowledged that it may lead to a further accumulation of refugees in major recipient countries. Inequitable sharing of protection seekers is aggravated by family reunion. Nevertheless, it must be noted that the group of persons falling under that norm is narrowly defined in two ways. Firstly, the concept of family is reduced to a core of spouse and children under 18; secondly, the family reunion criterion is only triggered by the presence of a family member who is recognized as a Convention refugee. Other protection categories fall outside the scope of this norm and, accordingly, under the discretion of the states involved.[969]

The second criterion, concerning residence and entry permits, may not be as crucial for a fair distribution of protection seekers, as states can reduce the risk of attracting the responsibility for applications by simply being very restrictive in the issuing of such permits.

The criterion on entry, however, is of utmost importance as it is intimately related to geographic proximity. To some extent, states can resort to more effective entry control through visa requirements linked to carrier sanctions and reinforced border surveillance. However, it is an empirically established fact[970] that borders cannot be sealed hermetically. Accordingly, states whose borders are more exposed to illegal entry

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[968] See text accompanying note 854 above.

[969] Art. 9 DC reads as follows: 'Any Member State, even when it is not responsible under the criteria laid out in this Convention, may for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires.' It must be observed, however, that the protection of family life under Art. 8 ECHR may force states to allow family reunion even for certain categories of protection seekers not falling under the 1951 Refugee Convention.

[970] Official German statistics indicate that the majority of asylum seekers manage to circumvent border controls and to apply for asylum in-country. This sheds some light on the efficacy of one of the most developed border surveillance systems in Europe. For more on this topic, see Noll, 1997a, p. 415.

attempts will automatically be subject to larger numbers of asylum applications.

All in all, the third and fourth criteria are prone to further reinforce concentration in States that already carry a considerable processing and reception burden. To a limited extent, the same goes for the criterion on family reunion. The present author published these findings in 1997; they were exclusively based on a legal analysis of the Dublin Convention.[971] As will be shown in the following, the statistics that are currently available have confirmed the correctness of that analysis to its full extent.[972]

Let us take Germany as an illustration of the accumulated effects of the Dublin criteria.[973] Initially, the German government had set high hopes for the Dublin Convention, only to later discover that its application

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[971] G. Noll, 'Prisoners' Dilemma in Fortress Europe. On the Prospects of Burden Sharing in the European Union', 40 *GYIL* 405 (1997), pp. 431–6.

[972] In its Dublin Working Paper, the European Commission has attempted to summarise the statistics as follows: ' Unfortunately, the statistics [...] are incomplete, and this makes it very difficult to draw up an overall analysis. [...] In 1998, the incomplete figures record approximately 3 000 transfers out of Member States and around 4 500 transfers into Member States under the Dublin Convention (if the figures were complete, these figures should of course correspond). On this basis, it would appear that less than two percent of asylum applicants are transferred between the Member States under the Convention. On the basis of the figures available for 1998 and 1999, Germany and Austria are the main net recipients of asylum applicants under the Convention. For both of these Member States, applicants transferred in under the Convention account for about 4% of all asylum applicants. The main net "exporter" of asylum applicants under the Convention is Denmark, which succeeds in transferring about 18% of all asylum applicants. The next best performer in numerical terms, the United Kingdom, transfers only about 1% of asylum applicants. The performance of Denmark apparently reflects the successful operation of a bilateral agreement with Germany, and it will be instructive to examine and build upon the experience of bilateral agreements between the Member States to improve the application of the Dublin Convention.' Dublin Working Paper, para. 38.

[973] The following presentation with regard to Germany and the other Member States is based on official statistics as reproduced in: Committee set up by Article 18 of the Dublin Convention, Dublin Convention—Statistical data on the application of the Convention from 1 July to 30 September 1998, 6 January 1999, Doc. No. DUBLIN CONV 2415/1/98. As noted below, two Member States did not make data available for that period. This is a common problem. However, comparisons with earlier statistics reveal that the basic pattern of distribution is not substantially different, and that Germany is one of the most heavily burdened Member States under the operation of the Dublin Convention. See also Letter of 18 August 1998 by the Federal Office for the Recognition of Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge) on the implementation of the Schengen and Dublin Conventions (on file with the author).

leaves Germany with a net increase of cases. This increase affects not only applications, but also decisions on accepted requests and actual transfers.

	Number of transfer requests	Rejected requests	Accepted requests	Transfer of persons
From other Member States to Germany	5 390	771 (14%)	3 818 (71%)	1 199
From Germany to other Member States	1 517	529 (35%)	661 (43%)	363

Table 3: Distribution of cases under the Dublin Convention between Germany and other Member States, 1 July–30 September 1998[974]

The statistics for the period reproduced in Table 3 show that the number of applications received by Germany was more than three times the number of applications it submitted to other Member States. When looking at the outcome of applications, that is, actual transfers, the same proportions prevail. Germany received three times the number of cases it sent out to other Member States. Of the total 26 399 asylum applications during the period scrutinized, the number of transfer requests received by Germany represented 20.41 percent. Thus, in the same period, the Dublin Convention supplied one fifth of total asylum applications in the German protection bureaucracy.

In total numbers, Germany topped the statistics with regard to both applications and actual transfers.[975] The analysis can be carried further by

[974] The percentages in the second and third column do not add up to 100, as not all transfer requests were decided during the period in question.

[975] In second rank with regard to applications, we find Italy with 1 713 received applications, on the basis of which a mere 76 persons were transferred. In second rank with regard to transfer of persons, we find Austria with 127 transfers.

looking at each Member State separately. It is sufficient to establish which states are net senders and which net receivers under the Dublin Convention. The following overview is based on the first and third quarters of 1998, as compiled in Table 4.[976] The second and third columns ('Requests') establish the ratio of received to submitted transfer requests. This serves to deduce whether the country in question is a net receiver ('R'), a net sender ('S') or neither ('P'). The first number relates to requests submitted to other Member States, while the second number relates to requests received from other Member States. The fourth and fifth columns ('Transfers') establish the ratio of persons received from and persons sent to other Member States. The first number represents persons sent to other Member States, while the second number represents persons transferred from other Member States. The signals 'R', 'S' and 'P' are used correspondingly. For further clarification, Member States that are overall net receivers are highlighted with bold letters.[977]

[976] The available following official statistics have been used in the present analysis: Committee set up by Article 18 of the Dublin Convention, Dublin Convention—Statistical data on the application of the Convention from 1 July to 30 September 1998, 6 January 1999, Doc. No. DUBLIN CONV 2415/1/98. Committee set up by Article 18 of the Dublin Convention, Dublin Convention—Statistical data on the application of the Convention from 1 January to 31 March 1998, 25 September 1998, Doc. No. DUBLIN CONV 2407/1/98.

[977] For the purposes of the present analysis, an overall net receiver is a Member State rated with 'R' in at least one column and not rated with 'S' in any column.

Member State	Requests 1/1-31/3 1998		Requests 1/7-30/9 1998		Transfers 1/1-31/3 1998		Transfers 1/7-30/9 1998	
Austria	62/77	(R)	66/436	(R)	2/5	(R)	8/127	(R)
Belgium	422/180	(S)	339/272	(S)	-/72	(?)	-	(?)
Denmark	531/24	(S)	381/101	(S)	137/19	(S)	259/14	(S)
Finland	3/16	(R)	33/11	(S)	-/7	(?)	0/0	(P)
France	257/471	(R)	-	(?)	86/91	(R)	-	(?)
Germany	865/2280	(R)	1517/5390	(R)	90/420	(R)	363/1199	(R)
Greece	-/162	(?)	2/168	(R)	-/1	(?)	1/13	(R)
Ireland	43/10	(S)	46/20	(S)	0/8	(R)	20/20	(P)
Italy	145/189	(R)	63/1713	(R)	1/5	(R)	2/76	(R)
Luxembourg	15/5	(S)	21/1	(S)	-	(?)	0/0	(P)
Netherlands	1163/155	(S)	-	(?)	71/57	(S)	-	(?)
Portugal	5/40	(R)	7/32	(R)	-/11	(?)	0/0	(P)
Spain	58/192	(R)	36/139	(R)	2/22	(R)	1/13	(R)
Sweden	95/27	(S)	912/38	(S)	17/-	(?)	0/0	(P)
United Kingdom	535/35	(S)	604/30	(S)	120/24	(S)	181/15	(S)

'R' implies net receiver
'P' implies parity
'S' implies net sender
'-' implies that no statistics were available for the period
'?' implies that no deduction on status can be drawn from the statistics

Table 4: Net Senders and Net Receivers under the Dublin Convention in the First and Third Quarter of 1998.

Apart from Germany, the net receivers of applications and transfers are Austria, France, Greece, Italy, Portugal and Spain. With the exception of France, these countries have in common that they host an external border at the Eastern or Southern flank of the Union.

Thus, the statistics collated by the Member States prove that the Dublin criteria provide for burden concentration instead of burden-

sharing.[978] What does this mean for future developments in the field of protection?

On a national level, more affected states will be inclined to cut back protection and benefits for those groups not covered by international law. The rationale for doing so is, firstly, to create a disincentive for potential asylum seekers and, secondly, to stretch resources. In this context, it should be remembered that Germany received the vast majority of Bosnian protection seekers. However, most of these protection seekers were merely tolerated. This must be compared with other more affected countries like Sweden that accorded a comparably favourable humanitarian status to the majority of Bosnian protection seekers.[979]

Translated into real terms, this means that a viable burden-sharing strategy first and foremost would need to break free from the conservation of inequality by the Dublin Convention. Considering the geographical and demographic differences among European States, the effect of this instrument and the quest for equitable burden-sharing are simply not compatible. It is somewhat ironic that the strategy of mitigating protection responsibilities by means of migration control not only strikes back at those in need of protection, but also at one of the major proponents of this strategy—Germany. But there are good reasons to suspect that other safe third country-mechanisms have the same detrimental effect. Inspired by the Western European pioneers, governments in Central and Eastern Europe, in Africa and in North America have started to copy the concept. The number of agreements on the readmission of third-country nationals is multiplying at an amazing pace.[980] These developments ignore the forceful warning signal emanating from the experiences with the Dublin system.

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[978] This is confirmed by the European Commission in its Dublin Working Paper, para. 35. However, the Commission simultaneously asserts that the Dublin 'system can not be said to be putting an excessive burden on any Member State'. Ibid. – It is ironic that the misgivings on burden-concentration raised during the deliberations of the 1989 Draft agreement on the responsibility for examining asylum requests were fully confirmed by the practice under the Dublin Convention. See note 331 above.

[979] Sweden linked the granting of humanitarian status largely to permanent residence permits. Beneficiaries were granted access to the labour market. By contrast, toleration implies that the person in question is still under an obligation to leave. However, this obligation is non-executable. A toleration permit is valid for a maximum of one year.

[980] See chapter 5.2.2.2 above.

Based on the logic of these developments, a burden-sharing mechanism stretching over both Convention refugees and other categories is indeed the key for safeguarding refugee protection on the territory of the Member States. Such a broad mechanism is mandated by Article 63 (2) (b) TEC. If combined with a material harmonization of protection categories and reception standards, it would mitigate competition for deflection as well as for the downgrading of territorial protection. Ideally, such a mechanism should have been launched concurrently with the mechanisms of migration control, so as to inhibit the latter setting the preconditions for the operation of the former.[981]

8.4.2 Concentration Effects of Safe Third Country-Arrangements

At present, it is extremely difficult to analyze the redistributionary effects of safe third country mechanisms between the EU Member States and the applicant countries. In contrast to the information available on the operation of the Dublin Convention, comprehensive statistics reflecting country-to-country readmission of persons falling under safe-third-country mechanisms simply do not exist.[982] However, from the limited statistical material available[983], a few trends worthy of reflection emerge.

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[981] In this respect, it is of interest to compare development in the European Union with bilateral developments between Germany and Poland. The European Union's Member States put a readmission mechanism in place without any linkage to the question of burden-sharing. In contradistinction to this, the named bilateral arrangement seized the opportunity by linking readmission with rudimentary forms of burden-sharing. In both cases, the readmission agreements covering return of third country nationals a) contained a burden-sharing clause for cases of massive inflows and b) were coupled to an agreement on financial assistance. Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen, 7 May 1993, BGBl. 1997 II, pp. 1734–6, Arts 6 and 2.

[982] The statistics available often refer to return measures at large, without breaking down numbers into cases with and without asylum dimensions. Regarding asylum returns, a distinction between pre- and post-procedure returns is frequently lacking. It is true that single countries produce such statistics, but these are collected according to quite different methodologies and, alas, often classified.

[983] UNHCR collects data on the processing of asylum applications worldwide, while ICMPD collects data on migration movements in the countries participating in the Central European Initiative. This author is indebted to both organisations for providing relevant data.

In the associated countries at large, the number of filed protection seekers has been on the rise throughout the last years, albeit from a very low base.[984] From 1996 to 1997, the aggregate number of applications in the associated countries rose by 35 percent to some 10 000 cases, the number Germany could receive in a month.[985] During more recent years, candidate countries have topped the application statistics. In 1998, Hungary came first with 7 100 applicants, the Czech Republic second with 4 080 applicants and Poland third with 3 370 applicants. At present, these three countries are rightly attracting a great deal of attention in the migrational context, due to their shared land borders with current EU Member States. For Slovenia and Estonia, the numbers are relatively low, and the statistical break-up incomplete. Therefore, the following analysis will focus solely on the Czech Republic, Hungary and Poland (see Table 5).

In 1998 the recognition rates in all three countries were markedly lower than the average of all European States. Poland recognized a mere 1.9 percent of all applicants as 1951 Convention refugees, which must be compared to the European average of 9.7 percent. The corresponding numbers were 2.8 percent for the Czech Republic and 7.8 percent for Hungary. The differential is even higher when comparing the total number of recognitions, accumulating 1951 Convention status and other protection-related statuses. Only Hungary offers an alternative status beyond the 1951 Convention, which boosts its total recognition rate to 13.0 percent. The European average is still significantly higher at 23.7 percent. Poland and the Czech Republic have no alternative status on offer, which explains their total recognition rates of an alarming 1.9 percent and 2.8 percent respectively. From this perspective, both countries are among the most restrictive in Europe. This confirms the logic of evasion inherent in burden-shifting. When faced with large burdens—be they real or merely anticipated—states react by retaliating against protection seekers.

Second, a marked feature of the three candidate countries is the high number of cases closed on either formal grounds or due to the disappearance of the claimant. While the European average is a rate of

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[984] IOM/ICMPD, 1999, p. 28

[985] By way of example, 10 877 persons applied for asylum in Germany during January 1997. For the rest of the year, the monthly number varied between 7 750 and 9 760 applying persons. Source: German Federal Ministry of the Interior.

18.4 percent, Hungary closed 25.8 percent of all cases on which a decision was taken. The corresponding numbers for Poland (54.8 percent) and the Czech Republic (76.5 percent) are even more striking. Generally, there is no breakdown available as to how many cases are closed due to disappearance of the claimant, and how many are closed on other formal grounds. However, various indicators suggest that disappearance is the dominating reason.[986] By way of comparison, the rate for cases otherwise closed was 9.9 percent for Germany in 1998. Of the 5 760 pertinent cases, roughly 2 500 cases were closed due to withdrawal of the application, which can be formally presumed by the authorities when the applicant fails to maintain contact with them. This makes up approximately two percent of the total number of applications.[987]

Disappearances under procedure are often interpreted as confirmation that the applicant is 'abusing' asylum procedures in the candidate country, considered a mere base camp while attempting onward migration to Western Europe. This interpretation reinforces the image of bogus refugees, whose motivations are in reality economic. Yet against the background of low recognition numbers and the limited availability of alternative statuses, a person with a genuine protection need may act wisely when attempting to migrate onwards. The conclusion that each disappearance represents an economic migrant is, therefore, simply unwarranted.

It is quite another matter if persons attempt to migrate westwards after they have been recognized as refugees. Anecdotal evidence suggests that this happens, but it is naturally hard to substantiate this claim with any official statistics. If refugees indeed embark on such onward migration, they are surely not always taking a wise decision. Due to safe third country-mechanisms, protection may not be readily available for such persons. Moreover, practices can be harsher even for those protected. Germany started out with return of Bosnians comparatively early, while Hungary provided protection to the same group for a longer period.

All aspects considered, the high number of disappearances in the three above-mentioned candidate countries does not alter the conclusion on

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[986] For 1997, the Polish administration stated that 89 % of all applicants disappeared during procedures. Source ICMPD questionnaire (on file with the author).

[987] In another 1 440 cases of the pertinent 5 760 cases, the applicant was found to be from a safe third country, which inhibited her from invoking the asylum provision of the German basic law.

their restrictive practices. Obviously, the differentials for recognition rates between the three countries and the European average are much higher than those for rejection rates.

In conclusion, safe third country mechanisms may produce effects similar to those under the Dublin Convention. For the Czech Republic, Hungary and Poland, the rising number of asylum applications was hardly unanticipated. Therefore, it is not surprising that these countries seek to limit their protection burden by avoiding the introduction of subsidiary protection categories and maintaining restrictive recognition practices.

Member State	Convention recognition rate	Total recognition rate	Rejection rate (material grounds)	Otherwise closed rate (formal grounds)
Czech Republic	2,8	2,8	20,6	76,5
Hungary	7,9	13,0	61,1	25,8
Poland	1,9	1,9	43,3	54,8
European average	9,7	23,7	57,9	18,4

Source: UNHCR, *Asylum-Seekers and Refugees in Europe in 1998: A Statistical Assessment with a Special Emphasis on Kosovo Albanians*, Geneva, March 1999.

Table 5: Outcomes of Asylum Applications in Three Candidate Countries in 1998

8.5 Two Interpretive Approaches

Concluding on the preceding sections, it has emerged that Union law as well as Community law lack sufficiently broad and elaborate *material* norms on burden-sharing. Both legal systems feature *procedural* norms, which, taken by themselves, cannot secure the necessary predictability to produce openness in crisis situations. As shown earlier, international law does not contain an obligation to share the burdens of protection. Therefore, the absence of material burden-sharing norms in the law of the European Union does not violate international law. It remains to be seen whether this absence may violate norms of a higher dignity within the law of the European Union.

The attempts to mould burden-sharing into a legal form within the EU could serve to support both an affirmative and a negative answer to this question. One could argue that the norms on burden-sharing stipulated in the EU context provide support for stating the existence of an obligation to share burdens in the law of the European Union. Alternatively, one could argue that these norms were adopted beyond legal obligations within the realm of discretion of the European Council and the Member States. Yet both interpretations are apparently beyond a mere legal-technical understanding of the law, and they therefore actualize the sphere of qualitative arguments expounded earlier.[988] To be specific, the question is what perspective is best equipped to explain burden-sharing in the law of the European Union—one that focuses on the needs of protection seekers, or one that focuses on the needs of states?

In the following, two theoretical extrapolations of burden-sharing shall be presented. The first takes a protection-oriented perspective, and seeks to explain burden-sharing as a part of the subsidiarity principle in the law of European Union. By contrast, the second extrapolation, based on a game-theoretical analysis, seeks to find convincing logical reasons why burden-sharing cannot be a binding norm of law. These extrapolations conflict; indeed, they seek to disaffirm each other: the first claims that there is an obligation to share protection burdens, while the second maintains that there is no such obligation. A caveat is in order: the following two sections are written in a partisan manner, and neither of

[988] See chapter 1.5.4 above.

them alone can be said to represent a complete picture of what burden-sharing is—and is not.

8.5.1 Subsidiarity

Subsidiarity is easily misconceived as a technical term governing the repartition of competencies within the Union. At first sight, this seems to be confirmed by the ERF Proposal. The last paragraph of its preamble reads:

> In accordance with the principles of subsidiarity and proportionality as set out in Article 5 [TEC, GN], the objectives of the proposed action, namely to demonstrate solidarity between Member States by achieving a balance in the efforts made by those Member States in receiving refugees and displaced persons and bearing the consequences of so doing, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or impact of the action, be better achieved by the Community. This Decision confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

This wording seems to serve an exculpatory function, giving reasons why it is legitimate that the Commission takes issue at all with the ERF. However, in this section, we shall attempt to demonstrate that there is not only a legal *competence* to arrange for burden-sharing within the framework of the TEC, but also a legal *obligation* to do so.

Conceptually, sharing the burden of reception is but an implementation of the subsidiarity principle. At first sight, this might seem inconclusive, as subsidiarity is commonly identified with the exercise of competencies in the European Union. At the core of the term 'subsidiarity', though, we find the simple concept of assistance—or, in Latin, subsidium.

Who shall be assisted, by what means and through which procedure? The contemporary idea of subsidiarity owes much to Catholic social thought, authoritatively expressed in the encyclical letters 'Rerum

novarum' of 1891[989] and 'Quadragesimo anno' of 1931.[990] Due to its degree of elaboration, the latter is commonly considered the most important source on subsidiarity. It has also emerged, though, that the concept of subsidiarity is indebted to Johannes Althusius' reformatory theology and, ultimately, to Aristotelian philosophy.[991]

The point of departure, and ultimate measure for the success of societal order, is the single human being, singularis homo. The single human being is not self-sufficient. This lack of autarky creates a need for collective structures to provide assistance: family, clan, local community, state, or even international community. But the individual shall not be absorbed in these structures, and her dignity prohibits that she be assisted, where she can assist herself.[992] This reflection triggers a preference for the lowest organizational level that can provide the necessary assistance. The core sentence in 'Quadragesimo anno' is very clear in that respect:

> For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.[993]

A careful reading reveals that subsidiarity is indeed a double principle.[994] Firstly, it prescribes assistance where there is a need for it and, secondly, it

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[989] *Rerum Novarum. On the Condition of the Working Classes, Encyclical Letter of Pope Leo XIII*, issued on May 15, 1891.

[990] *Quadragesimo Anno (The Fortieth Year), On Reconstruction of the Social Order, Encyclical Letter of Pope Pius XI*, issued on May 15, 1931 [hereinafter Quadragesimo Anno], paras 79 and 80.

[991] O. Höffe, 'Subsidiarität als staatsphilosophisches Prinzip', in K. W. Nörr and T. Oppermann (eds), *Subsidiarität: Idee und Wirklichkeit. Zur Reichweite eines Prinzips in Deutschland und Europa* (1997, J.C.B. Mohr, Tübingen), pp. 56–9.

[992] Referring to one of the authors of Quadragesimo anno, Oskar v. Nell-Breuning, Baumgartner warns of a liberal misreading of the reference to assistance in the encyclical letter, overtly focusing on individual autonomy. A. Baumgartner, '"Jede Gesellschaftstätigkeit ist ihrem Wesen nach subsidiär". Zur anthropologischen und theologischen Begründung der Subsidiarität', in K. W. Nörr and T. Oppermann (eds), *Subsidiarität: Idee und Wirklichkeit. Zur Reichweite eines Prinzips in Deutschland und Europa* (1997, J.C.B. Mohr, Tübingen), p. 16.

[993] Para. 79, Quadragesimo anno.

[994] The term 'principle' is chosen deliberately, denoting a legal norm of a non-binary character, imposing a duty to optimise. R. Alexy, *Theorie der Grundrechte*, 1994 ed. (1985, Suhrkamp, Frankfurt am Main), p. 75 et seq.. Later, Alexy has elaborated this distinction further. Principles relate to an 'ideal ought' which does not presuppose a factual or legal

proscribes the usurpation of competence in assistance.[995] 'The prescription of assistance is addressed to communities at large: the body social as a whole is put at the service of the single human being.'[996] Further, it is important to note that the duty to assist is not specified. This allows for the conclusion that the choice of means may differ from situation to situation, and from one societal extension to another.

The proscription inherent in the principle of subsidiarity is a mere deduction from its prescriptive component. Assistance turns into a pretext for the agglomeration of power, where a higher-ranking societal extension performs tasks that could be performed by lower ranking societal extensions or the single human being herself. This proscription has become notorious by its—contextually adapted—insertion into the Treaty of European Union, which will be exposed in some detail below. A full understanding requires, though, that it be not severed from the prescription of assistance.[997]

Who is to be assisted, by what means and through which procedure? The single human being is to be assisted by hierarchically ordered societal extensions, which give priority to the lowest level in the hierarchy, as long as higher levels are not better at providing the assistance needed. Next, how does the double principle of subsidiarity relate to the issue of burden-sharing? From the outset, it is quite clear that burden-sharing contains a dimension of assistance. Indeed, burden-sharing is about the relationship between the individual protection seeker, the country of first arrival and other potential host states. Where the country of first arrival cannot provide protection on its own, and delegation to an international

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realization, but demands an approximative fulfilment. In contradistinction, rules relate to a 'real ought' of a binary character. R. Alexy, *Recht, Vernunft, Diskurs* (1995, Suhrkamp, Frankfurt am Main), p. 202.

[995] This specification finds support in Höffe, 1997, pp. 53–5 and P. Koslowski, 'Subsidiarität als Prinzip der Koordination der Gesellschaft', in K. W. Nörr and T. Oppermann (eds), *Subsidiarität: Idee und Wirklichkeit. Zur Reichweite eines Prinzips in Deutschland und Europa* (1997, J.C.B. Mohr, Tübingen), pp. 40–1.

[996] Höffe, 1997, p. 54

[997] 'Das Solidaritätsprinzip gründet sich mithin auf die gemeinsame Aufgaben- und Zielbezogenheit (Gemeinwohl) der verschiedenen Handlungsebenen und wird auf diese Weise zur Voraussetzung des Subsidiaritätsprinzips.' C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (1996, Nomos, Baden-Baden), p. 168. However, the adequacy of referring to 'Gemeinwohl' (common good) can be questioned. When the preamble of the TEU speaks of 'citizens', it is at least open to debate whether those are related to as individuals or as a group.

level would better secure protection, subsidiarity suggests that other states share the responsibility for providing haven to the individual. However, where a country of first arrival is able to provide protection, subsidiarity would suggest that the case not be relegated to the international level. Subsidiarity is thus opposed to overtly centralized models of collective refugee protection and puts the definition of loss in burden-sharing schemes into a wider context. So far, so good.

Still, the argument is incomplete as long as the role of the individual is omitted. In the light of subsidiarity, the ultima ratio of burden-sharing is to serve the individual. Where the country of first arrival is unable to provide assistance, or where assistance can be better provided in other states, the obligation to assist is transposed. While it originally rested with the country of first arrival, it is now shared by other potential host states.

But is this indeed a reading that finds support in the primary law of the European Union? When answering this question, one needs to distinguish between the prescriptive and the proscriptive components of the principle of subsidiarity. Both are clearly catered for in Article 5 TEC, stating inter alia that

> [i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Side by side with the proscriptive 'only if and insofar as', we find the prescriptive 'shall'.

This provision is of relevance not only for the Community, but for the Union at large. Article 2 TEU stipulates that the European Union is bound to respect the principle of subsidiarity, as defined in Article 5 TEC, when achieving its objectives. Moreover, in the preamble of the TEU, the contracting parties express their resolution 'to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. The 'singularis homo' surfaces here as a citizen of the European Union; as we shall see, though, citizens are not the only beneficiaries of subsidiarity in the EU.

As it stands, the masters of this treaty clearly regarded the Member States, the Community and the Union as societal extensions, positioned at different levels within a hierarchical relationship. Taking account of their linkage to the free movement of persons, Articles 3 (1) (c), 61 (b) and 63 (2) (b) TEC establish the competence of the Community with regard to burden-sharing. Article 3 (c) and (d) TEC includes the creation of an internal market and measures concerning the entry and movement of persons in the enumeration of the Community's activities. Title IV specifies those activities, which are ultimately motivated by the establishment of an area of freedom, security and justice. The creation of this area is one of the overall objectives of the European Union according to Article 2 TEU.

Moving to Title IV, we find that Article 63 (2) TEC finally accords a specific competence for burden-sharing to the Community, as earlier expounded. Further, the 1998 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice' points out a number of selection criteria for setting priorities in the future work of the Council. Paragraph 24 of the said instruments reads as follows:

> 24. A number of principles have determined the way in which the Council and the Commission have identified -and intend to implement- the measures listed in this Part:
>
> [...]
>
> (ii) The principle of subsidiarity, which applies to all aspects of the Union's action, is of particular relevance to the creation of an area of freedom, security and justice.[998]

Up to now, it has been clarified that the Community is competent to tackle the issue of burden-sharing—a competency made use of by the Commission when launching the ERF Proposal—and that this competence shall be exercised with due regard to the principle of subsidiarity. The quest for a subject benefiting from this principle would

[998] Council of the European Union, Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, 7 December 1998, OJ (1998) C 011, pp. 1–4.

merely lead to the preamble of the TEU and its reference to citizens, had it not been for the rather dramatic turn taken in Article 61 TEC:

> In order to establish progressively an area of freedom, security and justice, the Council shall adopt:
>
> [...]
>
> (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;

Among the rights to be safeguarded are those enshrined in refugee law as well as in human rights law. Most recently by means of Article 6 TEU, Member States have obliged themselves to respect the latter.

Burden-sharing is thus understood as a means of safeguarding the rights of third country nationals or, in the specific context, the rights of protection seekers. Article 61 (b) TEC provides nothing less than the prescriptive part of subsidiarity, characterizing burden-sharing as a measure on behalf of a specific class of benefiting 'singularis homines'. This makes a decisive difference. If the Union's citizens had been the sole beneficiaries of subsidiarity, burden-sharing would have taken on another tinge. In that case, the goal would have been to minimize costs without taking into account the interest of protection seekers. As will emerge in the following section, the quest for cost reduction at the expense of protection seekers leads to deflection and exclusion as the most rational choice. Thus, burden-sharing would have been an intermediate solution pending the materialization of perfect exclusion. Article 61 (b) TEC confirms forcefully that this was not the idea pursued by the Member States as masters of the treaties.

Where burden-sharing is justified by the interest of protection seekers, its rationale is to make full use of existing protection capacities and maintain openness towards future beneficiaries. Among the 'rights' safeguarded by burden-sharing, the right to non-refoulement and the right not to be subjected to torture, inhuman or degrading treatment or punishment can be named.[999] Needless to say, burden-sharing not only

[999] 'It is necessary to support the efforts made by the Member States to grant appropriate reception conditions to refugees and displaced persons, including fair and effective asylum procedures, so as to protect the rights of persons requiring international protection', preamble, para. 3, ERF Proposal

contributes to averting extraterritorial risks, but also to securing the enjoyment of human rights on the soil of host states.[1000] Thus, the international law of human rights represents the last missing component in the reconstruction of subsidiarity.

At this stage, Quadragesimo anno and the law of the European Union become coextensive. The single protection seeker is to be assisted in a two-tiered body social. First, the obligation to assist is incumbent on single Member States. On that level, its manifestation is to be found in the 1951 Refugee Convention and a corpus of human rights instruments. Second, where inequalities in the distribution of protection seekers jeopardize their rights, the obligation to assist is extended to the level of the EC. Here, it takes the form of the duty to devise measures to level out inequalities in reception that may be detrimental to the rights of protection seekers. As stated earlier, the obligation to assist may take on different forms in different contexts. The interlinkage of human rights law and the Treaty of Amsterdam provides a telling example of this flexibility. Thus, the prescriptive component of the solidarity principle is covered. As for the proscriptive part, it follows that the measure adopted at EC level must not absorb the assistance which single Member States are capable of providing. Put differently, the Council is assigned to preserve the two-tier level as far as it can be reconciled with the best interests of the single protection seeker.

Thus, we may conclude that there is not only a competency, but also an obligation to share receptive burdens among Member States, making use of the legal instruments and institutions offered by TEC. Where single protection seekers do not receive shelter due to the absence of practical

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[1000] Compare the preamble of the ERF Proposal: '(4) The integration of refugees into the society of the country in which they are established is one of the objectives of the Geneva Convention and, to this end, there should be support for actions by the Member States intended to promote their social and economic integration, in so far as it contributes to economic and social cohesion, the maintenance and strengthening of which is one of the Community's fundamental objectives referred to in Articles 2 and 3(1)(k) of the Treaty. (5) It is in the interests of both the Member States and the persons concerned that refugees and displaced persons who are allowed to stay in the territory of the Member States are given the opportunity to provide for themselves by working. (6) Since measures supported by the Structural Funds and other Community measures in the field of education and vocational training are not in themselves sufficient to promote such integration, support should be given for special measures to enable refugees and displaced persons to benefit fully from the programmes which are organised.'

arrangements by the EC institutions, it could be argued that the latter are in breach of Community law.

8.5.2 Game Theory

Let us now approach the question on the existence of a burden-sharing obligation from a quite different tack. A look at the various solution attempts presented in earlier subsections leaves the observer wondering why it proves so difficult to reach a substantial consensus on matters of burden-sharing. Are viable normative developments likely to take place in the near future? What factors will influence the outcome of such developments? And, finally, is it justifiable to construe the abstract concept of subsidiarity as an obligation of burden-sharing?

Answers to these questions risk developing into long narratives. As a shortcut, we would propose the application of game theory[1001], which might help to trace and systematize the recurring elements of a burden-sharing conflict. Admittedly, in a human rights context, this choice of method might appear slightly bizarre. After all, game theory became widely known as a tool to frame nuclear conflict as a rational form of behaviour.[1002] Like cybernetics, it drew on a positivistic paradigm. The development of both disciplines was fuelled by their instrumental value for military ends. In their quest for order, predictability and control, both approaches presupposed rationality in action.[1003]

[1001] In addition to the contextual explanation given below, readers might be interested in a general definition of game theory: 'Game theory is a branch of mathematics which is frequently employed in a heuristic manner in order to draw attention to certain apparent paradoxes and dilemmas which emerge when interdependent decision-making is studied from a "rational choice" perspective—that is on the assumption that individuals choose courses of action that are believed to maximise their welfare, defined broadly.' C. Brown, *Understanding International Relations* (1997, Macmillan, Houndsmill and London), pp. 58–9. For an application of game theory in international law, *see* J. K. Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37 *Harvard International Law Journal* 139 (1999).

[1002] K. van der Pijl, *Vordenker der Weltpolitik. Einführung in die internationale Politik aus ideengeschichtlicher Perspektive* (1996, Leske + Budrich, Opladen), pp. 240 et seq.. M. De Landa, *War in the Age of Intelligent Machines* (1991, Swerve Editions, New York), pp. 84–7, 97–100.

[1003] The initial problem of cybernetics was to calculate the flight of an enemy aircraft in order to guide anti-aircraft weaponry; it soon developed into a comprehensive behaviouristic theory conceiving of the human psyche as a self-regulating mechanism.

While both game theory and cybernetics shared common behaviourist roots, they focused on quite different questions. The development of game theory is inextricably linked to the name of John von Neumann, a U.S. mathematician who became deeply involved in nuclear missile defence planning after World War II. von Neumann first presented his theory in an article featuring a logical analysis of chess strategies (*Zur Theorie der Gesellschaftsspiele*, published in 1928). Expanding into new disciplines, he carried out a study on the *Theory of Games and Economic Behavior*[1004] together with Oskar Morgenstern in 1944. Today, the interdisciplinary merger of Law and Economics is heavily indebted to von Neumann and Morgenstern's pioneering work.

Game theory provided the tools to translate complex real-world interactions into a limited number of abstract 'games'. Its ultimate promise was the identification of optimal moves and rational conflict resolution in spheres of reduced complexity. It did not come as a surprise that von Neumann moved on to yet another field of application. Eventually, he was appointed as an advisor to RAND Corporation, a think-tank originating in the U.S. defence industry. In the following, a considerable number of 'defence intellectuals' used a game theory paradigm when inquiring into the conflict arenas of the Cold War, notably nuclear deterrence and the arms race. This move secured a stable position for game theory in the study of International Relations.[1005]

Why should one resort to game theory when analyzing burden-sharing? Just like nuclear deterrence or the arms race, burden-sharing is a problem of co-operation in an international environment without a central enforcement institution. As we will see, its main actors can be divided into two groups of 'players' who fit into the attractive simplicity of the game model.

See P. Galison, 'Die Ontologie des Feindes. Norbert Wiener und die Kybernetik', in H. Rheinberger, M. Hagner, and B. Wahrig-Schmidt (eds), *Räume des Wissens. Repräsentation, Codierung, Spur* (1997, Akademie Verlag, Berlin).

[1004] J. von Neumann and O. Morgenstern, *The Theory of Games and Economic Behaviour* (1944, Princeton University Press, Princeton). *See* van der Pijl, 1996, p. 241.

[1005] A. Kytt and D. Snidal, 'Progress in Game-Theoretical Analysis of International Regimes', in V. Rittberger (ed.), *Regime Theory and International Relations* (1993, OUP, Oxford), p. 112. For a comprehensive application of game theory to various forms of conflicts from an international relations perspective, *see* M. Nicholson, *Rationality and the Analysis of Conflict* (1992, Oxford University Press, Oxford), pp. 63 et seq.

However, it must be underscored that our goal is not to point out the ultimate 'rational choice' in a given burden-sharing game. Rather, game theory is used as an interpretative device.[1006] The actors in the burden-sharing game pursue different goals, ranging from protection to cost-reduction; the outcome of the game enables us to reconstruct the goals that have been dominating the actors as they 'play'. If there is a difference between state rhetoric and state action, it should emerge at this point. Thus, game theory offers a short cut for identifying what is usually termed 'the will of the legislator'.

After this attempt to justify and delimit the use of game theory in this section, we would like to resort to a rather well known analytic device from its toolbox, which goes under the name of Prisoners' Dilemma.[1007] Let us briefly recall the choices facing the metaphorical prisoners.

Two prisoners, against whom there is not enough incriminating evidence, are interrogated separately. Each faces two alternative ways of acting: to confess the crime or to keep silent. They both know that if neither confesses they will be convicted of some minor offence, concerning which there is sufficient evidence against them, and will be sentenced to a year in prison. However, if only one confesses, he thereby turns king's evidence and is thus set free, whereas the other receives a heavy term of ten years.[1008]

Co-operation among the prisoners, namely an agreement to the effect that both keep silent, will yield an outcome which is beneficial for both. If both confess, the outcome will be a long sentence for both. If the prisoners are able to communicate, they will eventually agree on keeping silent. However, there is a strong temptation for each prisoner to break such an agreement, if he wants to avoid punishment altogether. Furthermore, how can he be sure that his fellow prisoner will not break the agreement? The safest thing to do is to confess, if one wants to avoid the maximum penalty of ten years. Technically speaking, confession dominates non-confession, or defection dominates co-operation.

[1006] Kytt and Snidal, 1993, pp. 114, 131.

[1007] I am indebted to my colleague Fredrik Danelius for supplying the idea to describe dilemmas of refugee protection as a Prisoners' Dilemma. Large parts of the following presentation are founded on E. Ullmann-Margalit, *The Emergence of Norms* (1977, Oxford University Press, Oxford), dealing with Prisoners' Dilemma norms, co-ordination norms, and norms of partiality from a philosophical perspective.

[1008] Ullmann-Margalit, 1977, p. 18.

Each single prisoner's preferences may be depicted as a linear chain of dominance. In this chain, D stands for defect, C for co-operate. The first letter indicates the behaviour of the actor whose perspective is taken. By way of example, DC stands for the following situation: the prisoner whose perspective is taken defects, while the other prisoner co-operates. Accordingly, the classical Prisoners' Dilemma described above would translate to the following chain:

$$DC > CC > DD > CD$$

To be sure, DC will result in freedom, CC in one year in prison and DD in five years. CD is the least desirable outcome and will yield 10 years of incarceration.

Quite apparently, the Prisoners' Dilemma deviated in important respects from the scenario of nuclear conflict, and has been rightly criticized for introducing a pro-conflict bias into U.S. nuclear policies.[1009] Does burden-sharing resemble a Prisoners' Dilemma? Let us take a brief look at the characteristics of the latter:

> In Prisoners' Dilemma-type situations the state which is mutually desired by the participants is such that there is a strong temptation for each to deviate from it unilaterally. The state that results when they all deviate, however, is bad for all, jointly as well as severally. The problem, therefore, is to devise a method which will protect the "good" state and annihilate the temptation to deviate.[1010]

Before addressing the temptation to deviate, let us point out some dissimilarities between the situation of the prisoners and the situation of EU Member States when faced with the problem of burden-sharing. To start with, the prisoners are confronted with a one-shot situation, where maximum gain must be secured in one single game in circumstances

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[1009] 'By framing [nuclear conflict] as a zero-sum game, where there is always a mathematically provable best strategy for an individual player, the scientists in search of the perfect "combat equation" artificially introduced a bias of conflict over co-operation. The preference for zero-sum games, where one player's gains are the other's losses, was also motivated by the fact that it could be used to eliminate the element of friction, *ambiguity* in this case, from the battle model.' De Landa, 1991, p. 97. [Emphasis in the original.]

[1010] Ullmann-Margalit, 1977, p. 9.

allowing no communication among the players. This may resemble the situation at the verge of nuclear conflict, but it differs somewhat from the burden-sharing-problem. Burden-sharing is a far more communicative process: in contrast to the two prisoners, Member States have all options to negotiate while making and reassessing their decisions on co-operation or defection. Additionally, burden-sharing is iterative by nature, as Member States are constantly confronted with new flight movements, thus allowing them to enter into a new 'game'. As we shall see later on, these differences are of some importance.

Now, what is the 'good state' which Member States wish to achieve in the burden-sharing game? Partly drawing on the language of the 1995 Resolution, one could compile the following non-hierarchical list:

1. To ensure free movement of persons between Member States while controlling the inflow and movements of non-communitarians (*migration control*).
2. To observe international law obligations, in particular those flowing from the 1951 Refugee Convention and the ECHR (*international law compliance*).
3. To demonstrate 'solidarity between Member States' and to 'share the responsibility regarding admission'[1011] (*equitable burdensharing*).
4. To 'reflect Europe's humanitarian tradition, thus ensuring to all persons in need of international protection within their jurisdiction a treatment in conformity with human dignity'[1012] (*protection*).
5. To attain the aforementioned goals at a minimum of financial, social and political costs (*cost reduction*).

In comparison to Prisoners' Dilemma, there is not merely a single goal (namely to minimize penalty), but an amalgam of goals. There are two possibilities. The group of Member States can choose a solution that accommodates all goals in the form of a certain compromise. Or the group of Member States can choose a solution that neglects one or more

[1011] Preamble of the 1995 Resolution.

[1012] Ibid.

goals.[1013] Let us look into the options, contraposing any given Member State to the group of all other Member States.

The cheapest option for a single Member State is to close its borders, thus minimizing its own reception costs, while other states keep their borders open, thus providing protection *somewhere* within the Union (DC). Mutual co-operation (CC) will also accommodate goals 1 through 4, but will induce higher expenses for a single Member State than the DC alternative. DD accommodates the control and cost reduction goals, while it clearly sets aside the protection and possibly the legal compliance goal.[1014] The CD alternative may ensure protection and legal compliance, but it maximizes costs for the single Member State, allows only for a limited protection offer and fails to attain equitable burden-sharing, which makes it probably the least attractive of all options from a player's perspective. Accordingly, if *all* goals are to be accommodated, one could expect the situation to be structured as a classical Prisoners' Dilemma (DC > CC > DD > CD).

As long as co-operation for the achievement of *all* goals is not stable and predictable, a single Member State faced with the probability of an influx of protection seekers will be tempted to resort to defection. In this context, defection may take the form of blocking access to state territory without regard for the interests of protection seekers or the ensuing 'overburdening' of other Member States. On the other hand, mutual co-operation yields optimal protection, as it ensures bigger capacities (more protection seekers can be protected) and greater choice (protection seekers can be 'matched' with an optimal host country with regard to such factors as personal preferences, social ties, labour skills, linguistic background and cultural characteristics). While bilateral defection renders protection impossible altogether, unilateral defection leaves protection seekers with the capacity of at least one Member State.

At this stage, it emerges clearly that the simple game model sketched above needs to be expanded. To do full justice to the complexity of the situation, one would need to look at burden-sharing as a three level game

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[1013] Clarifying goal preferences amounts to the revelation of actors' values. For a further exploration of the revelation of values by choices *see* I. Levi, *Hard Choices: Decision Making under Unresolved Conflict* (1986, Cambridge University Press, Cambridge), pp. 83 et seq.

[1014] See chapter 12.1 below on the legality of visa requirements as a means to deflect protection seekers.

which states play with each other, with the protection seekers, and with their domestic electorates.[1015] To complicate things further, burden-sharing is not a one-shot exercise, but a game which must be played over and over again, in which earlier outcomes form the basis for the strategic decisions taken in each game.[1016] However, as we merely wish to identify the dominance structure among the goals Member States pursue when playing the burden-sharing game, there is no immediate need to adopt a more complicated model for our purposes.

Neither burden-sharing nor a Prisoners' Dilemma is, however, a self-propelled machine. The outcome of either hinges on the values affixed to the various goals. Let us exemplify. Bilateral defection renders an undesirable outcome as to the goal of protection. Exactly how undesirable this outcome is depends on the importance of extraterritorial protection on each state's political agenda. If there is strong advocacy for protection seekers, the desirability of a complete denial of protection will be very low. In such a situation, bilateral co-operation is more desirable than bilateral defection. If, however, the electorate accepts the dismantling of extraterritorial protection for the sake of reducing financial costs, the outcome will change. There are no political costs to be anticipated for the blocking of access. In such a situation, it is not likely that co-operation on extraterritorial protection and burden-sharing will take place.

Apart from the impact of advocacy on cost assessment, other factors could influence the actors' choices. In context of free movement over internal borders of the EU, access of protection seekers to one single

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[1015] Such an approach might help to answer interesting questions (e.g. *why* did certain goals dominate?), but reaches clearly beyond those asked in this section (namely which goals dominate in European burden-sharing and what structural impediments influence the outcome of burden-sharing games). For more on multi-level games *see* Kytt and Snidal, 1993, pp. 130 et seq.

[1016] The standard narrative of an Iterated Prisoners' Dilemma is that of two salesmen exchanging goods in the following circumstances: they each must leave a package of merchandise at a predetermined spot; they never see one another but simply leave one package while picking up another. Now, they may choose between delivering the merchandise, or simply an empty package. Betrayal endangers future transactions, which is the main difference to one-shot Prisoners' Dilemma. This shift in the Dilemma's formulation turned the pro-conflict bias of the Neumann approach to a pro-co-operation one, driven by and associated with political scientist Robert Axelrod. Through a comprehensive series of tournaments, Axelrod was able to show that predominantly co-operative strategies (not betraying first, retaliatory upon betrayal, but also forgiving after retaliation) were the most successful strategy. De Landa, 1991, pp. 85–6.

Member State might trigger problems for other Member States in the long run. As it becomes more difficult to control movement between Member States, secondary movements of protection seekers must also be considered. Against this background, DC might be perceived as less favourable and blocking access not only to a single Member State, but to the whole Union, thus yielding the preferred solution: DD > DC > CC > CD.

To be sure, the focal point of analysis is the relationship between protection and the reduction of financial costs. If protection is perceived as less important than the cutting of expenses, DD may dominate CC. If the opposite is true, CC will be preferred to DD.

So much for our simplified model. Let us now get back to the reality of burden-sharing in the 1990s. In contradistinction to our model, states proved not to be equal. This emerged very clearly in the context of the Balkan refugee crisis. Among Western European states, two groups could be distinguished. States hosting a large population of Balkan crisis refugees had similar interests, while other states less affected in terms of refugee reception did not necessarily share those interests.

The more affected states hosting large populations of protection seekers and refugees had become victims of a containment strategy that they themselves had masterminded—reception in the region.[1017] According to this concept, protection seekers should be protected as near as possible to the region of crisis. In the case of the Balkan crisis, the notion of 'region' had to be successively expanded. Given the overburdening of states in the immediate vicinity of the conflict and the insecure conditions prevailing there, the region where protection would take place was extended to Austria, Switzerland, Germany and Sweden. Geographic proximity was one determining factor in the choice of the protection seekers, historical ties another, and the existence of transnational networks established by preceding migratory flows a third.[1018]

[1017] Allusions to this concept can be found inter alia in the preamble of the 1995 Resolution.

[1018] For further on networks as pull-factors *see* G. Brochmann, 'Migration Policies of Destination Countries', in Council of Europe (ed.), *Political and demographic aspects of migration flows to Europe* (1993, Council of Europe, Strasbourg), pp. 110 et seq; and Crisp, 1999.

In 1993, the more affected states had but one choice—to denounce reception in the region in favour of international burden-sharing. This was very clearly spelled out by the Swedish government.[1019]

Let us have a look at the different choices at the outset of 1993, before a group of more affected states started pushing for burden-sharing and before containment measures such as visa requirements for Bosnian citizens came into being. More affected states had already received a considerable number of protection seekers and faced the probability of a continuing inflow. They had a strong interest in changing the CD situation and reducing their costs. While geographical, social and political factors made unilateral defection outright impossible for these states, the two options left were either to co-operate on reception (CC) or to block access for further refugees (DD).

For less affected states, being in a DC situation, co-operation on burden-sharing would have led to augmented reception of refugees and increasing costs in a short-term perspective. Thus, cost-wise, mutual defection (DD) would have been as desirable as the status quo for less affected states; indeed, as more affected states were pushing for a change in the situation, mutual defection was the only alternative which could be reconciled with the self-interest of less affected states.

A move to mutual defection was precisely what happened. By the end of 1993, most European states had introduced visa requirements, which made it hard for refugees from former Yugoslavia to seek protection outside the conflict zone. Western Europe had moved from a status quo of non-equitable reception and relatively open borders to a status of blocked access.[1020] Thus, it can be inferred that, by the end of 1993, burden-sharing in Europe was structured as DC > DD > CC > CD. Contrary to state rhetoric, the goal of cost reduction dominated the goal of protection in the collective action (and inertia) of Western European states.

Finally, it should be asked whether any structural changes have taken place since the end of 1993. Have Member States attempted to change, or perhaps even succeeded in changing, the dominance order depicted above?

In 1993, more affected states had a short-term interest—to get other states to take a 'fair share' of Bosnian refugees. They had and still have a

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[1019] See text accompanying note 871 above.

[1020] It is true that this decision was not taken in a co-ordinated fashion. This does not detract from the point made, as the first states introducing visa requirements must have been perfectly aware of the fact that other states were forced to follow.

long-term interest—to prevent the repetition of the inequitable sharing of refugees seen in the case of former Yugoslavia in a future crisis.

States less affected by the Balkan crisis had a different short-term interest, namely to keep their level of involvement with refugee flows low. Their long-term interest depended on what scenario they deemed probable in the future: Would there be the possibility of a crisis producing an inflow into their own territory? If so, would they need burden-sharing in such a situation? A state that answers both questions in the affirmative has a long-term interest in the establishment of a burden-sharing mechanism.

A long-term perspective produces a classical Prisoners' Dilemma, with a dominance of mutual co-operation over mutual defection (CC > DD). The language of the 1995 Resolution and Article 63 TEC at least emulate such a perspective. If we take this perspective seriously, the stark differences between more affected states and less affected states begin to vanish. This is good in that it opens up for mutual co-operation as a rational choice; however, it leaves us with the question whether the better-yet-weak choice of co-operation actually has been strengthened. To be sure, unilateral defection dominates co-operation in a classical Prisoners' Dilemma. To change this, the choice of co-operation must be stabilized by reducing the pay-offs of defection.

The first stabilizing factor that springs to mind is retaliation. In a situation where all states are potentially affected by flight movements, defection in one crisis brings about the risk of becoming the victim of other states' defections in the next. However, retaliation alone does not seem to be sufficiently stabilizing. If it were, one could argue that burden-sharing was already tacitly practised, and the deliberations within the European Union since 1995 as well as any further debate on the topic would have to be regarded as quite superfluous.

Next, do the normative content of the 1995 Council Resolution and Article 63 TEC represent a sufficient stabilizing device? The analysis carried out earlier indicates that these norms set a framework for further deliberations on burden-sharing rather than providing a fixed distributive key securing a predictable outcome. Accordingly, they cannot help to reduce the pay-off for defection. The dominance of mutual defection over mutual co-operation prevails. The experimental instruments of 1997–9 do not alter this assessment, as their redistributionary effect was negligible.

At this stage, it seems reasonable to conclude that co-operation on burden-sharing is still a better-yet-weak choice. However, we need to go one step further. The Dublin Convention and other safe third country-arrangements actually structure burden-sharing as a Prisoners' Dilemma with unequal participants. This brings us back to the situation prevailing at the end of 1993, where mutual defection was the only conceivable common choice (DC > DD > CC > CD). There are no prospects for co-operation and mutual reception, as the only change acceptable for all participants is a complete blocking of access. As long as the Dublin Convention and other safe third country-arrangements preserve inequality, burden-sharing will be a systemic contradiction.[1021]

Where does this leave the law? In a situation where defection dominates co-operation in burden-sharing, it is very hard to uphold that Article 2 TEU and Articles 3, 5, 61 and 63 TEC are the cornerstone of an implicit obligation to share the burdens of reception in the law of the European Union. Actually, this would mean that all deliberations on burden-sharing were wholly unnecessary after the negotiation of the Treaty of Amsterdam, because the problem had been solved therein. This is obviously not the way the Member States perceived the matter. And game theory helps us understand why the subsidiarity argumentation expounded above simply cannot be taken as reflecting the will of the legislator—namely the Member States.

8.6 Conclusion

Let us briefly recall the main conclusions that have emerged in the course of this chapter.

1. Equitable burden-sharing is inextricably linked to the maintenance of protection capacities globally as well as regionally.

2. Three main approaches to achieving a more equitable sharing of the reception burden can be distinguished: harmonizing refugee and asylum legislation (sharing norms), reallocating funds (sharing money) and distributing protection seekers (sharing people).

[1021] In this context, it should be noted that the 1995 Council Resolution gives prevalence to the Dublin Convention in its preamble.

3. Member States have hitherto failed to develop a burden-sharing mechanism sufficiently comprehensive and predictable to inhibit the deflection of protection seekers or the downgrading of their rights.

4. Article 63 TEC obliges Member States to adopt a number of measures impacting on extraterritorial protection within a five-year period, while the issue of burden-sharing is exempted from these temporal constraints. As the outcome of future burden-sharing deliberations remains that uncertain, a rational Member State will try to control future risks by minimizing the protection offer. By necessity, this systemically created unpredictability will make the instruments on protection adopted during the transitional period more restrictive.

5. The Dublin Convention stabilizes an inequitable distribution of protection seekers between contracting States.

6. In three associated countries, the number of protection seekers is on the rise, while recognition rates are extremely low. It is reasonable to conclude that such restrictiveness is causally linked to burden concentration under safe third country arrangements.

7. As equitable burden-sharing is systemically blocked by the Dublin Convention and other safe third country-arrangements, there are only limited choices left for Member States and candidate countries that fear overburdening. The choices are either to block the access of protection seekers to their territory or to minimize protection obligations by curtailing the level of rights enjoyed during and after procedure, inter alia by adopting restrictive interpretations of existing protection categories and by avoiding the introduction of additional protection categories.[1022]

From the universalist perspective, a legal obligation of burden-sharing can be constructed, based on the concept of subsidiarity enshrined in the law

[1022] Compare chapter 3.1 above, suggesting that burden-sharing and state attempts to steer the number of beneficiaries and the level of rights enjoyed by them are interdependent.

of the European Union. From the perspective of the particularist, the existence of such an obligation can be denied. The particularist rejection is based, first, on the excessive abstraction inherent in the concept of subsidiarity and, second, on the structure of burden-sharing as a Prisoners' Dilemma, making co-operation on admission an irrational choice.

This set-up of conclusions leaves us with further questions, revolving around both empirical and theoretical problems. First, we would need to verify whether the particularist dynamics flowing from the absence of burden-sharing really can be substantiated in the law of the European Union. The findings of the preceding chapter warrant an answer in the affirmative. Second, if that were to be the case, the question would remain where law sets out the limits of such particularism. Parts IV and V of this work shall deal with those limits.

The question of the limits set by the law leads us to the third question, which is on the proper interpretation of the law. From a game theoretical approach, it is fully rational for states to opt for shared deflection instead of shared reception. By contrast, subsidiarity arguments cannot be used to argue in favour of deflective burden-sharing. This is so, because the latter focus on the conflict between individual and collective structures. Deflection cannot be justified, because it does not comply with the prescription of assistance vis-à-vis the group of protection seekers. No matter if this non-compliance is motivated by the protection of citizens' interest. As subsidiarity does not lend itself to the opposition of groups, it is unable to depict the tension between the group of citizens and the group of protection seekers. And precisely this tension between collectives is at the heart of game theoretical argumentation. This shows nicely that an argument of subsidiarity does not accommodate the formal arguments of particularists, which base differences in treatment on nationality or citizenship. Instead, it stresses the actual protection need, irrespective of formal requirements. Recalling the basic opposition between universalist and particularist argumentation expounded in

chapter 2, we behold the universalist, individual-based features of the doctrine of subsidiarity. The particularist potential of game-theoretical argumentation stands out in a marked contrast.[1023]

Beyond theory, how do both approaches relate to the law? Both the subsidiarity and the game-theoretical argument shuttle back and forth between the law and an extralegal meaning. While the former sets out with the letter of the law and changes it by means of theory, the latter starts out with theory, to prove the necessary absence of legal obligations on burden-sharing.

The subsidiarity argument seeks to flesh out a number of vague provisions in the law of the European Union with a fairly specific meaning based on Catholic social thought. It can provide law's abstract formulations with a nexus to a comprehensive mesh of meaning. Contrasted with this theoretically supercharged letter of the law, the actual inability of states to devise a burden-sharing mechanism in the real world shrinks to an irregularity of minor significance. Following subsidiarity thinking, there must be a burden-sharing obligation, because its absence would defy the logic of the law.

Game theory works quite the opposite way. It starts out with the actual behaviour of states and explains it rather well with a rationalistic theory. Indeed, hitherto, Member States have behaved like prisoners caught in the dilemma of burden-sharing. Now, as international law is made by the same rational actors whose behaviour game theory so aptly explains (namely states), it would be highly illogical if law already

[1023] It is of little surprise that game theory 'fits' so well into the particularist discourse on the threat of massive undocumented migration. After all, this threat has succeeded the one underlying the cold war in a multitude of ways. Both threats rest on the image of a massive inflow into Western Europe from the East—be it by Red Army soldiers and tanks, or by undocumented migrants. Further, neither the Soviet Union nor the migrants would be accessible for negotiations. With regard to both threats, Western agencies have shown a strong tendency to exaggerate them numerically. The fictive bomber and missile gaps constructed by U.S. defense and intelligence agencies (De Landa, 1991, pp. 198–9) correspond to the opaque 'guesstimates' which EU governments and agencies funded by them present on the extent of undocumented migration. Finally, a key element in both discourses is the cult of secrecy. It must be underscored, though, that the analogy between them is a structural one, and does not imply that the migration discourse is endowed with comparable resources as was the military and intelligence establishment during the cold war. After all, while information depositories such as the IGCARMP and the ICMPD could be functionally likened to the RAND Corporation, there is a quite obvious resource gap between the former and the latter.

contained an obligation to share burdens. Any pretension that it does is mere wishful thinking of idealists. Following game theory, there cannot be a burden-sharing obligation, as this would defy the logic of the lawmaker.

So, in the end, this is what the legal-theoretical conflict boils down to. The logic of the law is opposed to the logic of the lawmaker. With this, we seem to have reached the climax of argumentation. On the level of qualitative argumentation, it is rational behaviour to choose the subsidiarity argument for those seeking to promote the interest of protection seekers. But those seeking to promote the interest of the citizenry of potential host countries are well advised in choosing a game-theoretical approach when extrapolating legal argumentation. The concluding chapter of this work will scrutinize whether this opposition of approaches can be overcome.

9 International Law and Extraterritorial Protection

IN THE SECOND PART of this work, we have sketched an overall image of the EU acquis related to extraterritorial protection and singled out a number of binding norms which seem to be on a collision course with universalist interests. Now we shall proceed to testing the viability of these norms under international law. To do so presupposes that we know which norms of international law have a bearing on access to territory, procedures and protection, and what their precise content is. To clarify these matters, and to establish benchmarks to test the acquis against, shall be the task of this chapter.

But before embarking on the black letter of law, let us recapitulate the legal environment in which flight and refuge is posited. A person leaves her country of origin and attempts to reach another country in quest of protection. This is the basic scenario of refugee law, and it involves three main entities: an individual, the country of origin and the potential host country. To be sure, the relationship between the individual and both states is characterised alienage.[1024] Firstly, staying in the country of origin is not an option, due to the threats faced there. Secondly, the potential host state is not her country of nationality, which makes her presence on

[1024] Hathaway has introduced this term when describing the relationship between a refugee and her country of origin, as expressed in the territorial requirement of Art. 1 A (2) of the 1951 Refugee Convention. See J. Hathaway, *The Law of Refugee Status* (1991, Butterworths, Toronto), p. 27.

its territory contestable. Given this situation, it is of crucial interest how the issue of transition between the territories as well as the communities of both states is managed. In that sense, refugee law is certainly about movement[1025]—both in a physical and a social sense.

Possessing a defined territory and a permanent population are two preconditions for the international personality of a state.[1026] These constitutive elements are simultaneously the objects of state power. As a corollary flowing from territorial and personal supremacy, states are entitled to control the composition of their population. The existence of this qualified[1027] state right is unchallenged. Basically, this right is part of customary international law; it finds its expression in a large number of treaty instruments[1028], in case law[1029], and in doctrine[1030]. Within certain

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[1025] P. Tuitt, *False Images. The Law's Construction of the Refugee* (1996, Pluto Press, London), p. 6.

[1026] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19, [not in force], Art. 1. To be considered a person of international law, a state must also possess a permanent population, a government and the capacity to enter into relations with other states. The quoted provision is generally regarded as reflecting customary international law.

[1027] This right is qualified inter alia by the rules of asylum law and human rights law. By way of example, it is illegal to alter the composition of the state population by delivering refugees to their persecutors, by arbitrarily depriving persons of their nationality, or by committing genocide. Beyond such clear-cut cases, hard cases remain, where the precise delimitation of the state right to control the composition of its population has to be singled out.

[1028] A corollary of this state right to control immigration is the qualified right to return non-nationals to their country of origins, which is regarded as part of customary law and has been codified as such in a large number of bi- and multilateral readmission agreements. See, e.g., the preamble of the 1992 German-Romanian readmission agreement, reaffirming the international obligation to readmit nationals. Vereinbarung zwischen dem Bundesminister des Innern der Bundesrepublik Deutschland und dem Innenministerium von Rumänien über die Rückübernahme von deutschen und rumänischen Staatsangehörigen, 1. November 1992, ILM vol. 31 (1992), pp. 1296–1300, BGBl. 1993 II, pp. 220–1.

[1029] As early as in 1892, the U.S. Supreme Court affirmed that was 'an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe'. U.S. Supreme Court, *Nishimura Ekiu v. United States*, 142 US 651, 659 (1892). In 1955, Judge Read formulated this right as follows in his dissenting opinion in Nottebohm: 'When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission'. ICJ, *Nottebohm Case*, ICJ Reports 1955, p. 46. In the light of our discussion in this chapter, it is doubtful

limits, a state is thus entitled to remove a non-national from its territory. As mentioned earlier, 'boundedness' is regarded as a precondition for forming protective communities within political theory.[1031] Refugee law is a striking illustration of the mutual presupposition of protective community and boundary. For the ensuing analysis, it merits retaining that the boundary is twofold, featuring a geographical as well as a social dimension. The bounded community of a state is a function of territory and people. Both dimensions are legally controlled, and an analysis of refugee law will remain incomplete as long as one of them is omitted.

In law, the significance of a state's territorial and personal extension translates into the regulation of migration, which means controlling the physical movement of persons across state borders. To transgress the geographical boundary severing communities, a protection seeker has to leave her home country and gain access to a host country.[1032] In turn, the social boundary translates into the regulation of extraterritorial protection. For even where the individual protection seeker has managed to migrate, the question of social inclusion remains. Either the individual is allowed to stay or physically sent back.

To do justice to the double boundary, our further inquiry into international law needs to be guided by two principal questions:

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whether this right indeed is an unfettered one. —In its judgements concerning Art. 3 ECHR, the European Court of Human Rights has repeatedly spelt out that states are entitled to control the entry of aliens on their territory. See e.g., *Nsona v. the Netherlands*, ECHR Reports 1996-V, No. 22, at para. 92.

[1030] R. Plender, *International Migration Law* (1988, Martinus Nijhoff Publishers, Dordrecht/Boston/London), p. 1, with further references to earlier doctrinal texts; *The movement of persons across borders*, L. B. Sohn and T. Buergenthal (eds), (1992, The American Society of International Law, Washington D.C.), p. 1; Verdross and Simma, 1984, p. 799.

[1031] See text accompanying note 199 above.

[1032] Migration is also relevant in the context of return. Taking the case where a protection seeker has been denied extraterritorial protection by a potential host state, the individual right to return may facilitate the exercise of the host state's right to control the composition of its population. This is the case when the protection seeker wishes to return, confronting the country of origin not only with the inter-state claim to readmission, but also with a human rights-based claim to readmission. See section 9.2.1 below.

1. Are EU Member States under an obligation to grant extraterritorial protection?
2. Are EU Member States under an obligation to let the individual migrate in order to seek such protection?[1033]

The first question, relating to the social boundary, will be pursued under the heading 'Protection' in the present and the subsequent chapter. The second question, relating to the geographical boundary, shall be dealt with in a corresponding manner under the heading 'Access'. There is a reason for ordering both questions in this manner. As we shall see, not all beneficiaries of protection obligations are beneficiaries of obligations to allow access to state territory. Thus, it makes sense to delimit the broader class of beneficiaries first, before identifying their legal options to gain access to state territory.

In a first step, we will identify such norms having a prima facie relevance for the issues raised in the two questions. The base thus established shall function as a common point of reference when answering the questions on the existence, coverage and nature of protective norms. Second, we shall identify the methodology of interpretation international law assigns us to use. The third step will be to apply this methodology of interpretation to the norms belonging to the normative base. Quite obviously, the goal shall be to determine the content of binding legal

[1033] The reader will note that the state is the subject of the two questions, and not the individual protection seeker. One might as well have asked 'Is there an individual entitlement to grant extraterritorial protection?' and 'Is there an individual entitlement to migrate in order to seek such protection?'. As formulating a question is to predetermine its answers, a certain bias could be suspected in that choice. Clearly, there is a bias attributable to international law. Even within the domain of human rights, the vast majority of norms in international law is of an inter-state character, and cannot be invoked directly by individuals. Therefore, an inquiry into state obligations will yield a larger number of norms than one seeking to identify corresponding individual entitlements. Conversely, an inquiry limited to individual entitlements will provide only a fragmentary picture of the array of norms impacting upon extraterritorial protection. Thus, it is reasonable to use the broader concept of state obligations as a point of departure. This choice is supported by the fact that the issue is of limited practical importance. First, even a universalist interpreter has a hard time arguing that the norms singled out in the normative base below are 'directly applicable' or 'self-executing'. Second, as relevant norms of international law are transformed into the domestic law of a number of Member States, there is little or no 'added value' in invoking them domestically. Third, the individual's access to monitoring bodies under the ECHR, ICCPR and CAT reduces the interest for direct applicability.

norms, drawing on the positions taken by various actors of international law, treaty monitoring bodies, courts and doctrinal writers. However, as we shall see, this monolithic reading shall collapse at certain points, and two separate streams of legal reasoning will emerge. Those are the hard cases. By the end of this chapter, we will know which they are, and in the subsequent chapter, we shall try to dissolve the ambiguities haunting them.

9.1 Protection

Which norms of international law may have a bearing on a state's obligation to grant extraterritorial protection? This section starts out with inquiring into the normative quality of the UDHR, and continues with a survey of express and implicit prohibitions of refoulement in both human rights law and humanitarian law.

9.1.1 A Right to Seek and Enjoy Asylum?

In the quest for a common normative base, it is reasonable to revert to norms of a foundational character. In a double sense, the norms of the Universal Declaration of Human Rights fall within this category. Historically, they are foundational in that the UDHR was the first international human rights instrument of the post-war era. Considering their material content, they are foundational due to their level of abstraction. This allows an observer to regard the UDHR as an epicentre in the formation of the international system of human rights. Tracing these formative developments brings us to global and regional human rights treaties as well as to the 1951 Refugee Convention, all of which contain important extensions of the norms enshrined in the UDHR.

Article 14 UDHR is of prima facie relevance for the first question asked in this chapter. It is about transgressing the social boundary between home community and host community:

> 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

It should be noted that Article 14 is subject to the limitations in Article 29 and 30 UDHR.

To wit, there is no identically or similarly worded successor to Article 14 UDHR in treaty law with a universal scope.[1034] The prohibitions of refoulement to be presented later in this chapter are all less sweepingly worded, and none makes allusion to the right to *seek and to enjoy asylum*. If this provision turned out to be binding, it might, at best, provide universalists with raw material to argue for a broader scope of protection than that available under the prohibitions of refoulement dealt with below.[1035] This would probably not only be of importance for protection obligations, but also for obligations to allow access to the territory of potential host states. By way of example, Article 14 UDHR could play a role in countering the indiscriminate exclusion effectuated by pre-entry measures such as visa requirements and carrier sanctions. Given the singularity of the norm enshrined in Article 14 UDHR on the universal level and its potential for the universalist cause, it is reasonable to inquire into its character as binding international law.[1036]

[1034] On a regional level, a right similar to Art. 14 UDHR can be found in Art. 22.7 of the American Convention on Human Rights ('Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes.') and Art. 12.3 of the African Charter on Human and Peoples' Rights ('Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.').

[1035] However, such universalist arguments could be met with powerful particularist ones, claiming that the UDHR laid down a state obligation to respect the grant of asylum by other states. See, e.g., Å. Holmbäck, 'Förenta nationerna och asylrätten', in 1949 års utlänningskommitté, *SOU 1951:42. Betänkande med förslag till Utlänningslag m.m.* (1951, Stockholm), p. 292, arguing on the basis of the *travaux*. There would be no point in exploring the value of these arguments within the framework of our inquiry, if the UDHR turned out to be non-binding. Hence, the question of bindingness must be dealt with first.

[1036] For a detailed overview of the positions taken by different doctrinal writers, see P. R. Ghandhi, 'The Universal Declaration of Human Rights at Fifty Years', 41 *GYIL* 206 (1999), pp. 234–50. Ghandhi himself supports what we shall identify as the second position below, holding that certain provisions of the UDHR have acquired binding force as customary law.

As the UDHR was drafted and adopted as a non-binding declaration, it is clear that the Article 14 UDHR does not possess compulsory force per se. Therefore it must be asked whether Article 14 has acquired binding force by any other means than incorporation into universal treaty law. Three positions offer themselves. The first holds that the UDHR as a whole is to be regarded as binding. The second holds that single rights contained in it possess binding force, and that Article 14 UDHR is among them. If neither of these positions is tenable, we have to endorse a third one: the norms expressed in the named provisions do not oblige states in a legal sense.

Setting out with the first position, it has been claimed that the UDHR as a whole has acquired the quality of customary law. A broad range of evidence has been adduced in support of this position, spanning from the incorporation of human rights provisions in national constitutions[1037] to state practice in the General Assembly[1038] and elsewhere, to the dicta of various international and domestic courts.[1039]

However, to allow for the construction of custom, state practice needs to satisfy a requirement of uniformity.[1040] The ways and means by which the rights of the UDHR are reflected in national constitutions vary to a considerable degree. By way of example, a right reminiscent of that enshrined in Article 14 UDHR can only be found in a handful of constitutions.[1041] These rights usually turn on the right to *obtain* asylum, which is something quite different than the right *to seek and to enjoy* asylum. Furthermore, they are by no means sufficiently uniform in wording or in content. In addition, Schachter points out that actual state

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[1037] For an enumeration with further references, see O. Schachter, *International Law in Theory and Practice* (1991, Martinus Nijhoff Publishers, Dordrecht/Boston/London), p. 336. Schachter himself doubts, however, that the whole content of the UDHR can be regarded as binding based on this evidence. He proposes a more selective approach, endowing single rights in the UDHR with the quality of customary international law. See Schachter, 1991, pp. 336–41.

[1038] J. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character', in B. G. Ramcharan (ed.), *Human Rights Thirty Years After the Universal Declaration, Vol. II* (1979, Martinus Nijhoff Publishers, The Hague), p. 29.

[1039] See Schachter, 1991, p. 336 with further references.

[1040] 'State practice [...] should have been both extensive and virtually uniform in the sense of the provision invoked.' ICJ, *North Sea Continental Shelf*, p. 44, para. 74.

[1041] In the European context, Art. 16a (1) of the German Constitution and para. 4 of the Preamble to the French Constitution of 1946 provide pertinent examples of the right to asylum in national constitutions.

practice is not necessarily respectful of such constitutional rights.[1042] Transposing Schachter's inquiry onto the level of statutory rights, we find ourselves faced with largely similar problems. Again, a number of domestic legislations contain a right to obtain asylum at the statutory level, but the scope and content of this right is not necessarily identical.[1043] Therefore, the required uniformity in practice is missing in a twofold manner. This shortcoming also works against the argument that the UDHR is reflective of general principles of law in the sense of Article 38 (c) CICJ.[1044] With regard to state practice in the General Assembly, Partsch has observed that 'a verbal reference to a non-binding instrument in later such instruments has no more effect than its first adoption'.[1045] And the fact that courts have mentioned the UDHR in the same context as binding human rights instruments[1046] does not reach much farther. Admittedly, one might apply the principle of ejusdem generis[1047] when interpreting such quotes, and conclude that the court regards the UDHR to be normatively on an equal footing with the other instruments contained in the enumeration. However, it must be recalled that international law does not endow courts with the power to posit norms.[1048] Therefore, quoting passages from court decisions is of little

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[1042] Schachter, 1991, p. 336.

[1043] The divergent interpretations of what constitutes 'persecution' in the sense of Art. 1 (A) (2) GC provide but one illustration of this fact. See text accompanying note 717 above.

[1044] Carillo Salcedo maintains that the norms of the UDHR reflect such principles and consequently must be regarded as binding. J. Carrillo Salcedo, 'Human Rights, Universal Declaration of (1948)', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1999, North Holland, Amsterdam), p. 303.

[1045] K. J. Partsch, 'Article 55 (c)', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1994, OUP, Oxford), p. 783.

[1046] See e.g. the following passage from the Tehran Hostage Case: 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is manifestly incompatible with the principles of the Charter of the United Nations as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'. *Case concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Rep., 1980, 3 at 42.

[1047] 'In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.' H. C. Black, *Black's Law Dictionary* (1979, West Publishing Company, St. Paul), p. 464.

[1048] This is clear from Art. 38 SICJ.

help, as long as they fail to produce convincing material arguments for the binding nature of the UDHR.

Taking a different approach, the UDHR may be regarded as an authoritative specification of the obligation to respect and observe human rights contained in Article 55 (c) UNC.[1049] As the Member States have pledged in Article 56 UNC to take joint and separate action in co-operation with the UN for the achievement of the purposes set out in Article 55, one might argue that this pledge would cover the catalogue of rights set out in the UDHR. The UDHR as such would remain non-binding, but its content would be binding upon UN Member States according to the terms of the UNC. However, this position has been met with strong counter-arguments. The purpose of promoting universal respect for human rights enunciated in Article 55 (c) UNC is too unspecified to qualify as a legal norm and should rather be regarded as a programme for further action. The sole exception would be the prohibition of discrimination integrated in that provision, which is regarded as a binding legal norm.[1050] However, non-discrimination is not at stake here. Moreover, to be convincing, the linkage between the UDHR and Article 55 (c) must find support in state practice. On the level of single states, this brings us back to the problem of the lack of uniformity expounded in the preceding paragraph. On the level of the United Nations Economic and Social Council, such practice only covers gross and systematic violations of human rights. Therefore, the normative content of the UDHR as a whole boils down to a prohibition of gross and systematic violations of human rights in general international law.[1051] Given the high level of abstraction as well as the considerable threshold inherent in the terms 'gross' and 'systematic', this norm has no direct import on our questions.

With regard to the second position, it would be necessary to embark on an assessment of the normative quality of Article 14 UDHR. On the

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[1049] For a similar, albeit less specified approach, see L. B. Sohn, 'The New International Law: Protection of the Rights of Individuals rather than States', 32 *Am.U.L.Rev* 16 (1982), and Carrillo Salcedo, 1999, p. 303.

[1050] K. J. Partsch, 'Human Rights in General', in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice* (1995, Martinus Nijhoff Publishers, Dordrecht/London/Boston), p. 606, mn 14, referring to *Advisory Opinion on Namibia*, ICJ Reports 1971, 16 (57).

[1051] Partsch, 1995, p. 609, mn 30. For an account on the practice in ECOSOC, see K. J. Partsch, 'Article 68', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1994, OUP, Oxford), pp. 890–2.

understanding that Article 14 UDHR is something else than just a positive formulation of Article 33 GC[1052] and exceeds the normative content of the latter, there is no basis for such a finding. Neither a homogeneous state practice nor a corresponding opinio juris can be made out. This explains why the terms of Article 14 UDHR are missing in the list of customary human rights norms that doctrinal writers have compiled.[1053]

To conclude, it has become clear that neither the UDHR generally, nor the specific content of Article 14 UDHR possess the quality of binding international law.[1054] In keeping with the methodology outlined in the first chapter of this work, we shall focus on binding norms. Therefore, Article 14 UDHR must be excluded from the normative base underlying this work.

9.1.2 Express Prohibitions of Refoulement in Human Rights Law

9.1.2.1 *The 1951 Refugee Convention*

Undisputedly, the prohibition of refoulement is the centrepiece of international refugee law. Its most important manifestation is the wording of Article 33 of the 1951 Refugee Convention[1055], binding not only upon the State Parties to that instrument, but also to those who have ratified the 1967 New York Protocol.[1056] Article 33 GC is phrased as follows:

[1052] See chapter 9.1.2.1 below.

[1053] See inter alia American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, para 702. For a discussion of the 'listing' of customary human rights norms, see Schachter, 1991, pp. 338–42.

[1054] This does not deprive the UDHR of its possible relevance for the interpretation of binding norms.

[1055] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

[1056] See Art. 1 (1) of the New York Protocol: 'The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention [on the Status of Refugees, GN] to refugees as hereinafter defined'. A provision similar to Art. 33 GC is contained in Art. 10 of the Agreement on Refugee Seamen. 'No refugee seaman shall be forced, as far as it is in the power of the Contracting Parties, to stay on board a ship which is bound for a port, or is due to sail through waters, where he has well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.' The agreement does not contain an equivalent to Article 33 (2) GC.

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

It is clear, though, that the prohibition is not an absolute one. Paragraph 2 of Article 33 GC singles out a group of persons to which the benefit of non-refoulement is denied, even though they live up to the requirements set out in the refugee definition in Article 1 (A) (2) GC and are not excluded under Article 1 (F) GC. The wording of this paragraph is vague in a threefold manner. It is by no means clear when a person is to be regarded as a 'danger to the security' or a 'danger to the community' of a potential host country. The phrases 'reasonable grounds' and 'particularly serious crimes' beg further questions. Moreover, it is not quite clear which cases Article 33 (2) GC covers beyond the scope of Article 1 (F) GC.

It should be noted that the 1957 Agreement relating to Refugee Seamen[1057] and the 1967 Protocol relating to the Status of Refugees[1058] also feature a prohibition of refoulement. The pivotal importance of the prohibition of refoulement has been regularly reaffirmed by the General Assembly and by the UNHCR Executive Committee. Claims have been made that the prohibition of refoulement is also a part of customary international law.[1059] Given the geographical scope of this work and that

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[1057] Agreement relating to Refugee Seamen of 23 November 1957, 506 UNTS 125.

[1058] Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

[1059] Affirming that the prohibition of refoulement is a norm of customary international law: Goodwin-Gill, 1996, p 167, Plender, 1988, p. 431, T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989, Clarendon Press, Oxford), pp. 22–3. Denying that the prohibition of refoulement is a norm of customary international law: A. Grahl Madsen, *The Status of Refugees in International Law,* Vol. II (1972, A.W. Sijthoff, Leiden), p. 98, W. Kälin, *Das Prinzip des Non-Refoulement. Das Verbot der Zurückweisung, Ausweisung und Auslieferung von Flüchtlingen in den Verfolgerstaat im Völkerrecht und im schweizerischen Landesrecht* (1982, Peter Lang, Bern), p. 72, For further references, see H. Maaßen, *Die Rechtsstellung des Asylbewerbers im Völkerrecht* (1997, Peter Lang, Frankfurt

all Member States of the EU are parties to the GC, there is no need to pursue this question further. In the present context, a reference to the prohibition of refoulement relates to its manifestation in treaty law.

The 1951 Refugee Convention and the 1967 New York Protocol are binding upon all states of the European Union as well as upon all the first wave of candidate countries. They are regarded as part of the *acquis communautaire*.[1060] Article 63 (1) TEC expressly prescribes that measures on asylum adopted by the Council must be in accordance with these instruments.

9.1.2.2 The 1984 CAT

Until recently, the discussion on extraterritorial protection had focused to a very large degree on the 1951 Refugee Convention. Still, the protective capacities of international law are not exhausted with that instrument. Apart from the instruments dedicated to refugee law named in the preceding section, a prohibition of refoulement is also represented in a human rights treaty of a more general *portée*. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1061] limits the right of states to remove aliens in Article 3[1062]:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Generally, the CAT outlaws torture as well as cruel, inhuman or degrading treatment or punishment. The scope of the removal provision

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am Main), p. 192 note 622.

[1060] Draft List, para. I. A. b.

[1061] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

[1062] For an excellent overview of the case law related to Art. 3 CAT, see B. Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees', 11 *IJRL* 3 (1999). Generally on Article 3 CAT: D. Weissbrodt and I. Hörtreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties', 5 *Buffalo Human Rights Law Review* (1999).

in Article 3, however, is limited to torture only. Given the fundamental character of the prohibition of torture, the CAT does not provide for derogation in states of exception. Therefore, the prohibition of removal to torture has been termed as absolute.[1063] Hence, the CAT is drafted in a more inclusive manner than the 1951 Refugee Convention.[1064]

Through a declaration under Article 22 CAT, State Parties can choose to recognise the competence of the CAT Committee 'to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention'. However, the decisions of the Committee merely possess the character of recommendations.[1065] As it stands today, a significant portion of the cases considered by the Committee revolve around the issue of extraterritorial protection under Article 3 CAT.

Considering the number of ratifications by EU Member States and first wave candidate countries, the CAT has been well received.[1066] It is in force for all states of both groupings, save for Belgium and Ireland.[1067] The competence of the CAT Committee to receive individual complaints has been recognised by 11 of the remaining 13 EU Member States (Germany and the U.K. have refrained from doing so). Among first wave candidate countries, only Estonia has chosen not to endow the CAT Committee with that competence. Finally, it should be noted that the CAT is not on the list of instruments considered to form part of the acquis.

[1063] See, e.g., Weissbrodt and Hörtreiter, 1999, p. 16; J. Suntinger, 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?', 49 *Austrian Journal of Public and International Law* (1995), p. 208; and T. Harr[1] *Das völkerrechtliche Refoulementverbot abseits der Genfer Flüchtlingskonvention* (1999, Peter Lang, Frankfurt am Main), p. 182, with further references in note 822.

[1064] As earlier noted, Art. 33 (2) GC excludes certain groups from the benefit of Art. 33 (1) GC.

[1065] Art. 22 CAT, para. 7.

[1066] Information on ratification and acceptance of monitoring competence has been gathered from the following document: Status of Ratification As of 12 April 1999, UN Doc. No. A/MISC/99 (Chairpersons Meeting), 12.04.1999.

[1067] Both countries have signed, but not yet ratified CAT.

9.1.2.3 *Other Express Prohibitions of Refoulement in Human Rights Law?*

Article 5 of the 1977 European Convention on the Suppression of Terrorism[1068] has also been qualified as a prohibition of refoulement.[1069] The article reads as follows:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

This clause represents a corollary of the prohibition of refoulement in Article 33 GC.[1070] It exempts a certain category of persons from any extradition obligation under the Convention. Article 5 does not entitle an individual, nor does it prohibit a state, to carry out extradition in the named cases. It simply obliges a state requesting extradition to accept a denial by the requested state, because the extradition request is made for persecution-related reasons. Therefore, the quoted provision is unrelated to the two basic questions this chapter deals with.

9.1.3 Express Prohibitions of Refoulement in Humanitarian Law

Humanitarian law has hitherto played a subordinate role in the analysis of state obligations towards protection seekers.[1071] An overtly rigid separation of refugee law, human rights law and humanitarian law may

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[1068] European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90.

[1069] Hartl, 1999, p. 193.

[1070] However, it should be noted that the persecutory ground of 'membership of a particular social group' is absent in the quoted provision.

[1071] In this context, one should, however, take note of Melander's proposal to structure extraterritorial protection into two areas, one based on human rights law, and the other on humanitarian law. G. Melander, *The Two Refugee Definitions* (1987, Raoul Wallenberg Institute, Lund).

underlie such neglect.[1072] Given the existence of an explicit prohibition of refoulement in one of the basic instruments of contemporary humanitarian law, this attitude should be reconsidered.

Article 45 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War[1073] states inter alia that

> In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.
>
> The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

However, this prohibition of refoulement is both narrower and wider than its successor in the 1951 Refugee Convention. It merely covers the grounds of political opinion and religious beliefs, which is less than the five grounds enumerated in Article 33 of the latter instrument. By contrast, the phrase 'may have reason to fear' seems to set a lower threshold than 'well founded fear' in the refugee definition. Notably, the prohibition of refoulement in the Fourth Convention does not introduce any exclusion or cessation clauses and has been termed as absolute.[1074]

It must be underscored, though, that the general provisions of the Fourth Convention set out a rather narrow framework for the application of its Article 45. According to Article 2 FC, this Convention is applicable in any armed conflict between two or more contracting parties. Article 4 FC stipulates that 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. However, the same provision introduces further limitations, inter alia to the effect that nationals of a state not bound by the Convention are not protected by it. As long as their state of nationality has ratified the Convention, protection seekers may benefit from the provisions of the Convention. A

[1072] For an analysis of the interrelationship between the three areas of law, see Melander, 1997.

[1073] Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 [henceforth Fourth Convention, abbreviated FC].

[1074] Pictet, 1958, p. 269.

temporal limitation is also to be taken into account: following Article 6 FC, the Convention applies from the outset of conflict until the general close of military operations. However, the final sentence of this article provides that '[p]rotected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention'.

The Kosovo conflict provides an example of how such an instrument as this might become relevant. The NATO intervention made a number of EU Member States and first wave candidate countries parties to an international armed conflict with the Federal Republic of Yugoslavia. All of the states were bound by the Fourth Convention.[1075] A number of EU Member States and first wave candidate countries were confronted with protection claims from persons fleeing Kosovo. Apart from the explicit and implicit prohibitions of refoulement named elsewhere in this chapter, Article 45 FC may provide an additional safeguard against return. Given the very low recognition rate for Convention refugees from the Federal Republic of Yugoslavia in Germany[1076], clarifying the impact of such an obligation would be a worthy task. The general interest of this question is not diminished by the fact that return to the Federal Republic of Yugoslavia was *practically* impossible during the conflict, as flights were banned by the UN embargo. This example goes to show that the applicability of the Fourth Convention presupposes that the Member State in which protection is sought is concurrently a party to an armed conflict falling under the Fourth Convention.

The Fourth Convention has been ratified by all Member States as well as all first wave candidate countries.[1077] Given that its thematic centre of gravity is not Justice and Home Affairs, this instrument is not part of the acquis.

[1075] Source: IHL Database, available at <http://www.icrc.org/ihl> (accessed on 24 April 00).

[1076] In 1998, the Convention Recognition Rate for Germany amounted to a mere 4.2 percent. Source: UNHCR, *Asylum Seekers and Refugees in Europe in 1998: A Statistical Assessment With A Special Emphasis on Kosovo Albanians* (March 1999, UNHCR, Geneva), p. 15.

[1077] Source: IHL Database, available at <http://www.icrc.org/ihl> (accessed on 24 April 00).

9.1.4 Implicit Prohibitions of Refoulement in Treaty Law

Apart from the comparatively straightforward prohibitions of refoulement spelt out word for word in treaty provisions, the observer is confronted with a number of norms that have been construed to *imply* a prohibition of refoulement. The basic assumption underlying such implied prohibitions of refoulement is that states are responsible for violations of human rights or humanitarian law by other actors to the extent their own action or omissions contribute to such violations. What constitutes a violation must be assessed against the background of international law obligations of the returning state.

9.1.4.1 Human Rights Law

With Article 33 GC and Article 3 CAT, international law possesses two treaty provisions prohibiting the refoulement of different groups of beneficiaries. Differently from the 1951 Refugee Convention and the CAT, the International Covenant of Civil and Political Rights of 1966[1078] and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[1079] do not contain explicit prohibitions of refoulement. However, some of the rights guaranteed by them have been construed by their treaty-monitoring bodies to protect from removal to a state where a claimant would be exposed to certain violations. In particular, norms prohibiting torture and other forms of ill-treatment have provided the base for barring removal.[1080] In other words, such norms may contain an implicit prohibition of refoulement. This prohibition could, in turn, constitute a state obligation to grant extraterritorial protection.

For the purposes of this chapter, it is sufficient to scrutinise such an interpretation is tenable. As practice is most developed with regard to the prohibition of torture and other forms of ill-treatment, we shall limit our scrutiny to these norms. In cases brought before treaty monitoring bodies,

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[1078] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

[1079] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.

[1080] With regard to the ECHR, even other human rights guaranteed by it have been invoked in a manner reminiscent of non-refoulement arguments. See chapter 11.1 below.

torture and other forms of ill-treatment have been most frequently invoked as a basis for obtaining such protection. This in no way prejudices that other human rights imply entitlement to extraterritorial protection as well. What is at stake here, however, is whether extra-territorial protection can be justified under any of the rights guaranteed in the ECHR and the ICCPR. If such a justification is within reach, it may be asked exactly where the limits of extraterritorial protection under these instruments are. We shall revert to that question in a later chapter.[1081]

The prohibition of torture and other forms of ill-treatment has been codified on an universal level in Article 7 ICCPR, stating that

> [n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[1082]

This provision leaves no room for exceptions or limitations. Even in states of emergency, no derogation may be made from Article 7 ICCPR according to Article 4 (2) ICCPR.

All EU Member States and first wave candidate countries are bound by the ICCPR.[1083] By ratifying the First Optional Protocol[1084], State Parties to the ICCPR recognise the competence of the Human Rights Committee to receive and process individual complaints regarding the rights set out in the ICCPR.[1085] In contradistinction to the judgements of the European Court of Human Rights, the decisions of the Human Rights Committee are not binding upon states.[1086] The First Optional Protocol has been ratified by all states within the two groups save for the United Kingdom.[1087] The ICCPR has not been included in the list of conventions forming part of the *acquis*.

[1081] See chapter 11 below.

[1082] Art. 5 UDHR is the identically worded historical predecessor of this norm.

[1083] Information on ratification and acceptance of monitoring competence has been gathered from the following document: Status of Ratification As of 12 April 1999, UN Doc. No. A/MISC/99 (Chairpersons Meeting), 12.04.1999.

[1084] First Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 302 [henceforth First Optional Protocol], Art. 1.

[1085] Art. 1 First Optional Protocol.

[1086] Art. 5 (4) First Optional Protocol.

[1087] Information on ratification and acceptance of monitoring competence has been gathered from the following document: Status of Ratification As of 12 April 1999, UN Doc. No. A/MISC/99 (Chairpersons Meeting), 12.04.1999.

Omitting the word 'cruel' contained in Article 7 ICCPR, Article 3 ECHR states that

> [n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 ECHR makes no provision for exceptions. Furthermore, Article 15 (2) ECHR states that no derogation from this norm in time of war or other public emergency is permitted, which has brought some commentators to qualify the protection under Article 3 ECHR as absolute.[1088] Accordingly, it would be misplaced to weigh the interest of an applicant against the public interest in removal cases under Article 3 ECHR.[1089]

All Member States of the European Union and all Candidate Countries are bound by the ECHR. This instrument forms part of the *acquis communautaire*[1090], and Article 6 (2) TEU provides that 'the Union shall

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[1088] A comprehensive discussion on the absolute character of Art. 3 and the inherent prohibition of refoulement can be found with Hartl, 1999, pp. 96–103; and R. Alleweldt, *Schutz vor Abschiebung bei drohender Folter oder unmenschlicher oder erniedrigender Behandlung oder Strafe : Refoulement-Verbote im Völkerrecht und im deutschen Recht unter besonderer Berücksichtigung von Artikel 3 der Europäischen Menschenrechtskonvention und Artikel 1 des Grundgesetzes* (1996, Springer, Berlin), p. 56 ff. Doubts on the adequacy of terming protection as 'absolute' have been raised by M. K. Addo and N. Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?', 9 *EJIL* 3 (1998). See also the ambitious argumentation in S. Zühlke and J-C Pastille, 'Extradition and the European Convention—Soering Revisited', 59 *ZaöRV* 3 (1999), pp. 759–66, questioning to what extent 'absoluteness' is a helpful concept when scrutinising the effects of rights enshrined in Section I ECHR and denying that the absolute nature of a right is an indicator of superiority.

[1089] Accord: N. Mole, 'Problems Raised by Certain Aspects of the Present Situation of Refugees from the Standpoint of the European Convention on Human Rights', in UNHCR, *The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons* (1996, UNHCR, Geneva), p. 40, analysing inter alia the Commission Report in the *Chahal* case. However, a weighing of public interests against the applicant's interests is precisely what a number of dissenting opinions in ECtHR cases propose: ECtHR, *Vilvarajah and Others vs. the U.K.*, 30 November 1991, Series A 215 [henceforth Vilvarajah], Dissenting opinion of Judge Russo; and ECtHR, *Chahal vs. the U.K.*, 15 November 1996, Reports 1996-V [henceforth Chahal], Joint Partly Dissenting Opinon of Judges Gölcüklü, Matscher, Freeland, Baka, Totchev, Bonnici and Levits. See also Hartl, 1999, p. 102, suggesting that there should be no *weighing* of interests, while pointing out that the public interest may impact the *interpretation* of the concept 'inhuman and degrading treatment'.

[1090] Draft List, para. XII. A. b.

respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

A special feature of the ECHR is its powerful monitoring mechanism. Earlier, State Parties to the ECHR could choose to endow the Court with the competence to receive individual applications by making a declaration to that effect. After the restructuring of the Convention's control machinery through Protocol No. 11[1091], acceptance of that competence has become an integral and mandatory part of the Convention.[1092] Finally, State Parties have taken upon themselves an obligation to follow the judgements issued by the European Court of Human Rights. [1093] As we shall see, the European monitoring bodies have played a critical role in developing the inherent prohibition of refoulement in human rights norms.

9.1.4.2 *Humanitarian Law*

Are there any implicit prohibitions of refoulement in humanitarian law? Marx has suggested that Article 3 common to the 1949 Geneva Conventions creates 'an immediate prohibition of refoulement for victims of civil war'[1094] over and above its obligations to the parties to the conflict. His argument draws on the 1986 ICJ Decision in the *Nicaragua* case, where the Court had to pronounce itself on the question whether the

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[1091] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, 11 May 1994, ETS No. 155.

[1092] See Art. 34 of the 11th Protocol: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties set forth in the Convention or in the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right'.

[1093] Art. 46 of the 11th Protocol.

[1094] R. Marx, 'Völkervertragsrechtliche Abschiebungshindernisse für Flüchtlinge', in K. Barwig (ed.), *Ausweisung im demokratischen Rechtsstaat* (1996, Nomos, Baden-Baden), at 299. Accord: M. Kjærum, 'Article 14', in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (1999, Martinus Nijhoff Publishers, The Hague), p. 285.

United States had violated humanitarian law by publishing a manual on guerrilla warfare and spreading it to the insurgent 'Contras' forces.[1095]

The cornerstone of this argumentation is the content of a provision included in each of the four 1949 Geneva Conventions[1096], identically worded, allotted the same article number and therefore known as Common Article 3. This norm spells out basic protective obligations of State Parties bound by any of the four 1949 Geneva Conventions in situations of non-international armed conflicts:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[1095] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14 [hereinafter Nicaragua Case].

[1096] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287 [henceforth the 1949 Geneva Conventions].

> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Due to a reservation by the United States that excluded multilateral treaties from the jurisdiction of the ICJ, the Court was prevented from considering the responsibility of the United States under the—multilateral—1949 Geneva Conventions. Instead, it had to resort to a general principle of humanitarian law, consuming the content of Common Article 3, to pronounce itself on this matter. In the next step, it considered Common Article 3 to be an 'elementary standard of humanity' and, due to its minimum character, applicable in non-international and international conflicts alike. Further, the Court considered the United States to be party to an international conflict with Nicaragua, which would make the general principle of humanitarian law related to earlier applicable.[1097]

Subsequently, the Court found by fourteen votes to one that, under general principles of humanitarian law, the United States was bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of common Article 3 of the four Geneva Conventions of 12 August 1949. The manual on 'Psychological Operations in Guerrilla Warfare', whose publication and dissemination was the responsibility of the United States, advises certain acts which are to be regarded as contrary to that article.[1098]

Liberating himself from the actual reach of the judgement, Marx claims that Common Article 3 not only obliges parties to the conflict, but also 'any conceivable bearer of responsibility under international law' to refrain from immediate and mediated violations of its basic rights.[1099] If

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[1097] *Nicaragua Case*, para. 219.

[1098] *Nicaragua Case*, paras 219 and 292.

[1099] 'Diese Schutznorm kommt aber nicht erst bei der Unterstützung eines Konfliktbeteiligten zur Anwendung. Vielmehr will sie die unbeteiligte Zivilbevölkerung vor jeder unmittelbaren und mittelbaren Verletzung ihrer grundlegenden Rechte durch jeden denkbaren Träger völkerrechtlicher Verpflichtungen schützen.' Marx, 1996, p. 300.

this were the case, Common Article 3 would possess a given place in the emerging refugee law of the EU. All Member States and first wave candidate countries have ratified the 1949 Geneva Conventions and are bound by Common Article 3[1100]; besides, its content would also be binding on them as part of the general principles of humanitarian law.[1101] However, taking account of its greater transparency, the treaty obligation shall be looked into in the subsequent discussion.

Marx's line of argument is not convincing, as it runs counter to the very terms of Common Article 3. It emanates from the first sentence of Common Article 3 that this provision merely obliges states party to the conflict, and so do the general principles of humanitarian law alluded to by the Court.[1102] To be sure, reading a prohibition of refoulement by states not parties to the conflict into Common Article 3 would amount to an interpretation contra legem.[1103] The methodology of interpretation enshrined in the Vienna Convention and expounded at some length below[1104] does not permit us to pursue an interpretative operation further when clarity has been attained by studying the ordinary meaning of the terms of the provision in question.[1105] And the ordinary meaning of the terms used in Common Article 3 entail its non-applicability to others than parties to the conflict.

The *Nicaragua* Case does not support Marx's argument either. The Court's conclusion was explicitly reached on the premise that the United States was party to an international armed conflict.[1106] Thus, the Court did not expand the personal scope of Common Article 3 or its counterpart among the general principles of humanitarian law. Neither is it

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[1100] Source: IHL Database, available at < http://www.icrc.org/ihl > (accessed on 24 April 00).

[1101] In some domestic legal orders, this offers the advantage of direct applicability.

[1102] In the *Nicaragua Case*, there is no indication whatsoever that the Court considers the general principles of humanitarian law consuming the content of Common Article 3 to apply to non-parties to the conflict as well.

[1103] This argument also strikes against Kjærum's support for a prohibition of refoulement implied in Common Article 3, which he bases partly on the provisions on the prosecution of war criminals, partly on an analogy to the case law under Article 3 ECHR. Kjærum, 1999, p. 285. These analogies can hardly alter the wording of Common Article 3. Therefore, together with the one taken by Marx, his position is untenable.

[1104] See chapter 9.3 below.

[1105] See Article 31 (4) VTC and text accompanying note 1121 below.

[1106] *Nicaragua Case*, para. 219.

conceivable that a prohibition of refoulement would flow from other general principles of humanitarian law, as the personal scope of those is restricted to parties to the conflict.[1107]

Contrary to Marx's claim, the personal scope of Common Article 3 does not comprise all conceivable subjects of international law. The implicit prohibition of refoulement inherent in Common Article 3 would only oblige a host state which is party to the conflict.

This reduces the practical relevance of such a prohibition to a great extent. Properly speaking, it would offer protection to internally displaced persons. However, given that internally displaced persons per definition fail to have crossed an international boundary, this category falls outside the scope of the present work. Therefore, Common Article 3 shall not be included in the normative base. Nonetheless, the idea behind Marx's approach remains useful and merits further scrutiny.

We would propose another approach that offers the advantage of greater applicability in practice. We shall seek to expound whether norms of humanitarian treaty law applicable in international conflicts contain implicit prohibitions of refoulement.

The Fourth Convention contains a catalogue of rights in Part III, Section I, which protected persons are entitled to in the territories of the parties to the conflict as well as in occupied territories. This catalogue hosts inter alia the explicit prohibition of refoulement in Article 45 FC, already dealt with above. Here, we shall scrutinise Article 32 FC, obliging the parties to respect the life and physical integrity of protected persons:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

[1107] Compare the allusion to 'obligations which the *Parties to the conflict* shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity and the dictates of public conscience' in Convention I, Art. 63, Convention II, Art. 62, Convention III, Art. 142, Convention IV, Art. 158 (emphasis added).

Precisely as in Article 3 ECHR and Article 7 ICCPR, this article might host an implicit prohibition of refoulement. With due regard to Article 4 FC, a protection seeker is a protected person in the hand of a contracting party. Her return by the latter to a conflict zone could very well constitute a 'measure of such a character as to cause the physical suffering or extermination' of the said person. Considering the threat facing the returnee, the forcible implementation of return by civilian or military agents of the returning state could constitute a 'measure of brutality' in the sense of the second sentence.

If Article 32 FC indeed hosts an implicit prohibition of refoulement, its scope of application is comparably narrow. Due to political reasons, a party to the conflict might not even wish to return persons potentially coming under its protection. Moreover, it would overlap to a certain extent with other explicit and implicit prohibitions of refoulement. Nonetheless, there is a theoretical interest in clarifying the matter, and it cannot be excluded that a protection seeker would find herself outside all conceivable protection categories, were it not for Article 32 FC. Therefore, it is reasonable to include this provision in the normative base underlying the ensuing inquiry.

9.2 Access to Territory

Which norms are prima facie relevant for answering the second question regarding access to protection? First, it must be recalled that the explicit and implicit prohibitions of refoulement dealt with above need to be re-examined in the light of the second question. After all, a state obligation to protect could embrace an obligation to allow access as well. Second, those norms of international human rights law which deal specifically with migration also need to be included in the normative base. Both the ICCPR and a Protocol to the ECHR contain pertinent articles that shall be presented in detail below.

9.2.1 The ICCPR

Article 12 (2), (3) and (4) ICCPR deals with the transgression of state borders. More specifically, it enshrines a carefully delimited right to international freedom of movement:

> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

To be precise, this provision contains two rights: entitlement to emigration from any country, including one's own, and entitlement to entry into one's own country. On a matter-of-fact basis, it can be stated that Article 12 is asymmetrical in that the right to emigrate is wider than the right to immigrate. Neither this provision, nor any other contained in the ICCPR, makes mention of a right to immigrate into states which are not one's 'own country'. Compared to its predecessors in the UDHR[1108], Article 12 ICCPR specifies the conditions for restricting the right to leave, and qualifies the right to enter one's own country by prohibiting *arbitrary* deprivation.

9.2.2 The Fourth Protocol to the ECHR

Moving from the ICCPR to the regional system of human rights protection in Europe, we find that the right to leave and the right to entry are similarly framed. The 1963 Fourth Protocol to the ECHR[1109] provides for both rights under the European system. While Article 2 (2) lays down a right to leave which is identically worded to the corresponding right in Article 12 (2) ICCPR, the clause on restrictions in Article 2 (3) of the Fourth Protocol is worded in a slightly different manner:

[1108] Article 13 (2) UDHR is worded as follows: 'Everyone has the right to leave any country, including his own, and to return to his country'. This provision is subject to the limitations in Arts 29 and 30 UDHR.

[1109] Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16 September 1963, ETS No. 46 [hereinafter the Fourth Protocol].

> 2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of "ordre public", for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Compared to Article 12 (4) ICCPR, the right to entry is moulded into more specific terms in the Fourth Protocol. Its Article 3 (4) explicitly limits this right to nationals:

> No one shall be deprived of the right to enter the territory of the State of which he is a national.

However, its protective ambit is not limited to the arbitrary deprivation of the right to entry, but to any such deprivation. In this regard, the Fourth Protocol is more favourable than the ICCPR.

With the exception of Spain and the United Kingdom, all EU Member States have ratified the Fourth Protocol. It is regarded as part of the acquis, and the Council has classified it as an instrument which 'States applying to join the European Union should endeavour to become party of'.[1110] Already now, all first wave candidate countries are bound by the Fourth Protocol. Individuals can seize the European Court of Human Rights with complaints against those states that are parties to it.[1111]

9.3 Methodology of Interpretation

In the next move, it has to be clarified which norms of interpretation shall be used in establishing the precise content of the provisions singled out above. Articles 31–3 of the 1969 Vienna Convention on the Law of Treaties[1112] provide for the interpretation of treaties, which is at stake here. There is no doubt that the Vienna Convention, according to its Article 4, is not to be applied retroactively. This bars direct recourse to its

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[1110] Draft List, para. XII. D.

[1111] See Art. 34 of the 11th Protocol to the ECHR.

[1112] Vienna Convention on the Law of Treaties, 24 May 1969, 1155 UNTS 331.

interpretative norms when grappling with the 1949 Fourth Convention, the 1950 ECHR, its 1963 Fourth Protocol, the 1951 Refugee Convention, the 1966 ICCPR and the 1966 First Protocol. However, it is widely agreed that Articles 31–3 VTC are reflective of customary international law on the interpretation of treaties, valid at least throughout the post-war period at stake here.[1113] As an example, the Human Rights Committee has explicitly referred to the Vienna Convention when interpreting the ICCPR[1114], and so did the ECtHR when construing the ECHR[1115]. Even the ICJ has confirmed that the principles in Articles 31 and 32 VTC reflect customary international law.[1116] For practical reasons, we shall refer to Articles 31–3 VTC even when interpreting instruments concluded before its entry into force. Such references shall be understood as alluding to the corresponding norms in customary international law.

It should be underscored that the rules on interpretation contained in Articles 31–3 VTC are binding treaty law for the parties.[1117] The vast majority of Member States and first wave candidate countries have ratified this instrument.[1118] Those who have not are bound to apply identical rules of customary international law.[1119] Accordingly, neither Member States nor first wave candidate countries can choose freely which standards to apply to the interpretation of their international treaty obligations; rather, they are duty-bound to revert to the content of Articles 31–3 VTC.

Article 31 VTC provides for a 'General Rule of Interpretation'. Its first paragraph merits quoting in full:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[1113] I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984, Manchester University Press, Manchester), pp. 19 and 153.

[1114] Human Rights Committee, *Alberta Union v. Canada*, B118/1982, para. 6.3.

[1115] ECtHR, *Golder Case*, 21 February 1975, Vol. A 18, p. 14.

[1116] ICJ, *Case Concerning the Arbitral Award of July 21*, 1989, Judgment of 12 November 1991, ICJ Reports 1991, p. 53, at pp. 69–72.

[1117] For an exploration on the bindingness of rules of interpretation, see Bernhardt, 1992, p. 1418.

[1118] Save for France, Ireland and Portugal, all Member States are bound by the VTC. Among first wave candidate countries, only Malta is not bound by the VTC. Ratification data as of 28 June 1999, contained in UNHCR Refworld database, July 1999 edition.

[1119] Bernhardt, 1992, p. 1418.

Article 32 VTC deals with supplementary means of interpretation and their use, while Article 33 VTC spells out rules for the interpretation of treaties authenticated in two or more languages.

But Articles 31 and 32 VTC are not merely instructing international lawyers *where* to look for raw material informing their interpretation, but also *in what order and under which conditions* to use such material. Based on a systematic analysis of both provisions, Linderfalk has identified a hierarchical methodology of interpretative operations.[1120] The methodology inherent in the named standards stretches over a maximum of three stages. In the first stage, the interpreter shall establish the ordinary meaning to be given to the terms of a treaty. Where this operation leads to a clear result, interpretation has come to an end, and no further action is necessary.[1121] If and only if such clarity is not attained, the interpreter shall proceed to the second stage, drawing on the context as well as the object and purpose of the treaty to dissolve the ambiguity resting in the 'ordinary meaning'.[1122] Where the content of a provision is clarified in the second stage, interpretation has come to an end. If and only if such clarity is not attained, the interpreter shall proceed to a third stage, taking recourse to supplementary means of interpretation along the provisions of Article 32 VTC.[1123] Among other data, the third stage makes the *travaux* available to the interpreter.

It is quite obvious that the notion of clarity plays a prominent role in the correct application of Articles 31 and 32 VTC. Stating that the matter is clear may stop interpretation from proceeding to a subsequent stage, and thus bar additional data from being admitted to the interpretative process. Stating that the outcome of interpretation is still ambiguous

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[1120] U. Linderfalk, Om tolkning av traktater (2000, unpublished dissertation manuscript, on file with the author).

[1121] Compare Art. 31 (4) VTC, shifting the burden of proof to those who argue for an interpretation beyond 'the ordinary meaning' of the terms of the treaty. M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', *Receuil des Cours* 151[III] (1976), p. 28. This is precisely where the border between the first and the second step is located.

[1122] For an express confirmation of this step-by-step method, see ICJ, *Case Concerning the Arbitral Award of July 21*, 1989, Judgment of 12 November 1991, ICJ Reports 1991, p. 53, at pp. 69–72, summarising some of its earlier dicta on interpretation.

[1123] Yasseen, 1976, pp. 78–82, underscoring that recourse to the supplementary means of interpretation is to be considered as a distinct step in the interpretative operation. See also YILC 1966, II, p. 219. However, it should be noted that Art. 32 VTC may also be used to *confirm* the result of an interpretative operation under the first two stages.

opens the gates to further evidence of meaning and intent, evidence that may give interpretation a wholly new direction. The Vienna Convention does not define clarity, which leaves the international lawyer with a subjective margin.

Mindful of the order prescribed by the VTC, we shall now identify norms for which the 'ordinary meaning to be given to the terms of the treaty' is not enough to establish the content of state obligations vis-à-vis protection seekers. Going through those parts of the normative base singled out as binding above, we shall identify a group of hard cases, which will be taken to the second and, where necessary, even the third stage in chapter 10.

9.4 Identifying Hard Cases

In the following, it shall be established whether the questions on protection and access can be answered by interpreting the ordinary meaning to be given to the terms of the treaty norms in question.

9.4.1 Protection: Implicit Prohibitions of Refoulement

The first question was whether EU Member States are under an obligation to grant extraterritorial protection.

All of the express prohibitions of refoulement scrutinised above are unproblematic. The wording of Article 33 GC, of Article 3 CAT and of Article 45 FC, respectively, establish that EU Member States are under an obligation to refrain from refoulement. While the precise scope of these obligations is in need of further clarification[1124], their content is sufficiently clear to answer the question quoted above: Member States are under a legal obligation to grant extraterritorial protection. In this respect, there is no need to proceed to further stages in the interpretative operation.

Different is the case of implicit prohibitions of refoulement in human rights law and humanitarian law. The question whether and to what

[1124] Among other things, the precise personal scope of these prohibitions is not clear (see inter alia chapter 12.2.2 below).

extent these norms entail an obligation to grant extraterritorial protection has yet to be answered.

9.4.1.1 Article 3 ECHR and Article 7 ICCPR

The wording of Article 3 ECHR and Article 7 ICCPR is not of much help when it comes to the issue of extraterritorial protection. The sole insight to be derived from it is the fact that no one shall be subjected to certain forms of ill-treatment.

The ambiguity of interpretation emerged clearly in *Soering*, the first landmark case on Article 3 ECHR before the European Court of Human Rights.[1125] Although *Soering* concerned extradition, it unlocked the protective potential of Article 3 ECHR for asylum as well.[1126] The issue to be decided was whether it was permissible for the U.K. to extradite a suspected murderer to the United States of America, where he faced the risk of capital punishment and placement in a specific prison wing, commonly known as 'death row'. The responding U.K. government claimed that 'it would be straining the language of Article 3 [...] intolerably to hold that by surrendering a fugitive criminal the extraditing State has "subjected" him to any treatment or punishment that he will receive following conviction and sentence in the receiving State'.[1127] This view was not shared by the Court, which apparently regarded the language of Article 3 as ambiguous. Rather, it based the applicability of that provision in extradition cases on contextual and teleological arguments.[1128] Accepting the counsel's claim that the conditions in death row indeed were inhuman, the Court concluded that extradition by the U.K. would violate Article 3 ECHR.[1129] The U.K. government, however, remained unconvinced. When the *Chahal* case[1130] came before the Commission, the Government underscored 'that, contrary to the view of

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[1125] ECtHR, *Soering vs. the U.K.*, Series A, No. 161 [henceforth Soering].

[1126] In *Cruz Varas*, the Court held that Art. 3 was applicable not only to extradition cases, but a fortiori also to expulsion cases. ECtHR, *Cruz Varas vs. Sweden*, Series A, No. 201 [henceforth Cruz Varas], para. 69.

[1127] *Soering*, para 83.

[1128] See chapter 10.1.1.1 below on the second stage of interpretation.

[1129] Thus, in the Court's opinion, it was neither the risk of capital punishment nor that of execution, which would have made extradition a violation of the ECHR.

[1130] See text accompanying note 180 above.

the Court in the *Soering* and *Vilvarajah* cases, Article 3 [...] of the Convention has no extra-territorial effect, but should be construed as a prohibition on a Member State exposing persons within its own jurisdiction to torture or to inhuman or degrading treatment'.[1131]

Tracking down the ordinary meaning of 'to subject' and 'a soumettre' respectively[1132] does not solve the problem. The former means 'to cause to undergo or experience some action or treatment'[1133], while the latter signifies 'exposer à un effet qu'on fait subir'[1134]. The precise nature of the causality alluded to in these explanations can hardly be established by resorting to a semantic, grammatical and pragmatic analysis, however.

To wit, the terms of Article 3 ECHR and Article 7 ICCPR fail to answer in a sufficiently clear manner whether removal to ill-treatment in a third country is covered or not. A line of reasoning built on the assumption that the removal from one country and the anticipated human rights violation in the destination country are to be seen as non-divisible will lead to an affirmative position. On the other hand, perceiving the act of removal and the act of violating human rights as two separate phenomena typically supports a denial of non-refoulement obligations inherent in both provisions. True enough, Article 3 ECHR and Article 7 ICCPR enshrine certain rights to the benefit of individuals, but it is unclear whether these entail state obligations to grant extraterritorial protection. Only by moving on to the second stage of the interpretative operation can clarity be attained.

9.4.1.2 Article 32 FC

Precisely as in the case of Article 3 ECHR and Article 7 ICCPR, the issue of causality is critical for a proper interpretation of Article 32 FC. The ordinary meaning of the phrase 'taking any measure of such a character as to cause' is open to conflicting interpretations on whether such causation

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[1131] European Commission of Human Rights, Application No. 22414/93, *The Chahal Family against the United Kingdom*, Report of the Commission (adopted on 27 June 1995), para. 92.

[1132] The English and French texts of the ECHR are equally authentic.

[1133] *Websters New World Dictionary of the American Language* (1970, The World Publishing Company, New York and Cleveland), p. 1418.

[1134] *Le Mirco-Robert* (1988, Dictionnaires le Robert, Paris).

must be direct or may also be indirect. A proper reading of the terms of Article 32 FC reveals that it only covers direct causation.

The nexus between the first and the second sentence of Article 32 FC is of particular relevance in this context. Let us have a second look at the wording of the provision:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

In the first sentence, measures causing the physical suffering or extermination of persons in the hands of a Contracting Party are prohibited. In the second sentence, the prohibited measures are exemplified. Murder, torture and the other measures explicitly named have in common that they constitute violations of the physical integrity of the protected person. In line with the interpretative principle of ejusdem generis[1135], the phrase 'any other measure of brutality' must be understood to share this characteristic. This suggests that the drafters did not wish to include the indirect causation of physical suffering or extermination in the protective scope of this provision. Otherwise, they could have easily omitted the words 'of brutality' or extended the list of examples with an explicit reference to removal situations. Therefore, Article 32 FC does not contain an implicit prohibition of refoulement. By consequence, this provision can also be discarded from our scrutiny of the question of access to territory.

[1135] See note 1047 above. The first stage of interpretation—i.e. the identification of the 'ordinary meaning' of the terms of a treaty—covers not only a lexical, but also a grammatical and pragmatic study. Ejusdem generis is all about the pragmatics of legal language.

9.4.2 Access to Territory

The second question was whether an individual entitlement to migrate in order to seek such protection exists. Migration is a composite of leaving one country and entering another. Therefore, the right to leave as well as the right to entry has to be scrutinised. Given the ever more widespread usage of control mechanisms outside state territory (e.g. pre-entry measures such as carrier sanctions combined with visa requirements), our examination of the right to entry can be further differentiated. The regulation of entry at the border of a potential host state should be dealt with separately from the regulation of entry by means of externalised control mechanisms. In the former case, it can be argued that the claimant has made contact with state territory, which usually results in a more advantageous legal position. The same is not true for a claimant visiting the embassy of a potential host country in her home country, asking for an entry visa.[1136] Here, the absence of territorial contact might impact negatively on the claimant's legal position. In the following, we shall deal with both access situations, looking into the impact of relevant provisions on access at the border and access from outside the potential host state.

9.4.2.1 The Right to Leave and the Right to Entry

With regard to emigration, the matter is clear. It emanates from the wording of Article 12 (2) and (3) ICCPR and from Article 2 (2) and (3) of the Fourth Protocol that everyone has a right to leave any country, including his own, albeit this right is subject to certain limitations. As clarity has been attained in the first stage, recourse to contextual or teleological interpretation is unnecessary.

The other side of the coin, that is, immigration, entails greater difficulties. As earlier noted, neither of the provisions in the normative base contains a reference to immigration, be it in the permissive or in the limitative sense. A universalist would conclude that a right to immigrate is a necessary corollary of the right to emigrate. Admitting the right to emigration while denying a right to immigration would be a contradiction in terms. A particularist would disagree with this notion and underscore

[1136] It should be underscored that, legally and practically, this case is different from one where diplomatic asylum is sought.

that the ICCPR represents an enumeration of rights: the wording of its provisions demarcates the reach of the entitlements contained in them. A right can not simply be deduced from the silence of the text. If the texts are silent with regard to the right to immigration it is because their drafters did not want such a right to exist. Both positions exceed the wording of the said norms and draw on a deeper conflict: whether, in case of conflict, to give prevalence to the logic of the law or the will of its drafters.

To conclude, clarity cannot be attained on the right to entry by recourse to the terms of the said treaty provisions. It is thus indispensable to involve their context and telos.

9.4.2.2 *Explicit Prohibitions of Refoulement*

A prohibition of refoulement may be merely taken as a state obligation not to remove a certain group of persons present on its territory to the country of persecution. However, the question is whether such prohibitions shall be interpreted as implying an additional obligation. The question is whether states are bound to admit persons applying for protection at the state border or from outside state territory. While non-removal entails a right to transgress an administrative border (namely to be admitted to the state community, although in a minimalist sense), non-rejection would entail a right to transgress a physical border as well. If non-rejection is a legal corollary of the prohibition of refoulement, Article 33 GC, Article 3 CAT and Article 45 FC would contain an implicit right to entry for their beneficiaries.

It is clear, though, that the wording of all three provisions does not allow for deducing a right to entry in the absence of territorial contact with the potential host state. In other words, a person demanding an entry visa at the embassy of a Contracting Party cannot invoke the said norms. In such cases, one cannot speak of expulsion, return, refoulement or transfer 'to the frontier of territories'[1137] or 'to another State'[1138] or 'to a country'[1139] from which the specified threats originate.

[1137] Art. 33 GC.

[1138] Art. 3 CAT.

[1139] Art. 45 FC.

The ambiguity of all the above provisions is limited to cases where a person presents herself at the border of the territory of a Contracting Party. An inclusive reading would be based on the understanding that such a person has already left the territory from which a pertinent threat emanates. Therefore, denying entry to the territory of the Contracting Party would constitute return 'to the frontiers of' such territories or 'to another State' or transfer 'to a country' hosting the specific threat. An exclusive reading would propose that a person who is present at the border has neither left nor entered a territory. Therefore, it would be wrong to call the denial of entry a form of return. Since Article 33 GC, Article 3 CAT and Article 45 FC only have a bearing on return, such a person would fall outside their protective scope.

With regard to rejection at the border, we note that the terminological couplet 'return ("refouler")' is used in both Article 33 GC and Article 3 CAT. This exposes a literal interpretation to a problematic tension. The ordinary meaning of the English term 'return' normally excludes rejection at the border[1140], while the French term 'refouler' precisely includes such rejection.[1141] In short, this is not a case where the interpretative rule of Article 33 (4) VTC—dealing with divergences of meaning between the authentic language versions of one and the same treaty text—applies. [1142] In the present case, the divergence of meaning stems from one and the same language version, namely the English one, which happens to feature a French term.

The linkage between the English and the French term is not easily understood. If the drafters had perceived both terms as congruent, why was it necessary to add the French term to the English version of the text? If the drafters were conscious of the difference in meaning, why did they

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[1140] Following Webster's, the most appropriate connotation in the present context would be 'to bring, send, or put back to a former or proper place'. Webster's New World Dictionary of the American Language, 1970.

[1141] Davy refers to the following explanation given in the Grand dictionnaire Larousse VIII: '*Refouler qqn, un groupe* [...] les repousser, les faire reculer par la force ou les empêcher de passer qqpart, de pénétrer dans un lieu et notamment dans un pays; chasser [...] *Refouler des immigrants à la frontière*'. U. Davy, *Asyl und internationales Flüchtlingrecht, Band I: Völkerrechtlicher Rahmen* (1996, Verlag Österreich, Wien), p. 104, note 55.

[1142] Art. 33 (4) VTC reads: 'Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.

refrain from clarifying matters in the English language, e.g. by expressly including rejection at the border among the listing of prohibited acts?

Instead of 'return' or 'refouler', the Fourth Convention uses the verb 'to transfer'. This term denotes 'to convey from one person, place, or situation to another'.[1143] A person rejected at the border of a certain state is actually moved over from the jurisdiction of this state to that of another one. Therefore, it could be argued that the prohibition of transfer includes rejection at the border. On the other hand, the term is less precise than refoulement, and the practice of rejection lies at the fringes of its ordinary meaning.

Regarding all of the three named instruments, the mere wording of the provisions does not allow for a clear-cut interpretation. Therefore, it is indispensable to move to the second stage.

9.4.2.3 *Implicit Right to Access*

In addition to the scrutiny of explicit prohibitions of refoulement, it may be asked whether Article 3 ECHR, Article 7 ICCPR and Article 32 FC protect a claimant not only inside the territory, but also at the borders of a Contracting State. Apart from border situations, it needs to be assessed whether both provisions apply to persons neither *within* the territory nor *at* the border of a potential host state. In contrast to both Article 3 CAT and Article 33 GC, nothing in the wording of Article 3 ECHR, Article 7 ICCPR and Article 32 FC precludes that they protect persons attempting to avert the risk of ill-treatment by demanding admission at the border, or an entry visa at the embassy of a Contracting Party. If one concedes that the latter provisions indeed represent an individual entitlement to extraterritorial protection, it is fully arguable that they imply a right to entry as well. The very fact that such a right needs to be *derived* from the wording of the said provisions makes it contestable, however. A particularist interpreter would claim that the silence of the ECHR, the ICCPR and the FC with regard to refoulement is proof enough that their provisions were never intended to give rise to extraterritorial effects. The universalist interpreter would argue the opposite, pointing to the fact that a broad interpretation maximises the protection with which both instruments are tasked. Both a universalist and a particularist

[1143] Websters New World Dictionary of the American Language, 1970.

interpretation go beyond the terms of Article 3 ECHR, Article 7 ICCPR and Article 32 FC. Therefore, the double ambiguity of these provisions with regard to the right to entry cannot be solved in the first stage of the interpretative operation.

9.4.3 Interim Conclusion on the First Stage

In all, focusing on the 'ordinary meaning of the terms' of relevant provisions contained in the normative base did not yield full clarity. Regarding the issue of protection, it could be clarified that Article 33 GC, Article 3 CAT and Article 45 FC oblige states to refrain from refoulement. Nonetheless, it remains unclear whether Article 3 ECHR, Article 7 ICCPR and Article 32 FC cover situations where the threat of violation is situated outside the territory of a potential host state.

Regarding the issue of access, it could be clarified that international law endows the individual with a right to leave. It could not be established whether the silence on a corresponding right to entry shall be construed in a permissive or a prohibitive manner. This ambiguity is reflected in the interpretation of Article 33 GC, Article 3 CAT, Article 3 ECHR, Article 7 ICCPR and Articles 32 and 45 FC. It is fully possible to argue—and to contest—that the wording of these provisions allows for deriving punctual rights to access. However, an analysis of the terms of Article 33 GC, Article 3 CAT and Article 45 FC could exclude their applicability outside the territory and beyond the border area of a potential host state.

For ease of understanding, the effect of the claimant's location on the applicability of these norms is displayed in Table 6 below. Evidently, the entry 'arguable' dominates at this stage of reasoning; this illustrates the ambiguity of the 'ordinary meaning' of the terms used in the norms scrutinised here.

	Claimant is situated within the territory of a potential host state	Claimant is situated at the border of a potential host state	Claimant is situated elsewhere
Art. 33 GC	Yes	Arguable	No
Art. 3 CAT	Yes	Arguable	No
Art. 45 FC	Yes	Arguable	No
Art. 3 ECHR	Arguable	Arguable	Arguable
Art. 7 ICCPR	Arguable	Arguable	Arguable
Art. 32 FC	No	No	No

Table 6: Applicability ratione loci of Selected Norms in Relation to a Potential Host State. Results of the First Stage.

10 Interpreting Hard Cases

THE LAST CHAPTER HAS LEFT US with a series of interpretative questions related to extraterritorial protection. The present chapter has the task of reducing the number of ambiguous outcomes as far as possible with the assistance of the interpretative norms in the Vienna Convention. In the first stage, the methodology inherent in Articles 31–2 VTC compelled us to regard the terms of each provision separately, admitting only a limited set of data. The second stage, with which this chapter begins, extends the scope of the interpretative operation, and complements the analysis of the ordinary meaning with an examination of, first, the context and, second, the object and purpose. Article 31 (2) VTC delimits what shall be regarded as the context of a treaty, and Article 31 (3) VTC enumerates what shall be taken into account 'together with the context'. What is to be understood by the 'object and purpose' is not developed further in the Vienna Convention, however. With the second stage, it is clear that we are beginning to shift from the sphere of legal-technical arguments to that of qualitative argumentation.

Provided that the second stage fails to produce clear outcomes, the interpreter may resort to a third stage. A non-exhaustive enumeration of

the data which may be used in the third stage is contained in Article 32 VTC. Among them, we find the *travaux préparatoires*.

The rationale of the second and third stages is to resolve the conflict in interpretation persisting after the first stage. However, as pointed out earlier, the possibility remains that the interpretative divide will become more profound instead. This is where a conflict is transposed from a qualitative to a meta-legal level.

10.1 Protection: Implicit Prohibitions of Refoulement

Recalling our earlier reflections on the terms of Article 3 ECHR and Article 7 ICCPR, the question of how the term 'subjected' in each of these prohibitions of ill-treatment should be interpreted became unavoidable. The term could be understood to denote either 'subjected on the territory of the Contracting Party' or 'subjected on the territory of the Contracting Party or elsewhere'.

10.1.1 Article 3 ECHR

10.1.1.1 The Reasoning of the European Organs

As clarified earlier, the European organs have chosen the latter option. In constant case-law, the Court has stated that Article 3 ECHR is applicable in the context of removal.[1144] More specifically, this provision is violated

[1144] For a recent and carefully argued analysis of the case law of the European organs, see S. Karagiannis, 'Expulsion des étrangers et mauvais traitements imputables à l'état de destination ou à des particuliers', 10 *Rev.trim.dr.h.* 37 (1999). For general overviews of non-refoulement provisions in human rights law, including the case law under the ECHR, see R. Plender and N. Mole, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments', in F. Nicholson and P. Twomey (eds), *Refugee Rights and realities: evolving international concepts and regimes* (1999, Cambridge University Press, Cambridge), pp. 81–91; T. Hartl, *Das völkerrechtliche Refoulementverbot abseits der Genfer Flüchtlingskonvention* (1999, Peter Lang, Frankfurt am Main), pp. 39–135. See also H. Fourteau, *L'application de l'article 3 de la Convention européenne des droits de l'homme dans le droit interne des États members* (1996, L.G.D.J., Paris), pp. 211–65. For a comparison between the case law of the ECHR and of the CAT Committee, see J. Suntinger, 'Article 3 ECHR', *Austrian Yearbook of International Law* (1996).

where 'substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she was returned'.[1145]

The present argumentation, elaborated by the European organs throughout decades, assumes that the decision of removal and the expected violation of human rights in a third state are indivisible. Although this assumption is universalist, we shall see that the Court was careful enough to prepare for future limitations of its stance by incorporating particularist retreat positions. In the following, we shall track the pattern of argumentation as it emanates from the reasoning of the Court.

In *Soering*, already identified as the landmark case in which extraterritorial protection under Article 3 ECHR was introduced[1146], the Court found it necessary to argue for the applicability of this provision in greater detail. We shall follow this trail of argumentation, keeping in mind that its references to extradition apply mutatis mutandis to all other forms of removal[1147] and complementing it, where necessary, with the dicta from later judgements.

Typically, the Court proceeds in eight steps, weaving together its conclusion by alternating between the affirmation of rules and the reduction of their scope. First, it acknowledges the sovereign right of states to control immigration.[1148] Second, it states that the ECHR contains no right to immigration or to asylum.[1149] These are two major affirmations, seemingly conceding to the particularist interests of the state. We may conclude that, taken in an isolated fashion, a decision to remove an alien does not contravene the Convention. However, in a third step, the Court reduces the reach of both affirmations by underscoring that the state right to control is not an absolute one. It has to be exercised with

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[1145] *Nsona v. the Netherlands*, Judgment of 28 November 1996, Reports 1996 V, para. 92, with further references.

[1146] See text accompanying note 1125 above.

[1147] A parallel reasoning was first applied in the *Cruz Varas* case, turning on the removal of an asylum seeker. *Cruz Varas*, paras 69 and 70. Compare also the principles spelt out in *Nsona*, para. 92 (b).

[1148] *Vilvarajah*, para. 102; *Nsona*, para. 92.

[1149] Ibid. For an enumeration of cases, see Council of Europe, 1984, pp. 23–4. It should be borne in mind that the same is true for the 1951 Refugee Convention.

due regard to those human rights obligations flowing from Section 1 of the ECHR. Although it represents a necessary part of the Court's argumentation, this step is not documented in *Soering* or any other case before the Court. Here, we may rely on the expressions it has found with the Commission on a large number of occasions:

> Whereas under general international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory; and whereas it is true that a right or freedom to enter the territory of States, members of the Council of Europe, is not, as such, included among the rights and freedoms guaranteed in Section I of the Convention; whereas, however, a State which signs and ratifies the European Convention of Human Rights and Fundamental Freedoms must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limit of the obligations which it has accepted under that Convention.[1150]

That is, the implementation of a decision to remove a foreigner can conflict with obligations in Section I ECHR in certain cases.[1151]

Next, the Court prepares the ground for the ensuing interpretation by adducing, fourth, a contextual and, fifth, a teleological argument.

In developing the contextual argument, the Court reverses the order of things reigning in the earlier steps: now, affirmation works for the universalist claimant, and reduction for the particularist responding state. As part of the context, the Court introduces Article 1 ECHR, which provides that 'the High Contracting Parties shall secure to everyone

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[1150] The Commission has made use of this paragraph in more than a dozen cases between the fifties and eighties. It was first used in Dec. Adm. Com Ap. 434/58, 30 June 1959, YB II, p. 354 at 372; Coll. 1. For an overview of other cases where it has been used, see Council of Europe, 1984, p. 118.

[1151] Two types of cases can lead to such a conflict. Firstly, removal may directly affect a person's human rights as enshrined in the ECHR. This could be the case if the action of removal separates him from family members in the removing country. It can also be referred to cases where a gravely ill person is exposed to transport in spite of negative consequences for her health. Such conflicts relate to circumstances within the jurisdiction and, as a rule, on the territory of the removing state. They are not relevant for the purpose of this chapter. Instead, we shall focus on the second type of case, where a violation of a right enshrined in the ECHR is anticipated to take place in the country to which a person is removed.

within their jurisdiction the rights and freedoms defined in Section I'.[1152] Now, the Court shifts the focus of argumentation: suddenly, the negative obligation of not 'subjecting' is traded off for the positive obligation of 'securing'. The importance of this exchange for the outcome of the Court's reasoning can hardly be overestimated. As if it has been frightened by its own radical universalism, the Court rushes from an affirmation of the relevance of this positive obligation to its immediate limitation:

> In particular, the engagement undertaken by a Contracting State is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.[1153]

Although the judges denied the existence of an obligation embracing the individual's future treatment in another state, they underscored again that the liberty of states was not unfettered. In the end, Contracting Parties were not absolved 'from responsibility under Article 3 [...] for all and any foreseeable consequences of extradition suffered outside their jurisdiction'.[1154] No further motivation is given, and the exact delimitation of state obligation and state freedom of action under Article 1 ECHR remains obscure. At most, the quoted passage would suggest that the level of protection is lower in a context involving extraterritorial threats than in a context involving domestic threats.[1155]

[1152] *Soering*, para. 86. See also European Commission of Human Rights, Decision of 12 March 1984, Appl. 10479/83, *Kirkwood v the United Kingdom*, D & R 37 (1984) p. 158, at p. 183.

[1153] *Soering*, para. 86.

[1154] *Soering*, para. 86.

[1155] This implies that the Court introduces a two-level hierarchy of rights under the Convention, which is not provided for by its wording. Needless to say, the erection of such a hierarchy begs theoretical as well as practical questions.

Still, the contextual argument had increased rather than resolved ambiguity: apart from the question what 'subjecting' in Article 3 ECHR means, the Court also had to take a stand on the interpretation of 'securing' in Article 1 ECHR. At this stage, the Court switched over to the teleological level. It took recourse to the special character of the ECHR as a treaty for the collective enforcement of human rights and reminded observers of the interpretative principles developed in the Court's earlier case law.

> Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective [...] In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society".[1156]

The level of abstraction is rather high in these lines, striking a single chord of affirmation. The absence of clear delimitations ratione loci should not keep the Court from meting out effective protection to claimants. And the promotional dynamics inherent in the Convention would seem to motivate an extension rather than a restriction of protection accorded under it. The ambiguity harvested in the contextual argument is converted into freedom, and the telos of the Convention suggests that this freedom should be used for the sake of universalism.

In the sixth step, the Court turns more technical again, still maintaining the theme of universalist affirmation. Article 3 ECHR is identified as absolute and, given the wording of Article 15 ECHR, non-derogable.[1157] Thus, it is identified as enshrining 'one of the fundamental values of the democratic societies making up the Council of Europe'.[1158] Although the Court does not spell it out, this provision would seem to be one of the best candidates for the promotional agenda of the Convention. In the same step, the Court tackles the issue whether the prohibition of refoulement under Article 3 CAT should be seen as lex specialis,

[1156] *Soering*, para. 87.

[1157] *Soering*, para. 88.

[1158] *Soering*, para. 88.

possessing some form of regulatory monopoly for cases of removal. This is denied by the Court: 'The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 [...] of the European Convention'.[1159] To underpin that conclusion, the Court refers to the telos of the Convention, as expressed in the preamble, and the telos of Article 3 ECHR itself.

In the seventh step, the Court formulates the problem of a traditional limitation of the Convention's protective scope. It acknowledges that it usually does not pronounce itself on potential violations of the ECHR. Reducing the scope of this reduction, it introduces an exception for cases where the suffering risked would be 'serious and irreparable'.[1160]

Finally, in the eighth and last step, the Court claims to infer the responsibility of the removing state directly from the act of the third state:

> The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[1161]

With this final affirmation of the non-divisibility of acts leading to violations of human rights, the Court has taken a clear stand for the universalist cause. However, the universalist result is derived from walking a path of particularist 'principles'. In the first and second steps, particularism is made the starting point of the whole argumentation. By denying the existence of a universalist 'principle' in the fourth step, it relegates universalism to a status of exception and keeps the particularist door open for future corrections. The same is true for the seventh step, where a particularist rule is generally upheld, but complemented once

[1159] Ibid.

[1160] *Soering*, para. 90.

[1161] *Soering*, para. 91.

more with a universalist exception. By doing so, the Court avoided tying itself to a paradigm, which would reduce its options in future cases. For the Court, straddling divergent paradigms is a rational strategy. True enough, it strikes against the predictability of outcomes. However, this cost is borne by the Contracting Parties to the ECHR and the individuals under their jurisdiction rather than the Court itself.

10.1.1.2 Two Critics of the European Organs

In the foregoing, it could be shown that the reasoning developed by the European organs fails to deliver a stringent theory on the territorial reach of the human rights enshrined in Section I of the ECHR. The path chosen by the organs to affirm the existence of state responsibility for extraterritorial violations entailed new ambiguities. Moreover, the organs limit themselves to stating the choices they made instead of giving reasons for doing so. Probably, this was a wise thing for a monitoring body to do, but it does not relieve the doctrinal writer from an obligation to search for a more conclusive and forceful interpretation.

Making recourse to the methodology of interpretation expounded above, we note that other contextual and teleological arguments can be adduced, and that the ones invoked by the European organs can be used differently. As it pleased the organs to reach a universalist outcome, and as this outcome has been praised, condoned or tacitly accepted by numerous doctrinal writers[1162], it seems appropriate to let its critics come forward.[1163]

Reichel is one of them.[1164] Proceeding in two steps, he concludes that Article 3 ECHR possesses no extraterritorial reach. First, he reformulates the problem, asking whether the legal character of action taken by one state (expulsion) can be determined by those acts of another state (torture), for which they are a causal precondition.[1165] If this is the case, international law would contain a state duty to react on other states'

[1162] For a comprehensive overview, see Maaßen, 1997, pp. 117–20.

[1163] Apart from the criticism voiced by Reichel and Maaßen, dealt with extensively below, a less elaborate critique can be found with G. H. Gornig, *Das Refoulement-Verbot im Völkerrecht* (1987, Braumüller, Wien), p. 34.

[1164] E. Reichel, *Das staatliche Asylrecht 'im Rahmen des Völkerrechts'. Zur Bedeutung des Völkerrechts für die Interpretation des deutschen Asylrechts* (1987, Duncker & Humblot, Berlin), pp. 171–80.

[1165] Reichel, 1987, pp. 173–7.

wrongful acts by refraining from any action objectively promoting such acts. This duty, professes Reichel, is not generally incorporated into international law and cannot said to be 'the rule'. Therefore, at the time of its drafting, one could not assume that Article 3 ECHR would include protection from extraterritorial threats. However, he continues, international law has developed. As evidence, he cites Article 27 of the ILC Draft Articles on State Responsibility, outlawing aid or assistance by a state to another state for the commission of an international wrongful act.[1166] Based on the *Barcelona Traction* and *Teheran Hostages* Cases, Reichel finds that the observance of fundamental legal obligations is in the interest of all states and that all states are called upon to avert the damages emanating from their violation. Given that the prohibition of torture forms part of these fundamental legal obligations, Reichel comes to the intermediary conclusion that an extensive interpretation of Article 3 ECHR would correspond to the recent developments sketched by him.

In the second step, however, Reichel approaches the problem from a different tack.[1167] As Article 5 (1) (f) ECHR allows detention for the purposes of expulsion, Reichel deduces the general permissibility of removing aliens. A reference to the prohibition of collective expulsion in Article 4 of the Fourth Protocol is taken as a sign that other forms of expulsion are allowed under the Convention. These two deductions e contrario are complemented by a historical argument. Attempts to include a right to asylum in the rights catalogue of the ECHR and its protocols failed repetitiously. Reichel names specific attempts to include a right to seek and enjoy asylum from persecution as well as a prohibition of refoulement to persecution into the second Additional Protocol to the ECHR, which failed to muster the necessary support from governments in 1961.[1168] Reichel suggests that the absence of regulation proves that the state right to expel aliens is principally unfettered. This issue is simply not regulated in the Convention, and any attempts to compensate this lacuna by analogy would raise substantial doubts.

The pattern pursued by Reichel can be described as an initial affirmation of a universalist reading followed by an affirmation of the particularist perspective through contextual and historical arguments. The latter are allowed to dominate, being considered as closer to the actual will

[1166] YILC 1980, Vol. II, Part 2, p. 30.

[1167] Reichel, 1987, pp. 177–9.

[1168] Reichel, 1987, p. 178.

of the contracting parties. However, as deductions e contrario lack precision, and the second step relies on such deductions, his conclusion suffers from a lack of compelling force. As indicated earlier, this deficiency is shared by the argumentation advanced by the Court.

Eleven years after Reichels contribution to the debate, an outright rejection of the European organ's case law under Article 3 ECHR was attempted by Maaßen, who was able to integrate the Courts judgements since the 1989 *Soering* case into his analysis. Maaßen advances three lines of argument. The first deals extensively with the issue of state responsibility.

From the outset, Maaßen makes himself a partisan of particularism by explicitly describing removal to a country where the individual is faced with a human rights violation as an act consisting of two parts. The first part consists of removal proper, which he is endowing with a 'legality as such'[1169], and the second of the violation to which the individual is exposed in the receiving country. In a footnote, he motivates this strict distinction by pointing out that both parts presuppose their own voluntary decision and, as a rule, strive separately for different goals.[1170] We shall have reason to return to this issue in some detail below.[1171]

Maaßen states that the delict of aiding another state in the assistance of an internationally wrongful act lacks a basis in treaty law or custom. Moreover, even if it existed, it would fail to apply in the case in point: drawing a parallel from German criminal law, Maaßen states that the wrongful act must have been accomplished to trigger responsibility for aiding and abetting. As the human rights violation has not taken place at the time of removal, there cannot be any state responsibility for aiding and abetting.[1172] Next, Maaßen considers whether the notion of state responsibility for dangerous activities could apply to removal cases. Claiming that removal is a neutral act per se, he excludes this notion as a basis for an extensive interpretation of Article 3 ECHR.[1173] In the final

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[1169] Maaßen, 1997, p. 121 and p. 131.

[1170] 'Daß es sich hier um verschiedene Vorgänge handelt, kann man schon daraus entnehmen, daß beide Vorgänge einen eigenen Willensentschluss benötigen und in aller Regel getrennt zu einem unterschiedlichen Ziel hinstreben.' Maaßen, 1997, p. 126, note 376.

[1171] See chapters 10.1.1.2 and 10.1.1.3 below.

[1172] Maaßen, 1997, p. 124.

[1173] Ibid.

analysis, Maaßen ties state responsibility to territorial sovereignty rather than jurisdiction, which implies another reaffirmation of the particularist perspective.[1174]

The second line of argument largely reiterates the contextual and historical arguments already expounded by Reichel, complemented by a reference to Article 1 of the Seventh Protocol.[1175] Here, Maaßen follows Reichel's model by concluding e contrario a) that the state right to expel aliens is only limited by provisions expressly dealing with that matter and b) that the absence of a right to asylum in the ECHR and its protocol implies that a right of extraterritorial protection must not be interpreted into Article 3 ECHR.

The third line of reasoning points at a number of consequences which an extensive interpretation of Article 3 ECHR would trigger.

1. Contracting States would also be obliged to admit persons claiming a risk of human rights violation in their country of origin.
2. Apart from Art. 3 ECHR, even other articles will trigger protection from refoulement.
3. Protection from refoulement cannot be limited to violations by agents of the third state, but would also cover violations by non-state agents.
4. Apart from removal, even other forms of state action entailing human rights violation by third states would lead to liability.

[1174] Maaßen, 1997, p. 126.

[1175] Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, E.T.S. No. 117. Art. 1 reads as follows:

'1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a) to submit reasons against his expulsion,

b) to have his case reviewed, and

c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.'

5. State liability would not be restricted to violations abroad, but also cover violations by private agents within the territory of the Contracting State.[1176]

According to his estimation, these consequences are devastating in the sense that they lead to an overburdening of reception states. He concludes that the Court has exceeded its competencies by endowing Article 3 ECHR with a content which the legislator—i.e. state parties to the ECHR—did not want it to have.[1177]

By comparison, Maaßen's argumentation is far less dialectical than the one pursued by Reichel, which weakens its capacities to integrate and consume opposed arguments. With Maaßen, everything flows from the initial affirmation of separated state responsibilities, enticing him to take a conservative approach to the evolving law of state responsibility. However, his insistence on the issue of state responsibility points to an interesting facet that merits further discussion.

10.1.1.3 Methodological Appraisal

At this point of the discussion, we have achieved an overview of the main arguments used by the European organs and two of its critics in what could be regarded as a debate on the proper interpretation of Article 3 ECHR. To what extent do they fit into the framework of the general rule of interpretation in the Vienna Convention? To be sure, neither the European organs nor its critics appear to be overtly concerned with following the interpretative norms of the Vienna Convention. There seems to be a consensus that the mere wording of Article 3 ECHR is insufficient to produce clarity, as all of the named discussants proceed to other means of interpretation. As shown above, this is perfectly in line with the methodology derived from the Vienna Convention.[1178] With regard to the context, all discussants refer to further articles in the ECHR, which is fully in line with Article 31 (2) VTC.

Additionally, both critics invoke rights enshrined in Protocols to the ECHR (Reichel refers to Article 4 of the Fourth Protocol; Maaßen refers

[1176] Maaßen, 1997, pp. 129–34.

[1177] Maaßen, 1997, p. 128.

[1178] See chapter 9.3 above.

additionally to Article 1 of the Seventh Protocol). However, not all parties to the ECHR are parties to the named protocols.[1179] Therefore, the Fourth and the Seventh Protocol do not represent 'rules of international law applicable in the relations *between the parties*' in the sense of Article 31 (3) (c) VTC.[1180] Furthermore, it would be hard to qualify the Protocols as 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' in the sense of Article 31 (3) (b) VTC. Even if the Protocols had qualified under the latter norm, it merits recalling that they only replicate the ambiguity of the ECHR. This runs counter to the requirement that practice establish 'the agreement of the parties regarding' the interpretation of Article 3 ECHR. Thus, the Protocols do not form part of the context of Article 3 ECHR.

By contrast, the rules of state responsibility referred to by the two critics and the state right to control the entry of aliens referred to by all discussants are part of the context as defined in Article 31 (3) (c) VTC. As customary international law, they are applicable in the relations between all State Parties to the ECHR.

Generally, the references to the object and purpose of the ECHR or its Article 3 fit into the framework of Article 31 (1) VTC, although an observer will note that the Court adduces its own principles of interpretation without making the nexus to the telos of the ECHR clear.[1181]

The decisive argument in both critiques is the intentional abstention by the Contracting Parties to stipulate a right to asylum (taking the place of the second argument in each argumentation). However, in the manner of presenting it, both critics commit a serious methodological mistake. Both Reichel and Maaßen fail to separate the context from the legislative history of the Convention and its Protocols. When arguing for an

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[1179] A list of state parties to the Fourth and Seventh Protocols is available at the website of the Council of Europe: <http://www.coe.fr/tablconv/46t.htm> and <http://www.coe.fr/tablconv/117t.htm> (accessed on 26 April 00).

[1180] Emphasis added. Accord: Yasseen, 1976, p. 63. But see: Dissenting Opinion of Judge Fitzmaurice in the *Guzzardi Case*, where he interpreted Art. 5 ECHR in the context of Art. 2 (1) of the Fourth Protocol (which the responding state had not ratified). ECtHR, *Guzzardi vs. Italy*, Series A, No. 39, p. 51. With all due respect for the pragmatic position taken by Judge Fitzmaurice, one must recall that it is not supported by the text of Art. 31 VTC. See Fastenrath, 1991, p. 183 note 728 for further examples where the limits of Art. 31 (3) (c) VTC were trespassed in case law or rejected by doctrinal writers.

[1181] See text accompanying note 1156 above.

intentional omission of a right to asylum, they not only rely on the existing articles of the Convention, which are part of the context according to Article 31 (2) VTC, but also on the defeated attempts to include an asylum provision into the Convention framework. To be sure, the latter data are not part of the context under Article 31 (3) (c) VTC.[1182] Neither can they be subsumed under Article 31 (3) (b) VTC as a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. The abstention of pursuing a legislative project further does not amount to a practice in the sense of that provision. Moreover, numerous indications contradict the establishment of an unambiguous practice in the sense of Article 31 (3) (b) VTC.[1183] Falling outside the notion of context, these data must be considered as part of the legislative history. As such, they may be used exclusively for the confirmation of an interpretation derived from the second stage or for further clarification, if the second stage fails to render the necessary clarity.[1184] Both critics disregard this rule.[1185] Neither of them is able to show that the second stage has produced a result a) sufficiently clear to be the subject of confirmation in the third stage or b) which leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. Therefore, it is simply not warranted to proceed to the third stage.

Further, they fail to pursue the third stage to its end: there is no indication that the authors looked into those parts of the *travaux* specifically dealing with Articles 1 and 3 ECHR. This would have

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[1182] 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: [...] any relevant rules of international law applicable in the relations between the parties.'

[1183] E.g. Resolution 14/67 of 29 June 1967, cited in Reichel, 1987, p. 178 note 49. One should also consider that some Contracting Parties to the ECHR have introduced domestic protection categories that correspond to the case law of the European organs under Art. 3 ECHR. In the Swedish Aliens Act, a protection category drawing on the protective ambit of the ECHR is contained in Chapter 3 Section 3, para. 1, and a corresponding prohibition of refoulement can be found in Chapter 8 Section 1. According to Section 53 (4) of the German Aliens Act, an alien may not be removed, if removal contravenes the ECHR. The current deliberations on subsidiary protection in the EU Council should also be recalled (see note 1203 below).

[1184] Art. 32 VTC.

[1185] Maaßen develops the historical argument under the heading 'Context of significance'. (*Bedeutungszusammenhang*), which is at odds with the structure flowing from Arts 31 and 32 VTC. Maaßen, 1997, p. 127.

revealed inter alia that earlier drafts of Article 1 ECHR contained a limitation to persons 'residing within' Contracting Parties, which was dropped in favour of the present wording, with the express intent of widening the scope of application of the Convention.[1186] Accordingly, the critics' approach to the supplementary means of interpretation was a selective one.

In addition, Maaßen's third argument relating to the consequences of an extensive interpretation has no place in the methodological framework of Articles 31 and 32 VTC. Leaving aside the question whether his description of consequences is correct[1187], it remains unclear whether he adduces those within the framework of the second stage or as a supplementary means of interpretation.

10.1.1.4 Reinterpreting Article 3 ECHR

The reasoning of the European organs, the alternative interpretations offered by two of its critics and our own methodological appraisal of both have endowed us with a tool box of rather diverse arguments. We have criticised the critics, and to some extent even the European organs, for deviating from the framework set by the Vienna Convention. The question is whether following this framework would have produced a determinate outcome and, if so, what its content would be. What we shall attempt in the following is a reinterpretation of Article 3 ECHR, avoiding the errors committed by both the Court and its critics. As the outcome will be decisive for the protection issue as well as the issue of access, the following argument indeed represents the essence of this chapter.

[1186] See e.g. Report of the Sub-Committee instructed to make a preliminary study of the amendments proposed by the members of the Committee of Experts (5 February 1950): 'Since the aim of this amendment is to widen as far as possible the categories of persons who are to benefit by the guarantee contained in the Convention, and since the words "living in" might give rise to a certain ambiguity, the Sub-Committee proposes that the Committee should adopt the text contained in the draft Covenant of the United Nations Commission: that is, to replace the words "residing in" by "within its jurisdiction"'. As quoted in Council of Europe, Preparatory work on Article 1 of the European Convention on Human Rights, Strasbourg, 31 March 1977, Court (77) 9.

[1187] In a number of respects, his analysis of consequences is seriously flawed. For a critique, see G. Noll, 'Book review. Hans-Georg Maaßen, Die Rechtsstellung des Asylbewerbers im Völkerrecht', 67 *NJIL* 371 (1998), pp. 374–8.

Starting out with the context of Article 3 ECHR, we note that five sets of data have been tenably invoked hitherto:

1. Article 1 ECHR, obliging Contracting Parties to 'secure' inter alia the right enshrined in Article 3 ECHR to persons within its 'jurisdiction';
2. Article 5 (1) (f) ECHR, regulating the legality of detention in the context of expulsion;
3. the state right to control the entry of non-citizens;
4. the absence of an explicit right to asylum in the Convention; and
5. the law of state responsibility.

In consecutive order, the amount of data contained in each set increases, and so does the distance to the provision to be interpreted. Simultaneously, the precision in argumentation decreases in a corresponding fashion.

Ad 1): Article 1 ECHR is a single norm sentence, connected explicitly to Article 3 ECHR by a reference to 'the rights and freedoms defined in Section 1', of which Article 3 ECHR forms part. The amount of additional data provided by this provision is limited but as earlier noted, it forces the interpreter to take a stand on the extension of the term 'to secure'.

Ad 2): The nexus between Articles 5 (1) (f) and 3 ECHR is much more remote: the former provision enounces conditions under which detention may be used to deny entry to or to remove aliens. There is no explicit linkage between the provisions, and their thematic relationship is of a rather limited character. Article 5 (1) (f) ECHR would only be contextually useful if it had stated that, save for detention explicitly prohibited by it, all other forms of immigration control are permissible under the ECHR. Quite understandably, this is not the case. The fact that Article 5 (1) (f) ECHR *names* denial of entry and removal among the criteria for permissible forms of detention cannot be extrapolated to the conclusion that denial of entry and removal are per se unaffected by the rights and freedoms stated in Section I.[1188] If immigration control had been offered the *carte blanche* of absolute permissibility under the ECHR, inhuman treatment *during* expulsion would also be beyond the reach of

[1188] Had Art. 4 of the Fourth Protocol and Art. 1 of the Seventh Protocol been part of the context, the same argumentation would have applied to them.

the Convention. This is clearly fallacious, and none of the critics takes that position.[1189] By conclusion, an e contrario deduction based on Article 5 (1) (f) ECHR is too imprecise and cannot help to determine the proper meaning of Article 3 ECHR. It entices the interpreter to reasoning out of the negative, wich entails a very large amount of additional data to be handled.

Ad 3): The state right to control the entry of non-citizens is thematically close to the interpretative issue at stake here. This right forms part of customary international law, and is therefore part of the context of Article 3 ECHR.[1190] It is a positive right and, at first sight, this makes it easier to handle than the sets of data introduced under 2) and 4). However, the control right is not an absolute one; it has to be exercised with due regard to the stipulations of human rights law.[1191] Therefore, it would be tautological to determine the impact of human rights law by recurring to the state right to control. Where it is invoked by proponents of a particularist interpretation, it is—consciously or not—endowed with the character of a residual trump: everything not explicitly regulated by human rights law is regulated by the state right to immigration control. International law features neither a demand for explicitness on the limitations through human rights, nor does it offer a hierarchical order putting state rights on a higher echelon than human rights.[1192] Where the

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[1189] See Maaßen, 1997, p. 220, explicitly stating that the conditions of removal must not contravene Art. 3 ECHR.

[1190] See Art. 31 (3) (c) VTC.

[1191] 'A State has the competence to control and to regulate the movement of persons across its borders. This competence is not absolute. It is limited by the right of individuals to move across borders and by the obligations of the State that arise from generally accepted principles of international law and applicable international agreements.' Sohn and Buergenthal, 1992, p. 1.

[1192] Bernhardt states explicitly that 'the often-invoked rule that treaties should be interpreted restrictively and in favour of State sovereignty can no longer be considered valid'. R. Bernhardt, 'Interpretation in International Law', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (1992), Volume I (1992), pp. 1416–26, at p. 1421. Elsewhere, he notes that 'the in dubio mitius rule is not even mentioned in the Vienna Convention'. Ibid. at p. 1419. Given the post-war proliferation of human rights norms, the disappearance of this interpretative rule makes sense. Where treaties aim at stipulating benefits for third parties not represented under treaty negotiations, the duty-minimising presumption of bilateral international law is no longer appropriate. Moreover, inquiring into the precise content of 'mitius' brings us back to the conflict between universalism and particularism: does it serve the long-term interests of state to deflect victims of human rights violations, or is the opposite true?

argument of the state right to immigration control is endowed with such a trump function, it is merely the outflow of a political choice made by the interpreter. To conclude, the amount of data introduced by this argument is very large, and so is the risk of tautological reasoning.

Ad 4): The absence of a right to asylum in the ECHR also entails a reasoning out of the negative and shares the problems explained under ad 2). This absence forms the base of Reichel's and of Maaßen's second argument, providing another example of fallacious reasoning e contrario. The logical structure of their argument can be reduced to the following syllogism:

Premise 1: An implied right to extraterritorial protection under Article 3 ECHR is identical with the stipulation of a right to asylum, as suggested in the 1961 Proposal.[1193]

Premise 2: The right to asylum, as suggested in the 1961 Proposal, has not been laid down in the ECHR.

Conclusion: There is no implied right to extraterritorial protection under Article 3 ECHR.

Quite obviously, the first premise is flawed. The right to asylum as specified in the 1961 Proposal is far from being congruent with the potential scope of extraterritorial protection under Article 3 ECHR. The former contains exceptions, while the latter does not. The former is characterised by the notion of persecution, while the latter hinges on the threat of torture, inhuman or degrading treatment or punishment. These forms of mistreatment are only a fraction of all conceivable practices amounting to persecution. Finally, the rejection of the 1961 Proposal may have taken place for many reasons. It is not warranted to conclude that the non-adoption of the right to asylum implies that the Contracting Parties simultaneously intended to limit the extraterritorial reach of the rights enshrined in the ECHR. Had this been their intention, the rejection of the 1961 Proposal would not have constituted adequate means to

[1193] In strict pursuance of Reichel's version of this argument, such a right would be identical with the non-adopted 1961 Proposal, containing a right to seek and enjoy asylum from persecution as well as a prohibition of refoulement to persecution. See text accompanying note 1168 above.

express it.[1194] Given its flawed premise and, additionally, the methodological inappropriateness of the historical data used to underpin this argument, Reichel's and Maaßen's critique loses its decisive trump.

Ad 5): As we have seen, both critics have involved the customary law of state responsibility in their reasoning. They state no reason for doing so, and such a reason is not immediately evident. State responsibility does not offer norms of a higher dignity impeding an extensive interpretation of Article 3 ECHR. In fact, state responsibility may be considered relevant in an indirect manner. The critics may intend to show that a certain interpretation 'fits well' or 'does not fit' with the grid or norms in the area of state responsibility. In short, they want to prove that their interpretation is more consistent with that grid: it reduces complexity without producing additional complexity elsewhere in the system. What they suggest is the construction of an analogy between human rights law and the law of state responsibility.

The problem is twofold. First, the allocation of responsibility in the *tripartite* conflict with different classes of participants at stake under Article 3 ECHR (the bearers of interest being the returning state, the receiving state and the individual, the latter not possessing the same legal personality as the two former) is qualitatively different from the existing rules on state responsibility. The latter are seized with *inter-state* relations and deal with human rights violations only in an indirect manner.[1195] In this regard, human rights law and the law of state responsibility are simply not sufficiently comparable to allow for ex analogia reasoning.

Second, the law of state responsibility is sufficiently open to allow for a universalist as well as a particularist analogy. We recall that both critics come to diametrically opposed conclusions: while Reichel finds that an extensive interpretation of Article 3 ECHR is consistent with the rules on state responsibility, Maaßen suggests the opposite. Obviously, this field of international law only reproduces the choice encountered when interpreting Article 3 ECHR.

[1194] In line with Art. 31 (3) (a) VTC, one may think of an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' as an adequate means.

[1195] Compare Art. 19 (3) (c) ILC Draft declaring certain violations of human rights to be international crimes. It is quite indicative that this draft provision has attracted a fair amount of criticism so far.

The causal linkage between the anticipated human rights violation by a third state and the responsibility of the removing state can be elucidated further by making recourse to the ILC Draft Articles on International Responsibility of States, to some extent reflective of customary international law. According to the Draft Articles, state responsibility flows from an internationally wrongful act.

> There is an internationally wrongful act of a State when:
>
> (a) Conduct consisting of an action or omission is attributable to the State under international law; and
>
> (b) That conduct constitutes a breach of an international obligation of the State.[1196]

The action of removal is decided on and executed by agents of the removing state and consequently attributable to it.[1197] While removal of an alien as such is clearly permitted by international law, removal in a manner or under circumstances violating the ECHR is not. A state not taking the latter restrictions into account will attract responsibility under international law for such a removal.

Determining the content of 'to subject' and determining the limits of attribution offer identical interpretative dilemmata. Drawing analogies between human rights law and the law of state responsibility amounts to a mere replication of the problem.

Concluding on the context of Article 3 ECHR, we may state that the reference to Article 1 ECHR remains the only constructive contribution to the interpretative problem discussed here. All the other sets of data provide for circular arguments or suffer from logical flaws. As remarked earlier, the predominantly negative obligation in Article 3 ECHR is now complemented with a predominantly positive obligation in Article 1 ECHR. This suggests that a contextual interpretation supports the outcome arrived at by the Court.

Moving on to a teleological interpretation, we find ourselves confronted with the very abstract goal of promoting human rights. In their most pertinent and still rather hazy recital of the preamble, the Contracting Parties express their resolve 'to take the first steps for the

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[1196] ILC Draft Articles on International Responsibility of States, YILC 1980 Vol. II (Part 2), pp. 30–4, Art. 2.

[1197] Ibid, Art. 5.

collective enforcement of certain of the Rights stated in the Universal Declaration'.[1198] This aim propels us back to the very conflict between universalists and particularists on how to best promote human rights, expounded at some length above. It largely restores the complexity of the original political conflict and leaves the interpreter with the stalemate of an indeterminate outcome. The Court drew once more on an oft-invoked interpretative rule, stipulating that the Convention rights must be interpreted in such a way as to make them practical and effective.[1199] At first glance, this would suggest working in favour of the individual and advancing the universalist position. However, a second look reveals that the principle of effectiveness cannot shift the indeterminate setting. What is to be regarded as effective is equally vague and ambiguous as how to best promote a telos. After all, invoking this principle cannot alter the indeterminate outcome of a teleological interpretation.

Now, at the end of the second stage, we must combine the results of the contextual and the teleological interpretation. True enough, the former favours a universalist interpretation. Nonetheless, the indeterminacy of the latter begs questions. Admittedly, this indeterminacy is most useful for the partisan practitioner. The protection seeker's counsel may argue for a universalist reading of the telos, thus being able to produce a determinate outcome in the second stage. This allows the counsel to bar recourse to the third stage[1200] and declare the process of interpretation to be finished. The government would typically do the opposite, arguing that results yielded by the contextual and the teleological interpretation contradict each other and lead to an ambiguous outcome in the sense of Article 32 VTC. Theoretically, it is not immediately evident how the indeterminacy of the teleological interpretation should be handled. Two options are conceivable. Either teleological indeterminacy is a neutral factor when combining results of the contextual and teleological interpretations—suggesting that the universalist result of contextual interpretation shall prevail—or the stated teleological indeterminacy alone is sufficient to make the result of the second stage ambiguous, regardless of the clarity attained by the contextual interpretation. The question would not arise, if the contextual and teleological interpretations were found in separate, hierarchically

[1198] Fifth recital of the preamble of the ECHR.

[1199] See *Soering*, para. 87 with further references to earlier case law.

[1200] Save for the purpose of confirming the universalist result, in line with Art. 32 VTC.

ordered stages. Had this been the case, the clarity attained in the contextual interpretation would make any dealings with the telos superfluous.

However, we maintain that the first option must be chosen. To opt for the second would endow an indeterminate outcome in one of the two interpretations with the same weight as a clear-cut contradictory outcome, where both interpretations would lead to diametrically opposed results. It would imply a procedural advantage to the particularist position. When combining the two interpretations under the second stage, indeterminate outcomes must be treated as neutral entities, having a zero value in the final count of universalist and particularist arguments. This is in line with the rationale of the rule of interpretation enshrined in Article 31 VTC: to provide for a hierarchically structured increase of complexity, precisely to the extent needed for reduction. The second option defies the logic of executing interpretation in three distinct stages. In that sense, interpretation is not about the eradication of reasonable doubts, but rather about the establishment of justificatory dominance. As shown above, Article 1 ECHR provides for an abundance of data justifying a universalist outcome.

With this conclusion, there is no need to move on to the third stage. At any rate, this stage would have largely reproduced the universalist-particularist divide. A consultation of the *travaux* leads to ambiguous results, as indicated in the discussion of the doctrinal critique above. The abortive 1961 Proposal on the inclusion of a right to asylum would stand against the omission of the territorial limitation of the Convention's scope.[1201]

Apart from the *travaux*, other data could be adduced. Most important is probably the emerging consensus on a universalist reading of Article 3 ECHR, as it manifests itself in the discussions in the Council of the European Union.[1202] Based on a Danish initiative, various documents on subsidiary protection have been circulated since 1997, and the case-law of the European Court of Human Rights on cases involving extraterritorial threats holds a prominent place in them. In 1999, the Austrian Presidency

[1201] See chapter 10.1.1.3 above.

[1202] As for now, the domestic laws of some Contracting Parties feature protection categories that are inspired by a universalist interpretation of Art. 3 ECHR. Suffice it here to name Section 53 (4) of the German Aliens Act and Chapter 3 Section 3 (1) of the Swedish Aliens Act.

summarised the state of discussions as follows: 'Of the subsidiary protection instruments existing in the European Union, Article 3 of the European Convention on Human Rights is particularly important'.[1203] The note by the presidency goes on to discuss the impact of the Court's case law, of which 'use should be [...] made [...] in formulating policy for common legislation, although this involves judgements in individual cases, which may differ according to circumstances'.[1204] If these discussions will indeed produce a legislative measure transforming the case law of the Court into community law, a universalist reading would have won express support by a large part of the Contracting Parties to the ECHR.[1205]

Assuming for a moment that it would be warranted to move on to the third stage under Article 32 VTC, this would add no further determinacy. To conclude, the universalist conclusion derived in the second stage still stands: Article 3 ECHR must be construed as embracing extraterritorial protection.

10.1.2 Article 7 ICCPR

In principle, the reasoning developed above is applicable to Article 7 ICCPR as well.[1206] Above, we had identified five sets of data as relevant for the interpretation of Article 3 ECHR. Mutatis mutandis, four of them are relevant for the interpretation of the ICCPR:

1. Article 2 (1) ICCPR, obliging Contracting Parties to 'respect and to ensure to all persons within its territory and subject to its jurisdiction' the rights recognized in the Covenant, inter alia Article 7 ICCPR;
2. the state right to control the entry of non-citizens;

[1203] Council of the European Union, Note from the Presidency to the Asylum Working Party, Subsidiary Protection, 23 February 1999, Doc. No. 6246/99 ASILE 7, para. 4.

[1204] Ibid., para. 6 (a).

[1205] However, as the Union is not congruent with the group of State Parties to the ECHR, such an instrument would not constitute part of the context as alluded to in Art. 32 (3) VTC.

[1206] The Human Rights Committee opines that Art. 7 ICCPR prohibits extradition, expulsion and refoulement to a country disregarding the content of this provision. See General Comment 20/44, 3 April 1993, para. 9.

3. the absence of an explicit right to asylum in the Convention; and
4. the law of state responsibility.

There is no provision corresponding to Article 5 (1) (f) ECHR in the ICCPR. The pivotal factor is Article 2 (1) ICCPR, which provides the contextual element tilting interpretation in favour of a universalist reading. Therefore, even Article 7 ICCPR must be read to imply a right to extraterritorial protection. This reading has been endorsed by the Human Rights Committee in a number of cases related to Article 7 ICCPR.[1207]

10.2 Access to Territory

The second question was whether an individual entitlement to migrate in order to seek extraterritorial protection exists. An interpretation based on the terms of Article 12 (2) ICCPR and Article 2 of the Fourth Protocol could not clarify this issue.

Drawing on contextual and teleological interpretations, two lines of argument shall be pursued. First, Article 12 ICCPR shall be put in the context of inter-state norms regulating migration. This approach is in line with Article 31 (3) (c) VTC, stating that any relevant rules of international law applicable in the relations between the parties shall be taken into account together with the context. Second, Article 3 ECHR and Article 7 ICCPR shall be interpreted in the context of other provisions in each of the respective treaties. The latter provisions form part of the context according to Article 31 (2) VTC. Moreover, both provisions shall be interpreted teleologically as well.

10.2.1 The Right to Leave and the Right to Entry

We had been seized with the question whether or not Article 12 ICCPR implies a correlative right to enter another country. Hitherto, this question has not been dealt with in the case law of the Human Rights

[1207] Human Rights Committee, *Kindler vs. Canada*, No. 470/1991, UN Doc. No. CCPR/C/48/D/470/1991; Human Rights Committee, *Ng vs. Canada*, No. 469/1991, UN Doc. No. CCPR/C/49/D/469/1991; Human Rights Committee, *Cox vs. Canada*, No. 486/1991, UN Doc. No. CCPR/C/45/D/468/1991.

Committee, and doctrinal discussion of the issue remains rather limited. In the following, we shall first present a universalist reading affirming such a correlative right and, second, complement it with a particularist reading, denying its existence.

10.2.1.1 *A Universalist Reading*

It should be noted that the right to leave can be interpreted in two ways. It can be read as solely enshrining an entitlement *vis-à-vis* the country of origin. Or it can be read to contain an additional entitlement *vis-à-vis* all states. In this section, we shall argue for the existence of the latter entitlement from a particularist perspective.

Indeed, the right to leave one's country would be nullified in a situation where no other state was prepared to receive the individual making use of this right. The ideal to be realised by the right to leave and the right to return is the free movement of persons. Since these rights were conceived, the actual problem has shifted. The number of states preventing their citizens from leaving or prohibiting their return is clearly decreasing.[1208] Instead, free movement is hampered by a parallel emergence of immigration restrictions.[1209]

The wording of Article 12 ICCPR does not restrict it being a claim only *vis-à-vis* the country of origin. We shall now introduce a contextual argument, which rests upon an analogy between the inter-state right to return aliens to their country of origin and the human right to leave any country, including one's own.

How is the inter-state right structured? As a corollary flowing from their territorial and personal supremacy, States have a qualified right to expel aliens from their territory. In order for this right to become effective, another State has to receive the person expelled. It is largely uncontested that this obligation to receive rests upon the State of which

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[1208] K. Hailbronner, *Rückübernahme eigener und fremder Staatsangehöriger. Völkerrechtliche Verpflichtungen der Staaten* (1996, C. F. Müller Verlag, Heidelberg), p. 6.

[1209] See note 226 above.

the expelled person is a citizen.[1210] Thus, the right of a State to remove non-citizens from its territory has been extrapolated to produce a duty to receive by the country of origin. This correlate is regarded as a norm of customary international law[1211] although single countries of origin deny readmission to citizens not returning voluntarily. Recurring to the standards of interpretation enshrined in the Vienna Convention, it can be stated that the customary law norms governing inter-state relations are applicable in the relations between all State Parties to the ICCPR. Following Article 31 (3) (c) VTC, they form part of the context of Article 12 ICCPR. As such, they must be taken into account when interpreting this right.

Let us grant for a moment that the requirements of a sufficiently consistent practice[1212] and the requirement of opinio juris[1213] are fulfilled. This would prove that inter-State international law accepts the deduction of a correlative duty from a right. It follows that opinio juris embraces the logic of correlates. If the same argumentative technique of constructing a duty as a correlate to a right is applied in the field of human rights, the right to leave produces a duty to admit. In order for the former to be effective, one has to construct the latter. This line of argument entails an all-or-nothing outcome. Either it is accepted that the logic of correlates is part of customary international law, thus validating both an inter-state duty to readmit nationals and a human right to immigration, or it is

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[1210] The non-binding Cairo Programme of Action described this obligation as follows: 'Governments of countries of origin of undocumented migrants and persons whose asylum claims have been rejected have the responsibility to accept the return and reintegration of those persons, and should not penalize such persons on their return'. Programme of Action, International Conference on Population and Development, Cairo, 5–13 September 1994, UN Doc No. A/CONF.171/13, 18 October 1994, para. 10.20. Further on the obligation to receive, Hailbronner, 1996, p. 36; and Plender, 1988, p. 460.

[1211] It is hard, if not impossible, to assess the efficiency of return in practice. Comprehensive statistics are lacking.

[1212] Apart from those states outrightly denying readmission to non-voluntary returnees, others obstruct return by administrative measures. By way of example, the returnee is declared not to be a citizen of the requested state, or return is denied due to lacking travel or identity documents. See G. Noll, 'Unsucessful Asylum Seekers—The Problem of Return', 37 *International Migration* 267 (1999), pp. 274–5.

[1213] See the Cairo Programme of Action, note 1210 above. In a number of bilateral readmission agreements regulating the return of nationals to their country of origin, the right to return is merely *reaffirmed*. See note 1028 above.

denied that customary international law embraces the logic of correlates. In that case, a human right to immigration would fall, bringing with itself in the inter-state duty to readmit nationals.

It is quite clear from the analysis of the *travaux préparatoires* to the ICCPR that states intended to preserve their control over the composition of their populations.[1214] Now, accepting the logic of correlates as part of international law seems to produce a puzzling result. How can a state right to control the composition of its population coexist with an individual right to entry? If the right to entry is understood as a long-term or even permanent change of settlement, those rights indeed conflict. However, if one frames the concept of entry as a temporary one, they go along very well with each other. Drawing on the latter understanding, the individual's right to entry is merely a right to make contact with the territory of a state, pending a decision of the entered state whether to accept or to reject the entrant. This understanding would limit the right to entry to the transgression of physical borders, while admitting that the transgression of administrative borders remains a state prerogative. It also endows the inter-state duty to readmit nationals with additional functionality. After all, the temporary nature of a stay can only be enforced by efficient return, which is preconditioned on a duty to readmit. Thus, the logic of correlates augments coherence within the corpus of norms related to migration.

Marginally, one might wish to note that such a reading shows a striking correspondence to the Kantian 'right to visit'.[1215] It must be underscored, however, that the legal right to entry is deduced not from philosophical premises, but from legal ones.[1216] This interpretation manages to reconcile both individual and state rights without postulating artificial normative hierarchies.

[1214] Hailbronner, 1996, p. 11.

[1215] See chapter 2.2 above.

[1216] Therefore, Grahl-Madsen, Melander and Ring miss the point when they conclude that '[l]ogic does not entitle us to infer a right of entry in countries other than one's own, since the right of States to control entry into their respective territories is a jealously guarded privilege'. Indeed, the philosopher's logic may not, but the lawmaker's does. Moreover, as indicated above, the lawmaker's logic is careful enough to leave right to control entry untouched in the long term. A. Grahl Madsen, G. Melander, and R. Ring, 'Article 13', in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (1999, Martinus Nijhoff Publishers, The Hague), p. 276.

The contextual interpretation expounded above must be complemented by a teleological interpretation. This poses problems very similar to those encountered when interpreting Article 3 ECHR. The telos of human rights protection is broad and abstract; this brings us back to the original conflict between universalists and particularists. The ideal of free movement is subject to the same divide: who is to tell whether an all-out slashing of limitations or a gradual process of controlled deregulation is the best device to achieve it?

Let us sum up on the universalist line of reasoning. The second stage affirmed the existence of a right to temporary immigration under the contextual interpretation and yielded a neutral, i.e. indeterminate, outcome under the teleological interpretation. Cumulating both sets of data produces the following result: Article 12 ICCPR must be read to imply a temporary right to make contact with the territory of states other than one's home country. Interpretatio cessat in claris—there is no need to proceed to the third stage.

10.2.1.2 A Particularist Reading

10.2.1.2.1 Complementing the Second Stage

From the preceding section, it emerges that the universalist position is based on a contextual argument, allowing it to produce a determinate conclusion in the second stage. However, there is another contextual argument, suggesting a different outcome.

Earlier, it has been acknowledged that states possess a right to control the composition of their population. A widespread tool to exercise this right to control is the imposition of visa requirements. The number of states using this tool and the number of nationalities subjected to such requirements is on the rise. In the EU, all Member States are duty-bound to impose visa requirements along the Visa Regulation.[1217] In the U.S., visa requirements have been used throughout the whole century, and enforced extraterritorially by placing U.S. immigration agents at points of embarkation in third countries.[1218] Although visa requirements represent a barrier to free movement and can be perceived as politically undesirable, it

[1217] See chapter 5.1.1.1 above.

[1218] See generally Christian, 1999.

has not been claimed that they are illegal under international law. There is a widespread practice of states in all parts of the world, and there is also an opinio juris accepting their general conformity with international law.[1219] Thus, we may state that a customary law norm exists allowing states to use visa requirements as a tool of migration control. Following Article 31 (3) (c) VTC, this norm forms part of the context of Article 12 ICCPR.

The rationale of visa requirements is to inhibit a would-be emigrant from setting out on a journey to a country unwilling to receive her. If visa requirements are legal, it must also be considered legal to inhibit non-nationals from having territorial contact with a potential destination country. The state right to deny entry would not only relate to the administrative boundary, but the territorial boundary as well. This state right cannot be reconciled with a temporary right to entry held by the individual, as developed earlier. Its existence confirms that the ICCPR simply does not guarantee a general right to entry into the territory of the Contracting Parties.[1220]

With two powerful contextual arguments standing against each other, contextual interpretation cannot deliver a determinate outcome. Recalling the indeterminacy produced by the teleological interpretation, the second stage must be said to produce an ambiguous result. Therefore, it is mandatory to proceed to the third stage.

10.2.1.2.2 The Third Stage

The particularist position is further reinforced by arguments becoming accessible in the third stage. The *travaux* of the ICCPR offer ample proof that many of the Contracting Parties had an attitude favourable to limiting freedom of movement. In a 1950 meeting of the Human Rights Committee, the British delegation had requested the outright deletion of the relevant draft article. This proposal was rejected by nine votes to three, with two delegations abstaining from the vote.[1221] The *travaux* also show that the wording of Article 13 UDHR was perceived as too liberal

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[1219] For an overview of practices, see e.g. Commissioner of the CBSS, Conditions for Travel Across the National Borders of the CBSS Member States, 10 May 1999, pp. 20–36.

[1220] M. Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll. CCPR-Kommentar* (1989, N.P. Engel Verlag, Kehl am Rhein), p. 229.

[1221] Nowak, 1989, p. 209, quoting E/CN.4/SR.151, para. 44.

in some respects.[1222] By consequence, the Human Rights Committee agreed on the deletion of a general prohibition of exile as well as a number of qualifications of the freedom of movement.[1223] Finally, the Human Rights Committee dropped the introduction of a right to asylum as early as 1950.[1224]

In the third part, focus has shifted from the letter of the law to the intention of the legislator. This intention is clearly not in favour of an extensive interpretation of Article 12 ICCPR. Therefore, the particularist has improved her position, arguing that the aggregate conclusion must be that this provision does not contain an implied right to entry, be it temporary or not.

10.2.1.3 Conclusion

The discussion on Article 12 ICCPR provided a telling illustration of the interplay between material content and interpretative rules. In the second stage, the universalist argument appears to be more precisely formulated than the particularist counter-argument. As the gap between the two arguments is too wide to be bridged, there are faint chances for the construction of further universalist arguments consuming the visa argument. Therefore, the universalist can hardly argue that the interpretative conflict can be solved in an unambiguous or non-obscure manner in the second stage. Thus, what the particularist needs in the second stage is not an objectively better argument, capable of defeating the universalist stance, but one strong enough to produce indeterminacy. The visa argument is sufficiently strong in this regard, and the third stage is activated, allowing the particularist to access further arguments for her cause.

Does this mean that the aggregate outcome of the interpretative operation is in favour of the particularist? Having gone through all three stages according to the prescriptions of the Vienna Convention, we are

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[1222] Nowak, 1989, p. 210.

[1223] Firstly, internal freedom of movement was limited to those lawfully present in the territory of a Contracting Party. Secondly, a derogation option was introduced, covering internal freedom of movement as well as the right to leave. Thirdly, the ICCPR provision merely prohibits only those deprivations of the right to return which are arbitrary.

[1224] Nowak, 1989, p. 210.

left with an array of contradicting arguments. The Vienna Convention does not provide any help for the process of weighing these arguments against each other. Thus, the interpretation of Article 12 ICCPR ends with an indeterminate result and is ultimately open to the decision-makers preferences.

10.2.2 Explicit Prohibitions of Refoulement

10.2.2.1 Article 33 GC

10.2.2.1.1 The Second and Third Stage in the Light of Doctrinal Debate

Determining whether Article 33 GC applies to rejection at the border has been a standard topic for doctrinal writers ever since the inception of the 1951 Refugee Convention. Naturally, it does not evade the dichotomy between universalism and particularism. Inclusive readings affirm the applicability of Article 33 GC to border claims by referring to the logic of the law, usually drawing on its object and purpose, or pointing to 'absurd results' flowing from non-applicability.[1225] On the other hand, exclusionary readings largely rely on a reconstruction of the legislator's will, which is said to underpin the non-applicability of Article 33 to border claims. These reconstructions draw on the *travaux* and on the absence of a Convention provision regulating the admission of refugees.[1226] Given the richness of doctrinal thought, there is no need to craft further substantial arguments. However, not all of the arguments advanced in doctrine are constructed in a manner compatible with the Vienna Convention. In the following discussion of selected arguments, we shall use the Vienna Convention as a watershed for distinguishing arguable approaches from non-arguable ones.

In older literature, we find rather clear-cut statements with cursory motivations. The first exclusionary reading was advanced by Robinson in

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[1225] See, e.g. M. Pellonpää, *Expulsion in International Law. A Study in International Aliens Law and Human Rights with Special Reference to Finland* (1984, Suomalainen Tiedeakatemia, Helsinki), p. 313. For an overview of inclusionary positions in doctrinal thought, see Davy, 1996, p. 94, footnote 8.

[1226] For an overview of exclusionary positions in doctrinal thought, see Davy, 1996, p. 93, footnote 3, and p. 94, footnote 7.

1953. He denies that Article 33 GC applies to refugees seeking entrance into the territory of a potential host state: '[I]f a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck'.[1227] In a footnote, Robinson claims that the drafters did not intend to regulate admission by Article 33.[1228] Later on, a number of authors have based their exclusionary reading on this argument.[1229]

Recurring to the Vienna Convention, we have to state that Robinson leaps to the *travaux* without devoting any interest to the wording, context or telos of Article 33 GC. Quite clearly, this negligence strikes back at the viability of his results. We would like to add another reflection. Interestingly, Robinson deplores that his interpretation of Article 33 GC falls short of the protection provided in Article 3 (3) of the 1933 Convention, which provided that Contracting States undertake 'in any case not to refuse entry to refugees at the frontiers of their country of origin'.[1230] Nonetheless, he fails to see an interpretative idiosyncrasy flowing from this observation. After all, the High Contracting Parties to the 1951 Refugee Convention considered

> that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement[1231]

[1227] N. Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation,* 1997 ed. (1953, UNHCR, Geneva), p. 138.

[1228] Ibid., at 139, footnote 275.

[1229] A. Zimmermann, *Das neue Grundrecht auf Asyl* (1994, Springer, Berlin), p. 74; Maaßen, 1997, p. 78.

[1230] Convention relating to the International Status of Refugees, 28 October 1933, 159 LNTS 199. See also Robinson, 1953, p. 139. In his literal interpretation of the term 'refouler', Maaßen also takes note of this provision (Maaßen, 1997, p. 62). By pointing to the fact that only eight states had ratified the 1933 Convention, he attempts to disqualify its importance. In the light of the teleological interpretation presented here, his counter-argument is irrelevant. What counts is the fact that the Contracting Parties to the 1951 Refugee Convention explicitly named the 1933 Convention in Art. 1 A. (1) GC and that they expressed their wish to 'extend the scope of and protection accorded by' the 1933 Convention in the preamble.

[1231] 2nd recital, preamble of the 1951 Refugee Convention.

An exclusionary reading is at odds with this telos, as the 1951 Refugee Convention would offer a territorially more restricted scope of protection than the 1933 Convention.

Goodwin-Gill takes a moderate position, granting that Article 33 GC may not have been applicable to non-rejection at the border from the outset. However, following his argument, an extension of the provision's scope had taken place through later state practice.[1232] Goodwin-Gill does not refer to the Vienna Convention. His argument of extension through state practice may be subsumed under Article 31 (3) (b) VTC, but his sparse examples fail to show the existence of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

While the earlier discussions went directly for what was considered a relevant argument, more recent contributions explicitly relate to the Vienna Convention. An elaborate inclusionary reading has been proposed by Kälin, who operates both substantial and methodological arguments.[1233] Countering other authors' exclusive readings based on the *travaux*, Kälin rightly asserts that the Vienna Convention inhibits recourse to the latter, where a clear result has been derived from the norm's context and telos.[1234] While the *travaux* may very well reveal the drafters' unwillingness to regulate admission, this is irrelevant for the purpose of interpretation. Kälin himself states rightly that the wording of Article 33 GC is open to an inclusionary reading.[1235] In his view, a clear result can be derived from a teleological interpretation. Following his view, it is the aim of Article 33 GC to inhibit that a refugee, who has managed to evade a country of persecution, is returned to it.[1236]

His reading is opposed by Reichel, who manages to transform the *travaux* argument on the non-regulation of admission into a contextual argument, thereby evading Kälin's methodological critique.[1237] Reichel

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[1232] Goodwin-Gill, 1996, pp. 121–4, at 123.

[1233] Kälin, 1982, pp. 105–10.

[1234] 'Während eine an der Entstehungsgeschichte orientierte Auslegungsmethode zu einem negativem Ergebnis kommt, führt eine grammatikalische und teleologische Interpretation zu einem positiven Ergebnis. Welcher Auslegungsmethode in einem solchen Fall der Vorzug zu geben ist, lässt sich der Wiener Vertragsrechtkonvention (VK) entnehmen [footnote omitted, GN]'. Kälin, 1982, pp. 108, 109.

[1235] Kälin, 1982, p. 105.

[1236] Kälin, 1982, p. 107.

[1237] Reichel, 1987, pp. 39–42.

refers to the following passage in the Final Act of the 1951 Refugee Convention:

> The Conference
>
> [...]
>
> recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.[1238]

How does this passage affect the interpretation of Article 33 GC? Reichel is correct in qualifying this dictum as a part of the norm's context.[1239] Subsequently, he argues that it would lack meaning to *recommend* continued reception of refugees to governments, if Article 33 GC *obliged* them not to reject refugees at the border.[1240] However, this argument e contrario is unconvincing, as 'reception' remains a wider concept than non-rejection at the frontier. The meaning of 'reception' ranges from non-obstruction of physical entry to the meting out of a specific personal status. Given this incongruity, it is logically untenable to take the quoted passage as an indicative for the interpretation of Article 33 GC by the Contracting Parties. Compared to earlier proponents of an exclusive reading, Reichel barters a methodological error for a logical one.

An ambitious, but methodologically flawed, attempt to clear our thoughts on Article 33 GC has been put forward by Maaßen. Drawing mainly on the by now well-known argument of a missing intent to regulate admission, he concludes that this provision does not encompass rejection at the border.[1241] The Vienna Convention is invoked in support of Maaßen's assertion. But his understanding of the General rule of interpretation in Article 31 of the latter instrument builds entirely on the subjective approach focusing on state intent. Obviously, in the present case, such an understanding promotes an exclusionary reading of Article 33 GC. Had Maaßen followed Articles 31 and 32 VTC strictly, he would have started with a literal interpretation, concluded that the wording was

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[1238] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 37, 28 July 1951, IV, D.

[1239] Art. 31 (2) (a) VTC.

[1240] Reichel, 1987, pp. 40 and 41.

[1241] Maaßen, 1997, pp. 55–80.

not sufficiently clear, and directly proceeded to a contextual and teleological interpretation. Instead, he attempts to identify the historical and present intent of the Contracting States as part and parcel of a literal interpretation. To this end, he draws on the *travaux*. There is no support whatsoever in the Vienna Convention to supercharge the ordinary meaning of a term with contents derived from the drafting process. Maaßens' method turns a blind eye to the subsidiary character of the *travaux*, which are to be consulted *if and only if* the 'single combined operation'[1242] of literal, contextual and teleological interpretation has not produced a sufficiently clear or reasonable result.[1243] Even if one accepts the contested state intent approach[1244], the latter must not serve as an excuse to circumvent Article 32 VTC. While Maaßen observes the risk of contradiction between the subjective approach and the Vienna Convention[1245], he disregards that very risk in his actual interpretation.[1246]

Although Maaßen fails to realise it, his contribution demarcates a change in the discussion's focus. Given the richness of accumulated arguments, the battle on the proper interpretation of Article 33 GC can no longer be won on a substantial level. The decisive arguments are those relating to the interpretation of interpretative rules. Here, we experience a shift from the legal-technical to the qualitative level. The Vienna Convention is not a monolith, but—like any other body of norms—is open to interpretation. Although it pre-establishes the precarious balance between the letter of the law and the intent of the legislator, there is enough room for a versed interpreter to promote one of these parameters at the cost of the other.[1247] Both Reichel and Maaßen have realised that substantial arguments may be precluded by the Vienna Convention if they are not cloaked in proper form. Maaßen goes a step further and attempts to secure a better substantial outcome by *reinterpreting the interpretative rules* contained in the Vienna Convention. In short, this method is about producing substance through form. Although he fails in this effort, it is not inconceivable that future discussants manage to

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[1242] YILC 1966 II, p. 219.

[1243] Compare the wording of Art. 32 VTC.

[1244] For a discussion, see K. Ipsen, *Völkerrecht* (1990, C.H. Beck, München), pp. 7–14 and 121–2.

[1245] Maaßen, 1997, p. 61.

[1246] Maaßen, 1997, p. 64.

[1247] Bernhardt, 1992, p. 1418.

construct a tenable exclusionary reading by exploiting the idiosyncrasies of the Vienna Convention. Maaßen's attempt is, however, doomed because it lacks the necessary sophistication.

Recently, Davy has made what could be termed the most carefully argued and exhaustive contribution to this debate hitherto.[1248] Simultaneously, she is most orthodox in her handling of the Vienna Convention, which ultimately secures her success. Davy rejects an exclusionary reading for three reasons.[1249] First, the drafting history of the Convention does not offer unambiguous support for the contention that rejection at the border is outside the scope of Article 33 GC. The oft-quoted statements by delegates in support of an exclusionary reading have been superseded later in the drafting process. To wit, the exceptions in Article 33 (2) GC were included, meeting the demands for a limitation of the prohibition of refoulement. Moreover, the expression 'in any manner whatsoever' was included in the wording of Article 33 (1) GC, supporting an inclusionary interpretation of this norm. Finally, delegations also complemented the English term 'return' with the French term 'refouler'. Davy presents an interesting analysis of the latter amendment. She holds that the drafters intended to exclude measures taken at the border by inserting the term 'refouler' into the norm. However, this term relates also—and, in some cases, primarily—to measures taken at the border. In francophone asylum law and practice, 'refouler' covered non-admittance at the border.[1250] The same applies for the international refugee law of the 1930s, which was another point of reference for the drafters.[1251] And, most importantly, the ordinary meaning of 'refouler' also includes rejection at the frontier.[1252] According to Davy, the conclusion is inevitable that a linguistic mistake has been committed in the drafting of Article 33 (1) GC.[1253]

[1248] Davy, 1996, pp. 93–123.

[1249] Davy, 1996, p. 95.

[1250] Davy, 1996, pp. 101–3.

[1251] Davy, 1996, p. 104.

[1252] Davy, 1996, pp. 104–5.

[1253] 'Das Wort "refouler" verweist jedoch auch (und manchmal sogar vorrangig) auf Massnahmen an der Grenze. Bei der Abfassung des Art 33 Z 1 ist also—diese Schlussfolgerung scheint unausweichlich—ein sprachlicher Fehler unterlaufen.' Davy, 1996, p. 105.

Thus having defeated exclusionary readings based on the legislative history, Davy proceeds to a reinterpretation of Article 33 (1) GC along the lines of the Vienna Convention. She reverts to the ordinary meaning of 'refouler', which includes rejection at the frontier, and complements the linguistic interpretation by a contextual one. Among the contextual data, she identifies Article 33 (2) GC and Article 31 (1) GC as particularly important.

Article 33 (2) enshrines exceptions to the prohibition of refoulement and is worded as follows:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The expression 'as a danger to the security of the country in which he is' may be taken to support an exclusionary reading, ruling out the applicability of the whole provision, including its first paragraph, to rejection at the border. However, as Davy argues, two reasons militate against such a conclusion. Firstly, Article 33 (2) GC specifies a sub-group, which fulfils the prerequisites of Article 33 (1) GC, but which shall be excluded from its benefits. Thus, the group of persons alluded to in Article 33 (2) GC is not identical with the one alluded to in Article 33 (1) GC. Therefore, the qualifications of the former cannot be analogously transferred to the latter. Secondly, Davy points out that border controls usually take place on state territory, which means that a person waiting at the border is within the scope of Article 33 (2) GC. Summing up, Davy opines that a mere recourse to Article 33 (2) GC cannot deliver a determinate outcome.

She proceeds to Article 31 (1) GC, which exempts refugees from penalties on account of illegal entry or presence[1254], and tracks the legislative history of this provision. She lays bare the hierarchy of interests inherent in this provision, which accords the interests of the refugee a position prior to those of the state. In the next step, she concludes that it would be an evaluative contradiction to exempt refugees entering illegally from penalties, while insisting on an unconditional state right to reject refugees at the border. On the contrary: if the Convention compels Contracting States to refrain from penalising the violation of entry regulations by refugees, it must be concluded a fortiori that the Convention does not allow that the observance of the same regulations is enforced ex ante by the means of refoulement.[1255]

Davy's contextual argument is much more focused and precise than earlier advanced arguments on the contradiction between the telos of the Convention and the non-applicability of Article 33 (1) GC to rejection at the border.[1256] As her inclusionary reading is derived from a rigorous application of the Vienna Convention, it has to be unreservedly endorsed. Her interpretation produces a clear and unambiguous result already in the second stage. She never resorts to a teleological interpretation in the narrow sense, but draws on expressions of the telos in the norm context instead. Summing up, we may state that Davy fully exploits the strategic advantage offered by the Vienna Convention, allowing the letter and logic of the law to overrule other manifestations of the legislator's will. She arrives at a determinate result compatible with the canon of interpretation prescribed by the Vienna Convention.

[1254] Art. 31 (2) GC is worded as follows:

'(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

[1255] Davy, 1996, p. 120.

[1256] For an example of such an argument, see Maaßen, 1997, pp. 55–79.

Davy's argumentation can be further reinforced by the contextual argument drawing on the preamble of the 1951 Refugee Convention and Article 3 (3) of the 1933 Convention developed earlier in this sub-section. Pulling together the various threads, we find that the second stage renders an unambiguous outcome: the question whether non-rejection at the border is embraced by Article 33 GC must be answered in the affirmative.

10.2.2.1.2 Article 33 GC in the Light of the Dublin Convention

The inclusionary reading arrived at above can be consolidated by drawing on the acquis. On a sub-regional level, the most important factor in the contemporary interpretation of the territorial applicability of Article 33 GC is probably the 1990 Dublin Convention. Its Article 3 (1) reads as follows:

> Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum.

This convention has been concluded by the Member States of the European Union as an instrument of international law. The group of its Contracting Parties is thus smaller than the group of Contracting Parties to the GC. If both groups had been identical, the norms in the Dublin Convention would have formed part of the context of Article 33 GC under Article 31 (3) VTC.[1257] Now, with a strict application of the Vienna Convention, these norms would merely represent a supplementary means of interpretation, although one of a very high relevance.

However, if one narrows the scope of scrutiny to the obligations incumbent on Member States of the EU—which is precisely the delimitation chosen for this work—another approach comes into reach. Instead of asking what constitutes the proper interpretation of Article 33 GC, to be adhered to by all its contracting parties, one may ask what constitutes the proper interpretation of Article 33 GC, to be adhered to by the Member States of the European Union. Opting for the latter query, we find that the interpretation of Article 33 GC transmutes into

[1257] In this hypothetical case, it would have been most appropriate to term the norms enshrined in the Dublin Convention as 'relevant rules of international law applicable in the relations between the parties' as related to in Art. 31 (3) (c) VTC.

the question of interpreting the Dublin Convention. All parties to the Dublin Convention are also parties to the 1951 Refugee Convention. Therefore, the norms of the 1951 Refugee Convention form part of the context of Article 3 (1) DC.

Under this approach, the matter is clear. Member States of the European Union have taken upon themselves the obligation to process asylum claims filed both at their borders and in-country.[1258] The rationale of asylum procedures is to single out beneficiaries of the norms in the 1951 Refugee Convention, of which Article 33 GC is one. Thus, the rejection of a protection seeker at the border of a Member State amounts to a violation of the Dublin Convention.

10.2.2.1.3 Conclusion

On a universal level, convincing contextual arguments have been advanced that Article 33 GC covers non-rejection at the frontier as well. On the sub-regional level, it merits mention that Member States of the EU have acknowledged the applicability of Article 33 GC at the border. In a treaty provision, they have undertaken to examine asylum applications filed at their borders.

10.2.2.2 Article 3 CAT

10.2.2.2.1 The Second Stage

As stated earlier, the wording of Article 3 CAT does not make it entirely clear whether or not this provision also prescribes non-rejection at the frontier. Doctrinal writing on this issue is still rather sparse, mainly due to the fact that the CAT has been adopted only in 1984.[1259] From the outset, it must be recalled that one cannot solve the question by a simple analogy

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[1258] For a confirmation from a governmental perspective, see F. Löper, 'Pre-Procedural Aspects', in UNHCR, *4th International Symposium on the Protection of Refugees in the Central European and Baltic States, 27-29 September 1998, Bled/Slovenia.* Report and Proceedings (1999, UNHCR, Geneva), p. 55.

[1259] For an extensive reading, see Hartl, 1999, p. 181, with further references to other extensive interpretations.

to Article 33 GC.[1260] Apart from the very wording of both provisions, their context and telos is obviously not identical, which prohibits any interpretative short cuts.

It has been argued by Maaßen that the drafters of CAT must have been well aware of the terminological dispute embroiling Article 33 GC and that they consciously refrained from choosing an unambiguous wording, also prohibiting rejection at the frontier.[1261] First, one might wish to recall that this would make the interpretation of Article 3 CAT contingent upon the interpretation of Article 33 GC. As we saw above, the inclusionary reading of the latter provision prevails, which would bring about an inclusionary reading of Article 3 CAT. This is quite the opposite of what Maaßen has intended. Second, it has to be asked what relevance this argument possesses under the Vienna Convention. To be sure, the 1951 Refugee Convention is not part of the context of Article 3 CAT. By way of example, Afghanistan is party to CAT, but not to the 1951 Refugee Convention. It follows that the provisions of the 1951 Refugee Convention do not represent 'relevant rules of international law applicable in the relations between the parties' to CAT.[1262] Thus, arguments relating to the 1951 Refugee Convention are irrelevant for the purposes of the second stage.

Is there any contextual data that must be taken into account when interpreting Article 3 CAT? It must be underscored that this provision is embedded in a normative environment mainly dealing with the punishment of perpetrators as well as the prevention of torture and other forms of ill-treatment within Contracting States. Article 3 CAT is therefore somewhat atypical, and the possibility of drawing upon other provisions as contextual elements is clearly limited.

However, one might wish to note a reference to Article 7 ICCPR in the preamble of CAT:

> The States Parties to this Convention,
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> [...]
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> Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil

[1260] Weissbrodt attempts to solve the matter by a simple analogy to the 1951 Refugee Convention. Weissbrodt and Hörtreiter, 1999, p. 57.

[1261] Maaßen, 1997, p. 183.

[1262] Art. 31 (3) (c) VTC.

> and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, [...][1263]

Could this imply that Article 3 CAT is presumed to have at least the same protective scope as Article 7 ICCPR? If the latter covered non-rejection at the border, the former would do so too. This would make the precise content of Article 3 CAT contingent upon the interpretation of Article 7 ICCPR. Nonetheless, the protection from extraterritorial threats inherent in Article 7 ICCPR covers not only torture, but also cruel, inhuman or degrading treatment or punishment. This is obviously not the case with Article 3 CAT, which has been explicitly limited to cover torture only. Therefore, Article 3 CAT cannot be said to replicate the extraterritorial protection afforded under Article 7 ICCPR. Moreover, the language of the quoted preambular recital is rather weak: the phrase 'having regard to' merely denotes that the Contracting Parties had the named provisions in mind, without necessarily reaffirming and drawing upon each and every aspect inherent in them.

However, one might wish to inquire whether Article 3 CAT is part of a seamless system of preventing torture and other specified forms of ill-treatment. If that were the case, it would seem logical not to disrupt—by allowing rejection of potential torture victims at the border of host states—the universal coverage provided by such a system. But a seamless system would already be disrupted by the limitation of Article 3 CAT to torture only. Possibly, one could inquire whether the CAT provides seamless protection at least from torture. To be sure, the CAT provides for preventive, punitive and reparative measures with regard to torture. Nonetheless, an argument solely crafted on this basis will not be a very strong one—after all, the very purpose of the present argumentation is to single out the precise limitations of torture protection.

In addition, teleological interpretation is also hampered by the same lack of specific evidence. The preamble does not give further clues, and an inquiry into the object and purpose of Article 3 CAT quickly propels interpretation to very abstract levels. In all, the second stage yields singularly weak arguments, and does not allow for a stable and determinate outcome. Recourse to the third stage is necessary.

[1263] Preamble to CAT, fourth recital.

10.2.2.2.2 The Third Stage

The *travaux* provide some evidence supporting an inclusionary reading of Article 3 CAT. The original Swedish draft for that provision was worded quite differently:

> No State Party may expel or extradite a person to a State where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.[1264]

In the deliberations of the 1979 Working Group, no conclusion could be reached on this proposal.[1265] Therefore, Sweden presented a revised draft of this provision, which was subsequently adopted and became Article 3 (1) CAT:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[1266]

Notably, the words 'return ("refouler")' had been added to the prohibited measures, while the danger of cruel, inhuman or degrading treatment or punishment other than torture was eliminated from the protective scope of the provision. Thus, the revised draft provision simultaneously extended and limited the reach of what would become Article 3 CAT.

The ensuing discussion of the extended wording in the 1979 Working Group is quite remarkable. It was said that there were strong humanitarian reasons to include the English and the French terms. Further, mention was made of the 1951 Refugee Convention, which contained the very same words. On the other hand, it was pointed out that the 1951 Refugee Convention 'concerned a different subject and was not broadly accepted'.[1267] Finally, and probably most revealingly, it was

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[1264] J. H. Burgers and H. Danelius, *The United Nations Convention against torture: a handbook on the Convention against torture and other cruel, inhuman or degrading treatment or punishment* (1988, Martinus Nijhoff Publishers, Dordrecht), p. 49.

[1265] Burgers and Danelius, 1988, p. 49.

[1266] Ibid. The Swedish proposal was introduced in UN Doc. No. E/CN.4/WG.1/WP.1.

[1267] Burgers and Danelius, 1988, p. 50. At the time, the 1951 Refugee Convention did not enjoy the same degree of acceptance as it does today, especially in Eastern Europe and in Asia.

suggested 'that the inclusion of the concept of "return" might require a State to accept a mass influx of persons when it was not in a position to do so'.[1268]

In spite of these misgivings, the revised draft provision was adopted in the 1980 Working Group.[1269] Contrary to what Maaßen has assumed[1270], delegations took the term 'return' to imply non-rejection at the border. Otherwise, it would hardly make sense to allude to the risk of an *influx*. Furthermore, as the Working Group and, later on, the Signatories accepted the inclusion of the terms 'return ("refouler")', it can be validly assumed that this acceptance also stretched over an obligation of admission at the border, irrespective of number of beneficiaries.

Given the fact that the CAT was endowed with a facultative monitoring mechanism allowing for individual complaints, this argument gains additional weight. To wit, Contracting Parties may recognise 'the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention'.[1271] As rejection at the frontier is a jurisdictional act, the path would be open for a rejected person to complain to the CAT Committee. At least those Contracting Parties opting for the mechanism must have been conscious of the fact that any ambiguity in the wording of Article 3 CAT might be construed extensively by the future CAT Committee.[1272] Although the authoritative power of interpretation would still remain with states, the observations by the CAT Committee would de facto have a considerable impact on the understanding of CAT. This constituted a stark difference to the 1951 Refugee Convention, which could not be invoked by individuals before a specific monitoring body. Therefore, the fact that the drafting delegations chose to retain the terms 'return

[1268] Burgers and Danelius, 1988, p. 50.

[1269] Burgers and Danelius, 1988, p. 54.

[1270] See text accompanying note 1268 above.

[1271] Art. 22 (1) CAT.

[1272] At the time, the method of dynamic interpretation pursued by the European organs endowed with monitoring the ECHR was well known.

("refouler")' evidences that they were aware of and accepted a possible inclusionary reading of Article 3 CAT by the CAT Committee.[1273]

The assumption of admission obligations was, however, clearly limited in scope. First, as already remarked, Article 3 CAT did not protect from the extraterritorial threat of cruel, inhuman or degrading treatment or punishment. Compared to the implied prohibitions of refoulement in Article 3 ECHR and Article 7 ICCPR, this reduces the protective obligations of Contracting Parties to a great extent. Second, the definition of torture contained in Article 1 CAT is rather demanding, as it contains a specific criterion of intent. Taken together, the number of persons coming under the scope of Article 3 CAT is significantly reduced. This must have dissolved the fears voiced in the 1979 Working Group.[1274]

Although it is not possible to establish a consistent state practice in the sense of Article 31 (3) (b) VTC, the actual comport of states may prove relevant in the third stage. By way of example, in the German Aliens Act, the general prohibition of expulsion to a state where a torture risk exists in Section 53 (1) is explicitly extended to situations arising at the border.[1275] Chapter 8 Section 1 of the Swedish Aliens Act puts the refusal of entry and expulsion on the same footing:

> An alien refused entry or expelled may never be conveyed to a country where there are reasonable grounds for believing that he would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment, nor to a country where he is not protected from being sent on to a country where he would be in such danger.

These examples from domestic law may further support the contention that states support an inclusionary reading of Article 3 CAT at present.

Let us sum up. In the third stage, and drawing mainly on the *travaux*, it has been possible to establish strong arguments militating for an inclusionary reading. Against this background, Article 3 CAT must be

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[1273] The question of rejection at the border in the light of Art. 3 CAT has not yet been brought before the CAT Committee. This is mainly due to the fact that states de facto observe the prohibition of refoulement when confronted with claims at their borders.

[1274] See text accompanying note 1261 above.

[1275] Section 60 (5) of the Aliens Act makes Section 53 (1) applicable mutatis mutandis to the refusal of entry.

understood to comprise non-rejection at the border of Contracting Parties.

10.2.2.3 Article 45 FC

In the second stage, we were tasked with clarifying the meaning of the verb 'to transfer' as it is used in Article 45 FC.

Are there any contextual elements which may elucidate the proper reading of Article 45 FC?

Article 1 FC states that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. The phrase 'in all circumstances' may be taken to suggest that it is improper to infer limitations from the Convention text, which are not explicitly stated in it. This is reinforced by the language of Article 45 FC, which states that transfer may take place 'in no circumstances'. Further, the heading of Section II, of which Article 45 FC forms part, reads 'Aliens on the territory of a party to the conflict'. As earlier mentioned, rejection at the border usually takes place on the territory of the State where entry was requested. Therefore, the phrase 'in no circumstances' must be understood to include rejection at the border.

At first sight, the widely respected Commentary to the Fourth Convention seems to confirm this reading: 'Any movement of protected persons to another State, carried out by the Detaining Power on an individual or collective basis, is considered as a transfer for the purposes of Article 45'.[1276] Obviously, this statement is the product of a contextual interpretation. The Commentary continues:

> The term "transfer", for example, may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition. The Convention makes provision for all these possibilities.

Suddenly, this exemplification turns into an exhaustive listing, when the Commentary states:

[1276] Pictet, 1958, p. 266.

> On the other hand there is no provision concerning deportation (in French "expulsion"), the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action. However, practice and theory both make this right a limited one: the mass deportation, at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted.[1277]

The method used herein begs questions. The exclusion of expulsions from the scope of the provision relies on an argument e contrario: as expulsion is not explicitly mentioned, it must be assumed that Article 45 FC applies to it. Neither the wording nor the structure of the provision suggests that the prohibition of refoulement is limited to those practices mentioned in other paragraphs of the Article. In other words, these practices do not form an exhaustive list. Had that been the case, it would have been quite meaningless to introduce the prohibition of refoulement with the phrase 'in no circumstances', added to the prohibition of refoulement. The quoted argumentation is simply unconvincing.

Moving on to a purely teleological interpretation, we face the same difficulties as already encountered with human rights instruments. It is quite clear that the Geneva Conventions are inspired by the wish to maximise the protection of the individual. At the same time, it is clear that states wished to draw the line with regard to their responsibilities. Thus, the telos alone does not help to establish an interpretative presumption—be it in favour of individual beneficiary or protection-burdened states.

The contextual elements adduced earlier, however, are sufficient to establish clarity in the second stage: Article 45 FC must be understood to prohibit rejection at the border as well.

[1277] Ibid.

10.2.3 Implicit Prohibitions of Refoulement

We have earlier concluded that a specific risk of human rights violations in third countries blocks the *removal* of a claimant, present on the territory of a host state, to such a third country. However, this does not necessarily answer the question whether Contracting Parties to the ECHR and ICCPR have to *admit* persons threatened with pertinent human rights violations elsewhere to their territories. The important difference consists of the fact that the latter group of persons is still outside the territory of Contracting Party.

10.2.3.1 Article 7 ICCPR

Regarding protection claims made from outside the territory of a Contracting Party, the parallels between the ECHR and the ICCPR cease to exist. To be sure, the ICCPR does not provide for such claims. This flows from a contextual argumentation. Article 2 (1) ICCPR expressly requires that the individual claimant be 'within its territory and subject to its jurisdiction'.[1278] This contextual argument clarifies the matter: Article 7 ICCPR cannot be invoked if the claimant lacks territorial contact with the potential host state.

With regard to protection claims made at the border of a Contracting Party to the ICCPR, the wording of Article 2 (1) ICCPR is unambiguous. As long as the claimant is physically in touch with the territory of that Contracting Party, she falls under the protective ambit of Article 7 ICCPR.

[1278] Nowak first affirms that presence on state territory and subjugation to state jurisdiction is crucial for individual protection under the ICCPR. However, Nowak also points at the contradictions inherent in this cumulative requirement (e.g. that a state would not be responsible for denying the right to entry to a citizen *outside* its territory) and suggests a teleological interpretation to resolve them. Moreover, he suggests that recourse should be taken to the extent of state responsibility when determining the precise meaning of Art. 2 (1) ICCPR. Nowak, 1989, p. 45. At first sight, his argumentation could be taken to support a state responsibility to allow access to protection seekers outside its territory. In the opinion of this author, Art. 31 (4) VTC must be taken into account, which would provide a powerful counter-argument to such an extensive reading. See also Goodwin-Gill, 1996, p. 142, invoking dicta of the Human Rights Committee in support of an extraterritorial application of the ICCPR.

In both cases, contextual arguments could bring about a determinate outcome. The ICCPR provides no right to access for persons not in touch with the territory of the Contracting Party.

10.2.3.2 Article 3 ECHR

When delimiting the scope of the ECHR, its drafters discarded the criterion of territorial presence and resorted only to the criterion of jurisdiction. Article 1 ECHR is worded as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

For reasons of argumentative economy, we shall first scrutinise the impact of that solution on protection claims made outside the territory of Contracting Parties. If they fall within the ambit of the ECHR, an argument a fortiori would imply that protection claims made at the border do so as well. If not, we would be compelled to look into the issue of claims at the border separately.

In 1981, the European Commission delimited the scope of Article 1 ECHR in some detail. Its pertinent reasoning, drawing on the case law of the Court as well as its own earlier decisions, merits quoting at some length.

> The Commission recalls that, in this provision, the High Contracting Parties undertake to secure the rights and freedoms defined in Section I to everyone "within their jurisdiction" (in the French text: "relevant de leur juridiction"). This term is not equivalent to or limited to the national territory of the High Contracting Party concerned. It emerges from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad. [...] As stated by the Commission in Application Nos. 6780/74 and 6950/75, the authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its

> jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. In so far as, by their acts or omissions, they affect such line with persons or property, the responsibility of the State is engaged.[1279]

Thus, in our terminology, the term 'within the jurisdiction' does not refer to a geographical, but to an administrative boundary, and the administrative reach of a state exceeds its territorial borders. Be it within or outside state territory—wherever the state or its agents act or omit to act—its responsibility under the ECHR can be engaged.

Let us now merge these two lines of argument. First, we have concluded that State Parties to the ECHR must accord extraterritorial protection to persons present on its territory by not removing them to countries where protection-relevant threats are situated.[1280] Removal is an act of state authority, affecting a person under the jurisdiction of the removing state. It is covered by Article 1 ECHR, as expounded earlier. This conclusion could be reached in the second stage of interpretation, relying mainly on a contextual argumentation.

Second, following the argumentation of the Commission, Article 1 ECHR also obliges states to protect the rights guaranteed in Section 1 in the exercise of their authority *outside* state territory. A person in need of extraterritorial protection requesting entry into a state is under the authority of that state as far as the demand of entry is concerned. Those rights that may trigger extraterritorial protection are all rights guaranteed in Section I. Any act or omission by the demanded state relating to the entry demand affect that person. Thus, such acts or omissions may engage the responsibility of the requested state under the ECHR. Accordingly, there is no difference between removal and denial of entry with regard to state responsibility under Section I. Paraphrasing the words of the Court in *Cruz Varas*, one may state the following. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State *denying entry* by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-

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[1279] Dec. Adm. Com. Ap. 9360/81, 28 February 1983, D&R 32 p. 211 (214–6), para. 14. To support its reasoning in this passage, the Commission refers back to a number of earlier decisions.

[1280] See chapter 10.1.1.4 above.

treatment.[1281] To be sure, such an obligation is a negative one: the Contracting State may not hinder entry by jurisdictional acts or omissions. If that state routinely blocks access to its territory by imposing visa requirements for certain nationalities, it has to waive that requirement in relevant cases.

For protection claims filed at the border of Contracting Parties, a corresponding argumentation implies that a duty not to inhibit access to the said Party's territory flows from Article 3 ECHR.

Otherwise put, Article 1 ECHR entails a privilege of entry for aliens threatened by torture or other forms of ill-treatment covered by the ambit of Article 3 ECHR. The term 'privilege' is used in the Hohfeldian sense here—it implies that a State Party to the ECHR has no right to impose visa requirements on such an alien. Let us exemplify. A person risking torture in her home country approaches the Swedish Embassy in its capital, asking for an entry visa. Provided that the denial of an entry visa has the direct consequence of exposing that person to torture, the Swedish consular officer must issue it, if Sweden is not to violate Article 3 ECHR. Technically speaking, the present conclusion is a mere consequence of the prevailing universalist reading of Article 3 ECHR in the sub-sections on protection. It draws on the determinacy won in that argumentation.

It cannot be denied that this conclusion unfolds the most radical consequences for European migration policies. Together with complementary measures (carrier sanctions and pre-frontier training and assistance), visa requirements remain the most powerful device of migration control. Their track record of deflecting would-be refugees is considerable, reaching back to the German refugee crisis of the 1930s. On a political level, it has been constantly argued by UNHCR and non-governmental organisations that such requirements are an indiscriminate means of control, blocking access even for those persons in need of protection. Drawing on the argumentation developed in this chapter, it is now possible to argue that an indiscriminate application of visa requirements is illegal under the ECHR.

This conclusion is radically at odds with the current practices of many Contracting Parties to the ECHR. In the EU, far from all Member States operate a regime allowing protection seekers to file claims under Article 3

[1281] See text accompanying note 1161 above.

ECHR with diplomatic representations abroad.[1282] This endangers their compliance with their human rights obligations flowing from the ECHR.

10.3 Interim Conclusion on Hard Cases

In order to facilitate further discussion, we shall finish by pulling together the main results of the second and third stages. Finally, it shall also be asked how the material outcome affects our further inquiry.

Setting out with the first question on protection, we can state that almost all of the ambiguities persisting at the first stage could be clarified at the second stage. Proceeding to the third stage was necessary only in two cases (the applicability of Article 3 CAT to non-rejection at the border and immigration under Article 12 ICCPR), of which the latter resulted in an indeterminate outcome. An overview of the results derived from the second and third stages is given in Table 7 below.

Moving on to the second question of access to territory, it was determined that all explicit prohibitions of refoulement (Article 33 GC, Article 3 CAT and Article 45 FC) contain an obligation of non-rejection at the border. Contrary to various particularist arguments, these provisions feature a punctual right to access. However, this right is only applicable on the territory of a Contracting Party, and cannot be invoked by a person present in another state. Thus, the named provisions cannot be used to obtain a waiver from visa requirements in order to evade the situations of threat specified in the three provisions.

Moving on to the remaining provisions, the second stage produced remarkable results with regard to Article 3 ECHR. This provision indeed implies a prohibition of removal, thus confirming the reasoning of the European Court of Human Rights, as well as a punctual right to access at the border and from elsewhere (issues hitherto not deliberated by the Court). The importance of this outcome can hardly be underestimated. Mainly due to its monitoring mechanism and the respect it enjoys, the ECHR remains the most powerful human rights instrument available in the region. Provided the preconditions for the applicability of Article 3 ECHR are fulfilled, a Contracting Party to the ECHR is not only legally required to mete out protection. Over and above that, it is also obliged not to obstruct access to its territory, e.g. by demanding an entry visa.

[1282] See notes 522 and 523 above.

Given that visa requirements are the prime tool of regulating access to extraterritorial protection in contemporary Europe, this outcome should have considerable practical repercussions on regional asylum and migration policies. Although this interpretation is a stable product of the interpretative rules contained in the Vienna Convention, it opens a justificatory question: where are the limits of the protective obligations relating to extraterritorial threats under the ECHR? This issue shall be pursued in detail in the ensuing chapter.

The ECHR remains, however, the only instrument covering protection as well as both modes of access. While Article 7 ICCPR allows for protection on the territory as well as non-rejection at the border, its scope does not include persons situated elsewhere.

It is also worth noting, however, that some interpretations at the second stage entailed voluminous and complex arguments, as was the case with the protection and access dimensions of Article 3 ECHR as well as the access dimension of Article 33 GC. Materially speaking, though, it is hardly surprising that the issue of access raises profound conflicts, which can be tidied up only with great effort—or not at all. The only issue remaining indeterminate after the second and the third stage was whether Article 12 ICCPR provides for a temporary right to immigration. Both the universalist and the particularist position could be fortified with complex argumentations, and a weighing operation turned out to be inevitable. This is the second theme for further inquiry: can this indeterminacy be solved beyond interpretation, e.g. by introducing some form of presumption? If not, what does it do to law as a whole, given that the issue at stake is far from being trivial?

	Claimant is situated within the territory of a potential host state	Claimant is situated at the border of a potential host state	Claimant is situated elsewhere
Art. 33 GC	Yes (1st stage)	Yes (2nd stage)	No (1st stage)
Art. 3 CAT	Yes (1st stage)	Yes (3rd stage)	No (1st stage)
Art. 45 FC	Yes (1st stage)	Yes (2nd stage)	No (1st stage)
Art. 3 ECHR	Yes (2nd stage)	Yes (2nd stage)	Yes (2nd stage)
Art. 7 ICCPR	Yes (2nd stage)	Yes (2nd stage)	No (2nd stage)
Art. 32 FC	No (1st stage)	No (1st stage)	No (1st stage)

Table 7: Applicability ratione loci of Selected Norms in Relation to a Potential Host State. Results of the First, Second and Third Stage.

10.4 Substance by Method?

10.4.1 What Does the Vienna Convention Do To the Law?

In the preceding interim conclusions, we have pulled together the material outcome of a number of interpretations. However, reaching this outcome raised a new question. To wit, what did the strict pursuit of Articles 31–2 VTC do to our material or, put generally, what do these articles do to any legal material?

The interpretative provisions of the Vienna Convention structure interpretative data by assigning them specific places in a hierarchy. This is helpful in two ways. First, irrelevant, i.e. non-legal, arguments are

eliminated.[1283] Second, procedural rules for the controlled escalation of complexity in interpretation are provided. To overcome ambiguity, the amount of data accessible to the interpreter is increased step by step. It is reasonable to assume that the conflicts identified and persistent in the first stage will come into full bloom in the remaining stages of the interpretative operation. Yet, with an increasing total amount of data, chances augment that data critical for the elimination of competing positions come within reach. Ultimately, the goal of interpretation is to use the increased amount of data for the purpose of reduction. The underlying logic is to expand complexity for the purpose of reducing it. This would only work if there were no 'residual data' which would not be consumed by reduction. The ideal would be to expand the data amount exactly so much as to induce one single outcome, consuming all data made available. However, the requirement of neutrality inherent in a legally framed procedure prohibits that only such data is made available that would resolve ambiguity in a determinate manner. Neutrality dictates that not single data, but rather classes of data (as the 'context' or the 'telos') are gradually made available to the interpreter. In these classes of data, irreducible elements may be contained. These would then augment complexity instead of reducing it, resulting in ever more profound ambiguity.

To conclude, a materially neutral methodology of interpretation cannot guarantee determinate outcomes. This does not imply that it is useless, however. What it can do, and should do, is to structure legal argumentation, to do away with simple ambiguities, to diminish the necessity of weighing conflicting principles and, finally, to single out the point in argumentation at which political decisions are cloaked in the attire of formal implementation of interpretative rules.

However, the rules of the Vienna Convention are not necessarily neutral when it comes to balancing the letter of the law and the will of the legislator. The procedure of interpretation outlined above gives the letter of the law a strategic advantage over the context, telos and other manifestations of the will of the legislator. This advantage can be compared to that enjoyed by the chess player making the first move. It also offers such an advantage to the context and telos in their relation to

[1283] Properly, one might wish to speak of arguments that are not legally coded. However, the question whether all arguments can be translated into legal arguments is not at stake here.

other manifestations of the legislator's will, as, for example, the *travaux*. This hierarchy may impact most decisively on the outcome of a specific interpretation, and, as we have seen earlier, a versed interpreter usually takes it into account when crafting arguments.

The methodology offered by the Vienna Convention is no self-propelling machinery, however. It remains dependent on decisions taken by the interpreter. To wit, the assessment of clarity after the first and second stage respectively is a critical area.[1284] As clarity is a vague concept, here is the possibility of manipulating the outcome of interpretative operations. Above, we have opted for a formal concept of clarity, implying the absence of arguable counter-arguments admissible in a given stage of interpretation.[1285] Yet, while this concept is logically derived from the Vienna Convention, it is not prescribed by it. We have to acknowledge that other concepts of clarity can be devised and defended, and may eventually lead to different outcomes.

10.4.2 What Do Lawyers Do With the Vienna Convention?

As a by-product of our own interpretation, we were forced to conclude that the majority of interpretative efforts by doctrinal writers as well as within monitoring bodies partly or fully neglect the methodological framework prescribed by the Vienna Convention. On a formal level, this is serious, as the Vienna Convention is a binding instrument, and the international lawyer has no choice but to follow its rules of interpretation. But what are the reasons for this neglect? Why is the positivist potential of international law not fully exploited when it comes to the cutting-edge exercise of interpretation?

It is conceivable that some lawyers perceive the material and structural limitations flowing from the Vienna Convention as simply impeding their argumentative project. Such lawyers may believe that an unrestrained presentation of interpretative arguments is the better success strategy. Or they believe that following a different canon of interpretation (e.g. one

[1284] There are others: as an example, what exactly is to be considered as the 'text of the treaty' or what is to be counted as 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'?

[1285] See text accompanying note 1200 above on the combination of a determinate context and an indeterminate telos in the second stage.

putting more emphasis on the intent of the legislator) secures an outcome more favourable to their needs. Obviously, such wholesale circumvention of the Vienna Convention makes an interpretation derived on its basis extremely weak and contestable. Put succinctly, it reveals a lawyer disregarding the law. In the present context, this approach is without theoretical interest and merits no further discussion.

More interesting is the class of lawyers who use the Vienna Convention as a strategic tool in their material argumentation. Above, we saw how doctrinal writers became ever more aware of the trump role played by the Vienna Convention. They reformulated older arguments, thus moving them up to a better position in the three stages of interpretation.[1286] Or they sought to transform teleological arguments into contextual ones[1287], thus making them more concrete and protecting them from being consumed in the opposition of a universalist and a particularist telos. Used likewise, the Vienna Convention becomes a tool in a partisan struggle. This is wholly acceptable—legal argumentation does not take place in a political void, but is part and parcel of a greater context. As long as arguments can be cloaked in the language of law, they enjoy a privileged position in discourse. But beyond partisan conflict, the question remains whether the law favours, or indeed implies, a certain outcome.

10.4.3 Three Wildcards: Presumptions, Telos and Indeterminacy

Some doctrinal writers had a ready-made answer in store. They operated openly with presumptions on an implicit burden of proof, a method highly reminiscent of a standard framework in civil procedure law: if the universalist claimant does not succeed in the creation of determinacy, she shall lose the case. Otherwise put, if interpretation does not produce a clear and unambiguous outcome, a certain paradigm shall prevail, and the opposite paradigm shall lose the case. One author operated with the maxim in dubio mitius to support state interests: where an obligation cannot be unambiguously shown to exist, it shall be assumed that states

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[1286] Consider e.g. the reformulation of a *travaux*-based argument on the applicability of Art. 33 GC to rejection at the border into a contextual argument grounded in the Final Act. See text accompanying note 1237 above.

[1287] See text accompanying note 1254 above.

are not obliged.[1288] But in dubio mitius can also be turned around and put to work for the universalist. This would imply the opposite presumption: any doubt would support the deduction of a state obligation. Clearly, if such presumptions had had a basis in international law, they would open good chances to secure an outcome that is determinate. Presumptions are thus serving two groups: those favouring their underlying paradigm, but also those cherishing determinacy. However, none of the authors using such presumptions bother to clarify their validity and justification under international law. While the operation of presumptions based on some sort of intuition must be rejected, the question remains: does international law contain an inherent presumption apt to endow interpretative stalemates with determinacy? And, if this is the case, does it work for universalism or particularism?

The use of presumptions can take on a more subtle form. We have noted above that some authors convert the telos into a Trojan horse, bringing their own preferences into the second stage of interpretation.[1289] As shown earlier, there is no simple answer to the question how the goal of promoting human rights is best served. Therefore, teleological interpretation easily leads back to the original conflict between universalism and particularism. If any hierarchy between the two paradigms could be established, this would impact on the second stage of interpretation, either tilting outcomes in its favour, or, where counteracting contextual arguments exist, producing an indeterminate outcome. Basically, teleological reasoning raises the same questions as the issue of presumptions.

There is a third manifestation of the very same question. In the present chapter, the Vienna Convention was perceived as a tool producing determinate outcomes—no matter whether these work for the particularist or the universalist. The underlying assumption was the desirability of determinacy at the earliest possible stage in interpretation. This determinacy was to be produced without resort to presumptions. By consequence, if the Vienna Convention failed to produce a determinate outcome, there would simply be no determinate outcome, and one of the two promises of law—justice and predictability—would remain unfulfilled.

[1288] See text accompanying note 1192 above.

[1289] See text accompanying note 1236 above.

As we have seen, this worst case scenario materialised with regard to the contested right to immigration under Article 12 ICCPR.

Now, what are the consequences of an indeterminate interpretation? The issue of determinacy is one of partisanship as well. Are not indeterminate outcomes simply supportive of existing power structures? Would not an indeterminate outcome support that paradigm which happens to dominate political discourse for the moment? Regarded as such, is indeterminacy nothing more than a nicely camouflaged way of taking sides?

This chapter set out to scrutinise how the conflict between universalism and particularism manifests itself in the interpretation of the law regulating protection and access. Faced with these manifestations, we were compelled to realise that we cannot do without an answer to this conflict. In reality, the three issues beyond the reach of the Vienna Convention—the existence of a presumption, the handling of the telos and the consequences of indeterminacy—boil down to one. Directly or indirectly—does international law favour universalism or particularism? Without an answer, the meaning of law remains obscure.

11 Delimiting and Justifying Protection under the ECHR

WHILE THE PRECEDING CHAPTER answered some questions on the protective capacities of international law, it at the same time raised new and ever more complex ones. We came to the conclusion that the CAT, the ICCPR and the ECHR all contained norms prohibiting refoulement. While the protective ambit of CAT was rather clear cut—Article 3 was the sole provision impacting removal of aliens, and it covered removal to torture only—both the ICCPR and the ECHR proved trickier to delimit. As a comprehensive interpretation based on the Vienna Convention has shown, we must endorse that Article 7 ICCPR and Article 3 ECHR protect from removal and entitle to access at the border. Most intriguingly, it emerged that Article 3 ECHR also contained an implicit right to access from other territories.

At this juncture, then, the question imposes itself whether other provisions of the ICCPR and the ECHR unfold corresponding effects. Does the right to a fair trial contain an implicit prohibition of refoulement? If one accepts the implications of the prohibition of ill-treatment upon removal, must one not also endorse parallel implications of the right to life? In the case of the ECHR, the consequences would attain a revolutionary tinge. If there is a right to access for persons

threatened with torture in a third country, there might also be a right to access for persons whose right to free speech is impaired. Affirming that all rights in the ECHR and its Protocols can be transformed into ancillary rights to non-refoulement would potentially undermine large parts of current migration control policies in Europe.

This suggests that future battles on the extent of extraterritorial protection are to be fought in the arena provided by the ECHR and that their intensity will exceed those on the 1951 Refugee Convention. After all, a potentially much broader protection package is at stake, coupled with a rather impressive inherent right to access. The deliberations on subsidiary protection within the Council represent only feeble preliminaries for things to come.[1290] Let us anticipate this discussion in the present chapter, which is fuelled by two questions. Where exactly are the boundaries of extraterritorial protection under the ECHR? How are these boundaries justified? We shall look into responses developed in the case law of the European organs and by doctrinal writers. Given that the ECHR possesses a more powerful monitoring mechanism than the ICCPR and comprises an implied right to access as well, we shall limit our scrutiny to the former. Suffice it to note that the delimitation of extraterritorial protection and its justification under both instruments is largely parallel.

11.1 The Case Law of the European Organs

Do all human rights listed in Section I of the ECHR contain an implicit prohibition of refoulement? In *Soering*, the European Court has made clear that extraterritorial protection need not be confined to Article 3 ECHR when stating that 'in so far as a measure of extradition has

[1290] The Council seems to be at pains to realise the impact of the ECHR on extraterritorial protection. While it is laudable that a structured discussion on subsidiary protection has started, and that the Amsterdam Treaty has created legal competencies for an EC measure on the topic, the Council's General Secretariat appears to have difficulty realising the full impact of the ECHR on extraterritorial protection. In the Council's study on subsidiary protection, the issue of non-refoulement under other provisions than Art. 3 ECHR is not even named. Furthermore, the study suggests 'it would [...] be wrong to assume that Article 3 would require Contracting States to adjust their admission policies'. For the reasons outlined in the preceding chapter, this suggestion is untenable. Council of the European Union, Study on international instruments relevant to subsidiary protection, 13 July 1998, Doc. No. 10175/98 ASIM 178, p. 8.

consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee'.[1291] The case law of the European organs provides a few indications on the potential of other provisions than Article 3 ECHR with regard to extraterritorial protection. The right to life, the prohibition of the death penalty, the right to a fair trial and the right to family life have been expressly addressed by the European organs in a context of non-refoulement. In the past, the latter have not had the opportunity to pronounce themselves on the inherence of non-refoulement in other rights than those named. Let us embark on a brief overview.

Concerning the right to life, the Commission has explicitly stated that removal of a person to a state where his or her life is endangered may engage responsibility under Article 2 ECHR, prohibiting the intentional deprivation of life.[1292] Precisely as is the case with Article 3 ECHR, Article 2 ECHR does not allow for exceptions and cannot be derogated from in time of war or other public emergency. However, the provisions differ in that Article 2 ECHR contains a requirement of intent, while Article 3 ECHR does not. Accordingly, when seized with an issue under Article 2 ECHR, the Commission applied a far more exigent standard of proof than under cases related to Article 3 ECHR:

> As to the prohibition of intentional deprivation of life, the Commission does not exclude that an issue might be raised under Article 2 in circumstances in which the expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near-certainty. The Commission considers, however, that a "real risk"—within the meaning of the case-law concerning Article 3 [...] —of loss of life would not as such

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[1291] *Soering*, para. 85.

[1292] Application No. 25894/94, *Bahaddar vs. the Netherlands*, Report by the Commission of 13 September 1996, para. 78. Application No. 14912/89, *X vs Switzerland* (unpublished), quoted in W. Kälin, *Die Bedeutung der EMRK für Asylsuchende und Flüchtlinge. Materialien und Hinweise* (1997, ZDWF, Bonn), p. 19.

> necessarily suffice to make expulsion an "intentional deprivation of life" prohibited by Article 2, although it would amount to inhuman treatment within the meaning of Article 3.[1293]

In practice, though, this need not diminish the protective scope of the ECHR. As the Commission suggests in the last words of the quoted passage, a threat not satisfying the requirements of Article 2 ECHR may very well fall under the protective ambit of Article 3 ECHR.[1294]

The prohibition of condemning a person to the death penalty or executing her contained in Article 1 of the Sixth Additional Protocol of the ECHR[1295] could also contain an inherent prohibition of non-refoulement. In *Soering*, the ECtHR was inhibited to pursue this question further, as the respondent state was not bound by the Protocol.[1296] The European Commission has considered extraterritorial protection under Article 1 of the Protocol as arguable in *Y vs. the Netherlands* without however providing further details.[1297]

Concerning the right to fair trial, the European Court 'does not exclude that an issue might exceptionally be raised under Article 6 by an

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[1293] Application No. 25894/94, *Bahaddar vs. the Netherlands*, Report by the Commission of 13 September 1996, para. 78.

[1294] We note, however, that the requirement of proof under Article 2 ECHR, as expressed in the previously quoted case of the European Commission, is higher than the corresponding demands in Art. 5 of the Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions. The latter provision reads: 'No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country'. To be sure, the word 'may' sets a lower threshold of proof than the term 'real risk', which is used by the European Commission. It is most unfortunate that a regional human rights mechanism features a lower degree of protection than what has been politically consented upon at the universal level. Fully conscious of the non-binding character of the Principles as such, the observer wonders why the European Commission has felt the need to amplify this difference by introducing the very demanding concept of 'near-certainty'. Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, recommended by Economic and Social Council resolution 1989/65, 24 May 1989.

[1295] Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, Strasbourg, 28 April 1983, E.T.S. 114.

[1296] *Soering*, paras 102 and 103.

[1297] *Y vs the Netherlands*, Decision of 16 January 1991, Appl. No. 16531/1990, Decisions and Reports 68 (1991), para. 304.

extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'.[1298] This position was reiterated by the Commission in the *Kozlov* case.[1299] Parenthetically, it might be of some interest to note that the right to fair trial figures also amongst the mandatory grounds for refusal of extradition named in Article 3 of the UN Model Treaty on Extradition.[1300]

With regard to the right to family life, we must distinguish those cases where family life on the territory of the removing party is disrupted from those where a disruption takes place extraterritorially. True to the delimitation of this work to extraterritorial protection, only the latter cases are of interest.[1301] In *Cruz Varas*, the European Court has shown itself prepared to scrutinise whether a disruption of family life due to removal and outside the territory of the respondent state violates Article 8 ECHR.[1302] This implies that, in the Court's view, Article 8 ECHR also features an inherent prohibition of refoulement.

Although it has proved willing to embrace other provisions than Article 3 ECHR, the Court has been far from making itself a harbinger of universalism. As earlier noted, it has stressed the exceptional character of extraterritorial protection under the Convention. It has underscored that

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[1298] *Soering*, para. 113.

[1299] *Kozlov vs Finland*, Decision of 28 May 1991, Appl. No. 16832/1990, Decisions and Reports 69 (1991), para. 332.

[1300] This provision reads as follows:

'Extradition shall not be granted in any of the following circumstances:

[...]

(f) [...] if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;

(g) If the judgement of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence.'

G.A. Res. 45/116, Model Treaty on Extradition, 14 Dec. 1990, UN Doc. No. A/RES/45/116. While not binding as such, this instrument might be of some use when analysing the opinio juris with regard to the permissibility of extradition under customary international law. As stated earlier, an analogy can be drawn to removal other than extradition.

[1301] For a general overview on the case law related to removal and Article 8 ECHR, see A. Sherlock, 'Deportation of Aliens and Article 8 ECHR', 23 *European Law Review* (1998).

[1302] *Cruz Varas*, para. 88.

its Article 1 'cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention'.[1303] At face value, this allows for three possible readings. First, there are *some* Convention rights which do not unfold extraterritorial protection. Or, second, in an extraterritorial context, the protection through each Convention right *is not as far reaching* as in the domestic context. Or, thirdly, *both* limitations could apply. Seemingly, the Court discards the fourth option, and therewith the *congruency of extraterritorial and domestic protection* under the ECHR.

Anything else than the fourth option requires that a line be drawn. This line is differently located in the first and the second reading. While the first reading implies a hierarchy *among* the rights in Section I of the ECHR, the second implies a hierarchy *within* these rights. According to the first reading, some rights are 'superior' to others, motivating and justifying their potential for extraterritorial protection.[1304] Following the second reading, some violations of a right are superior to others, which motivates and justifies that extraterritorial protection be granted for the former. When browsing through relevant doctrinal text in the following, we shall see how the argumentative patterns of both readings resurface—tracking either *which* rights apply, or *to what extent* they apply to extraterritorial protection.

11.2 A Hierarchy among Rights?

Let us start out with the first reading and, hence, with *which rights apply*. Close to the particularist end of the spectrum, we find a position that argues that extraterritorial protection under the ECHR is *exclusively* confined to Article 3 ECHR.[1305] Another, less rigidly formulated, but materially identical, approach accords Article 3 ECHR the function of a *passerelle* to extraterritorial protection. The latter position can be

[1303] *Soering*, para. 86.

[1304] Zühlke and Pastille, 1999 have provided an excellent overview of a broad variety of superiority arguments, discarding them in a systematic fashion.

[1305] See A. H. Robertson and J. G. Merrills, *Human Rights in Europe* (1993, Manchester University Press, Manchester), p. 44.

exemplified with the case of a person threatened with an unfair trial in her home country. Removal to that country would be considered inhuman treatment and would thus violate Article 3 ECHR, rather than Article 6 ECHR. The bottom line is that the feared treatment must qualify as inhuman in the sense of Article 3 ECHR. Proponents of the latter position[1306] appear to have been inspired by the earlier case law of the European Commission[1307]—case law that is obsolete after *Soering* and the cases referred to earlier in this sub-section.[1308]

Taking any of these limitative positions inevitably leads one to ask why the prohibition of ill-treatment in Article 3 ECHR should enjoy special status among the rights enshrined in the ECHR and its Protocols. As noted in doctrine, '[i]t remains unclear where the superiority of Article 3 is located'.[1309] Arguing for a special character of torture-related norms, motivating their exclusive possession of extraterritorial range, is indeed a demanding task. It is by no means evident why protection from torture is tantamount to protection from other 'irremediable damages' such as, for example, the intentional deprivation of life. Neither the wording, nor the context, nor the telos of Article 3 ECHR accommodate an exclusive possession of non-refoulement capacities. Nor can the absence of permissible limitations in Article 3 ECHR and its non-derogable character support hierarchical superiority within Section I—after all, both characteristics are shared by other provisions of the ECHR. As a result, we must reject the two limitative approaches.

What then is the criterion singling out a special class of rights endowed with an inherent prohibition of refoulement? This criterion can be sought either *within* the text of the ECHR or *outside* it.

Taking the latter approach, a distinct effort to argue for the special status of Article 3 ECHR was made in 1988 by Vogler, who advances a jus cogens-criterion. He contends that Article 3 ECHR inhibits extradition,

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[1306] Accounting for arguments in favour of such an exclusive possession, Maaßen, 1997, p. 136, states that the European organs ultimately focus on the legality of removal from the sending state and not the legality of the presumed treatment in the receiving state. But see Zimmermann, 1994, p. 90 f, Suntinger, 1996, p. 214, affirming an independent prohibition of refoulement under Art. 2 ECHR.

[1307] Zühlke and Pastille, 1999, pp. 756–7.

[1308] The reader will note that both limitative positions are at odds with the Court's own position, as stated earlier. See text accompanying note 1291 above.

[1309] Zühlke and Pastille, 1999, p. 757.

while Article 6 ECHR does not.[1310] He bases this contention on the observation that only Article 3 ECHR represents a 'general rule of international law recognised by civilised nations' in its totality, while, for example, the principles of legality of procedure enshrined in Article 6 ECHR 'belong to them only in their intrinsic components'.[1311] He elevates this conclusion to a general theory: '[w]hether a State is allowed to extradite [...] ultimately depends on the classification of rules as belonging to the international *ius cogens*'.[1312]

Van Dijk refutes this argumentation with a reference to the competence of the Strasbourg organs, which 'is limited to the "engagements undertaken by the High Contracting Parties in the present Convention"'[1313]. This misses the point, as Vogler uses the criterion of jus cogens only to single out those norms in the ECHR endowed with an inherent non-refoulement capacity. The responsibility of State Parties to the ECHR is still based directly on the ECHR, which is merely interpreted in the light of international law.

Other reasons militate against Vogler's explanation, which is ultimately an attempt to craft an argument capable of superseding contractual obligations under bi- or multilateral extradition agreements.[1314] Vogler

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[1310] This was roughly a year before the ECtHR spelt out in *Soering* that Art. 6 ECHR could very well provide a basis for extraterritorial protection. See text accompanying note 1298 above.

[1311] T. Vogler, 'The scope of extradition in the light of the European Convention on Human Rights', in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension (Essays in Honour of G.J. Wiarda)* (1988, Heymann. Köln), p. 669.

[1312] Ibid., p. 670.

[1313] P. van Dijk, *Asylum Law and Policy in the Netherlands. The Dynamic of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers, Vol. III* (1994, Martinus Nijhoff Publishers, Dordrecht), p. 139.

[1314] Such agreements usually do not exempt persons risking torture or other forms of ill-treatment in the requesting country from extradition obligations. It would follow e contrario from Vogler's approach that a State Party to the ECHR could liberate itself from its obligations vis-à-vis an individual under its jurisdiction by entering into a bilateral agreement to that effect with another state. This is clearly not the case, and one need not resort to jus cogens or, for that matter, obligations erga omnes to explain why. The answer lies in the fact that human rights are not a bilateral business with states as reciprocal beneficiaries. By agreeing to Article 1 ECHR, states have simply bound themselves not to enter such rights-impairing agreements. Otherwise put, Section 1 of the ECHR would constitute lex specialis in relation to extradition agreements. An interesting parallel is the explicit exemption of treaty provisions relating to the 'protection of the human person' from the party's disposal in Art. 60 (5) VTC. The

meets this challenge by declaring Article 3 ECHR to reflect a norm of higher dignity.[1315] In the absence of rudimentary forms of support from the actors of international law, the qualification of norms as peremptory is still a disturbingly controversial affair.[1316] Zühlke and Pastille have aptly demonstrated the practical fallacy of reasoning based on jus cogens by comparing two cases involving the death row phenomenon. In *Soering*, the ECtHR considered the death row phenomenon to constitute inhuman treatment in the sense of Article 3 ECHR. In *Kindler*, however, the Human Rights Committee did precisely the opposite.[1317] It is little helpful to declare a norm to be jus cogens, when there is such disagreement on its content by highly qualified actors as the ECtHR and the HRC. Similar reflections apply to an approach based on obligations erga omnes[1318] or on attempts to identify a group of basic protection norms in international treaty law[1319]. Therefore, we are compelled to conclude that these concepts are of no help when identifying the rights in Section I ECHR or in the Protocols that may entail extraterritorial protection.

Let us now turn to the search for a criterion distinguishing such rights *within* the text of the ECHR. In 1982, Kälin proposed that non-refoulement under the ECHR is reserved for violations of non-derogable rights as defined by Article 15 ECHR and for the 'core content' ('*Kerngehalt*') of other rights enshrined in the ECHR.[1320] Regarding non-derogable rights, Ermacora agrees with Kälin: 'The most legal approach to the problem may be to state wherever rights might be involved which are even guaranteed in the case of public emergency (Articles 2, 3, 4 § 1 and 7 of the Convention) a member State may be considered responsible under the Convention for actions taken with a view to deportation or

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problem is that Article 1 ECHR stretches over the whole rights catalogue contained in Section 1 of the ECHR. The contractual approach leads either to disturbing consequences for the international law of human rights or back to the original question.

[1315] See Art. 59 VTC.

[1316] A topical discussion with further references can be found with Higgins, 1993, pp. 20–2.

[1317] Kindler revolved around whether the removal of the applicant to the U.S. would constitute a violation of Article 7 ICCPR. The HRC denied that a placement in death row would constitute inhuman treatment in the sense of Article 7 ICCPR. *Kindler vs. Canada*, para. 6.4. See Zühlke and Pastille, 1999, p. 765.

[1318] For a good argumentation, see Zühlke and Pastille, 1999, p. 763.

[1319] Zühlke and Pastille, 1999, p. 763.

[1320] Kälin, 1982, pp. 181–2.

extradition'.[1321] A delimitation turning on derogability appears to be plausible, as it follows a structure erected within the ECHR by the Contracting Parties themselves. The same would go for a delimitation based on which rights are formulated as 'absolute', that is, making no room for limitations. Such 'absolute' rights would offer protection from refoulement, while the 'relative' rights in Articles 8 to 11 would not. In its case law, the Court has repeatedly stressed the absolute nature of Article 3 ECHR as well as its non-derogability.

But this plausibility is deceptive. As Zühlke and Pastille have convincingly argued, it rests on a tautology: '[t]racing superiority with the help of non-derogable rights dwells on the assumption that those rights are non-derogable because they are superior—a classic circular argument'.[1322] This works against all attempts to deduce a hierarchical structure from the textual manifestations and delimitations of rights, whether they be drawn from express limitations (as in Article 5 ECHR), justifiable interferences (Articles 8 to 11 ECHR) or derogability in case of public emergency (all rights other than those enshrined in Articles 2, 3, 4 (1) and 7 ECHR). Basically, the Convention text is no more than a structure of technical solutions to the problem of formulating rights with sufficient precision. There is no indication whatsoever that the chosen technical solutions are signs of superiority.[1323]

Further, the adequacy of terming rights as 'absolute' can be drawn into question. Along the terms suggested by Alan Gewirth, the absoluteness of a right implies that it survives a conflict with another right.[1324] It is questionable, though, whether Article 3 ECHR, or, for that matter, similarly formulated rights in Section I, are absolute. As Zühlke and Pastille have argued, the precise extent of Article 3 ECHR cannot be established but on a case-by-case basis, necessitating subjective assessments

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[1321] F. Ermacora, 'The Application of the ECHR in Asylum Cases', in R. Lawson and M. de Blois (eds), *The Dynamic of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers. Vol. III* (1994, Martinus Nijhoff Publishers, Dordrecht), p. 162.

[1322] Zühlke and Pastille, 1999, p. 761.

[1323] 'The different mechanics of protecting rights follow substantial differences in the history and practical nature of those rights. The different forms that rights take in the Convention cannot serve as an indicator of superiority [footnote omitted, GN].' Zühlke and Pastille, 1999, p. 760.

[1324] Addo and Grief, 1998, p. 514, quoting A. Gewirth, *Human Rights. Essays on Justification and Applications* (1982, University of Chicago Press, Chicago/London), p. 219.

by means of a weighing process.[1325] Consider two police officers marching a handcuffed and sparsely clad person over a public square. Whether or not this is degrading treatment in the sense of Article 3 ECHR depends on the circumstances. Provided that person is a suicide assassin, such conduct is likely to be justified. Where the same person has merely committed a minor traffic offence, this public display would most certainly be considered degrading by the European Court.[1326] Thus, Addo and Grief are certainly right when stating that the case law 'gives an impression of shifting boundaries as regards the character and scope of the absolute nature of the prohibitions in Article 3'.[1327] Where the fringes of a right are dynamic to this degree, what sense does it make to suggest that it survives a conflict with any other right? The example has shown that the rights of others—e.g. the potential victims of a suicide assassin—impact on the extent of the right enjoyed by the person marched over the public square. What one could validly claim is that a core content of Article 3 ECHR (e.g. the more specific concept of torture) will always survive and is thus absolute.[1328] But this is true for any of the rights in Section I—beyond justified interference and the margin of appreciation. So, in the end, there is no difference between Article 3 ECHR, and, say, Article 8 ECHR. At the fringes of Article 3 ECHR, the concept of absoluteness turns out to be materially empty.[1329] Thus, it is useless for discerning hierarchical structures *among* the single rights enshrined in Section I ECHR.[1330] Hence, we can discard the first reading of the European Court's dictum quoted earlier.

[1325] Zühlke and Pastille, 1999, pp. 770–2.

[1326] The example is taken from Zühlke and Pastille, 1999, p. 771.

[1327] Addo and Grief, 1998, p. 514.

[1328] However, while the torture concept may represent a 'core content' for Art. 3 ECHR, the same is not true for Art. 3 CAT, where the fringes of the concept are highly contested grounds. This is so because the buffer zone of other forms of ill-treatment is unavailable under the latter provision.

[1329] It is no coincidence that Gewirth, while affirming the existence of absolute moral rights, chooses to formulate them in very abstract terms. Gewirth illustrates rule absolutism by the right not to be made the intended victim of a homicidal project, and principle absolutism by the principle that agents and institutions are absolutely prohibited from degrading persons, treating them as if they had no rights or dignity. Gewirth, 1982, p. 233.

[1330] By stating this, we have taken no position on the existence of absolute rights.

This brings us back the second part of Kälin's proposal, turning on the notion of a 'core content' inherent in each right. Kälin himself defines the concept of core content as the realm of a right, which cannot be infringed upon without eradicating the right as such.[1331] Indeed, it is not simple to make Kälin's formula operational right away. Two alternative understandings are conceivable. Either Kälin wishes to separate violations of the core content from less severe violations, with only the former entailing extraterritorial protection, or any infringement into a derogable right beyond what has been termed the margin of appreciation would be regarded as touching upon the core content. This reading would make Kälin's proposal congruent with the fourth reading, affirming the congruence of extraterritorial and domestic protection under the ECHR. Consequently, it is reasonable to assume that Kälin indeed had the first alternative in mind when formulating himself.

Using the notion of a 'core content' implies erecting a hierarchy *within* a right. It is of little surprise that Kälin's usage of the notion has been met with criticism for its ambiguity.[1332] Thus, the search must go on. Exactly how shall the line be drawn between the core content and the fringes of the rights enshrined in Section I? In the following, we shall test a delimitative criterion inferred from the case-law of the European organs.

11.3 Irreparability as a Water-Shed?

The European Court has stressed that it was only willing to rule on a potential violation of the ECHR due to the irreparable nature of damages flowing from removal to a country where there is a risk of treatment contrary to Article 3 ECHR.[1333] Could the notion of irreparability be a water-shed, separating those violations triggering refoulement from those which do not? It is worth recalling that the instruments themselves do not spell out which violations are to be regarded as causing irreparable damages. Neither did the European organs give further guidance on the

[1331] The doctrine of core content is highly relevant in a constitutional context. As an example, the German legislator may very well change single provisions in the rights catalogue of the German Constitution, as long as the core content of the right to human dignity remains unaltered. Art. 79 (3) of the German Basic Law (*Grundgesetz*).

[1332] Gornig, 1987, pp. 33–4, Maaßen, 1997, pp. 130–1.

[1333] *Soering*, para. 90.

issue of reparability. Nonetheless, the concept of irreparability fits well together with the subsidiary character of extraterritorial human rights protection.

Which human rights violation could qualify as irreparable? Tentatively, one could to distinguish three main categories of violations. The first category comprises violations leading to a direct or indirect termination of life. Starting with a truism, one can state that the intentional deprivation of life is an irreparable violation.[1334] From this, it can be inferred that violations of due process[1335] and the maxim of nullum crimen sine lege[1336] fall into the same category, if conviction would result in capital punishment.

The second and third categories encompass violations that are not irreparable per se, as a violation would not lead to a termination of the victim's life. However, amongst those rights, two additional factors might endow a violation with irreversibility: therapy-resistant traumatisation and lack of legal remedies. This category is made up of right violations other than those falling under the first category.

In certain cases, violations of human rights falling short of a direct or indirect deprivation of life can nevertheless lead to a trauma for the victim, which is resistant to therapy. Such a trauma becomes irreversible in the sense that the violation continues to affect the mental or physical health of the victim. Thus, the violation is perpetuated. Clearly, violations of Article 3 ECHR are cases in point. Torture is highly traumatising and affects the victim over a long period, if not the rest of his or her life.[1337] In specific cases, the same might be true for violations of other human rights, depending on the gravity of the violation and its effects for the individual victim. In other words, the risk assessment carried out before a removal decision must comprise an individual evaluation of possible traumatisation by the violation of any human right, which the sending state is obliged to observe.

[1334] Art. 2 ECHR and Art. 1 of the Sixth Protocol respectively.

[1335] Art. 6 ECHR.

[1336] Art. 7 ECHR.

[1337] In a lucid essay recounting his repeated interrogation by SS agents in 1943, Jean Améry has condensed the impact of torture when stating *'Wer gefoltert wurde, bleibt gefoltert'* (He, who has been tortured, remains tortured). J. Améry, *Jenseits von Schuld und Sühne. Bewältigungsversuche eines Überwältigten*, July 1988 ed. (1988, Deutscher Taschenbuch Verlag/Klett-Cotta, Stuttgart), p. 51.

Apart from cases falling under the second category, violations can also be perpetuated by the absence of a legal remedy ending rights-violating practices. This constitutes the third category of violations. Let us assume that a person is arbitrarily detained. In the absence of legal remedies, such detention cannot be subjected to legal scrutiny. There are no means of putting a stop to the denial of human rights in such cases, which constitutes a violation of its own right according to Article 13 ECHR. Accordingly, the absence of legal remedies makes a violation practically irreversible and, consequently, irreparable.

The criterion of irreparability would thus establish a hierarchy both among and between rights. Along the lines suggested above, the concept of irreparability could be made the cornerstone of a doctrine of extraterritorial protection under the ECHR. Its central proposition might be formulated as follows: All human rights enshrined in the ECHR and its Protocols contain an inherent prohibition of refoulement to a country where there is a risk of an irreparable human rights violation. A violation is irreparable inter alia when it directly or indirectly terminates the life of the victim, when it produces a trauma resistant to therapy or when there are no legal remedies available to redress the violation.

But the concept of irreparability is burdened with problems. Precisely like the notion of a 'core content' of human rights, it is ambiguous and difficult to pin down: we may all agree that torture is irreparable, but we are not so sure when it comes to degrading treatment. Thus, the concept of irreparability opens up a new arena for indeterminacy, turning on the question of exactly what is reparable and what is not. Furthermore, the distance of this notion to the letter of the ECHR is considerable: we have inferred this rule from the case law of the European organs, which, in turn, is based on the letter of the law. That adds up to three steps, and a considerable degree of abstraction. This inherent abstraction produces unrestrained conflicts on a meta-legal level: instead of being based on the law, the decisive arguments will be medical, psychological, or otherwise technical. In addition, it is hard to justify the water-shed of irreparability within the normative edifice of the ECHR itself. There are no indications that its drafters intended to create a hierarchy of violations according to reparability. Dogmatically, the determination of non-refoulement obligations by a criterion of irreparability would simply not fit into the framework of the ECHR. Although the question of reparability remains an important factor when assessing the severity of a certain treatment

alleged to violate the ECHR, it alone cannot serve as the water-shed we are tasked with identifying here.

11.4 A Hierarchy within Rights: The Concept of Positive Obligations

At this stage, it appears that no simple and objective criterion can be found which would determine non-refoulement obligations under the ECHR and its Protocols. We seem to be stuck with a case-by-case approach, necessitating subjective evaluations by the decision-maker. Indeed, Zühlke and Pastille have suggested that, in the absence of a predetermined superiority of certain rights, all rights are principally capable of possessing non-refoulement properties.[1338] However, the extent to which they do so is to be determined by a 'direct balancing' of the interests of the persons to be removed against those of the removing state.[1339] In justifying this approach, the authors draw a parallel to inhuman or degrading treatment or punishment under Article 3 ECHR—the existence of which is, in their view, established by balancing state interests against those of the individual.

Seconding Zühlke and Pastille, we would like to underscore that this balancing is not the same as the one proposed by the *Chahal* dissenters. While the latter wished to balance an established violation of an ECHR right against state interests, Zühlke and Pastille resort to balancing only to establish whether an ECHR right would be violated at all. It is quite obvious that the option proposed by the *Chahal* dissenters doubles the degree of discretion—balancing is applied both to establish the existence of a violation, and its permissibility. This is at odds with Article 15 ECHR, which is exhaustive with regard to additional powers of limitation.[1340]

By and large, to describe the establishment of non-refoulement rights as a balancing process has a great deal of merit. Indeed, when confronted with the fringe areas of rights, we agree that there is a predominantly subjective and case-oriented element in singling out the extent of protection by them. However, while the 'direct balancing approach' is reflective of the European organs' practice, it is incapable of justifying it.

[1338] Zühlke and Pastille, 1999, p. 766.

[1339] Zühlke and Pastille, 1999, p. 769.

[1340] Zühlke and Pastille, 1999, p. 769.

Below, we shall attempt to develop a dogmatically more coherent approach, drawing on the concept of positive obligations.[1341]

We shall suggest a two-pronged procedure for identifying whether a specific threat in the country to which the claimant shall be removed entails extraterritorial protection under the ECHR or its Protocols. In the first step, one would ask

- Would one or more of the rights protected in Section I of the ECHR and the Protocols to the ECHR be violated upon removal?

In the first step, *any* violation of *any* right is of interest. To be sure, a discriminatory or non-emergency derogation of a derogable right would also be considered a violation.[1342] In principle, the assessment of when a right is violated would not differ from that made in a purely domestic context. That is, the threat of ill-treatment by police officers in the home country of the claimant would be assessed in exactly the same manner as if that threat emanated in the host country where protection is sought. This is valid for all rights, regardless of whether or not they are derogable or may or may not be restricted under the ECHR. Thus, an alleged violation of a right which may be subject to restrictions (Articles 8–11 ECHR) will also need to be assessed against the benchmarks provided in the second paragraph of each of these articles. To identify whether a restriction is acceptable under the named provisions, it must be lawful, serve a specified interest and be 'necessary in a democratic society'. To assess the latter benchmark, the alleged violation is subjected to the proportionality test developed by the European organs.

The qualification of the threat as a violation is a necessary criterion for triggering extra-territorial protection under the ECHR. However, it is not sufficient that this criterion is satisfied. If and only if a potential violation has been established in the first step, we shall proceed to the second. The second step turns on the following question:

- Do the positive obligations flowing from that right impede removal?

[1341] On the logical structure of positive obligations, see R. Alexy, *Theorie der Grundrechte* (1985, Suhrkamp, Frankfurt am Main), pp. 179–94.

[1342] Compare Arts 14 and 15 (1) ECHR.

Why is such a step necessary? We recall that the European organs had focused on the obligations of the host state, and not of the country of origin, when justifying the implicit prohibition of refoulement under Article 3 ECHR. Undoubtedly, removal would be perfectly legal under the ECHR in situations where a person is removed from the territory of a host state and subsequently becomes the victim of unforeseeable violations; the responsibility of the removing state under the ECHR is not engaged in such cases. Obviously, we need to involve the issues of risk and predictability to clear our minds on the scope of extraterritorial protection under the ECHR.

To understand the necessity of risk assessments, we should revert to a purely domestic level for a moment. The positive obligations enshrined in Section 1 of the ECHR and its Protocols make such assessments by State Parties necessary on a regular basis. The right to life, for example, cannot be actively protected without clarifying which kinds of risks it is exposed to and what measures of protection are proportional to the probability linked to such risks. In a case turning on the legality of a vaccination scheme under Article 2 ECHR, the Commission reasoned as follows.

> The concept that everyone's life shall be protected by law "enjoins the State not only to refrain from taking life intentionally" but, further, to take appropriate steps to safeguard life. However in the present case the Commission is satisfied that, where a small number of fatalities occur in the context of a vaccination scheme, whose sole purpose is to protect the health of society by eliminating infectious diseases, it cannot be said that there has been an intentional deprivation of life within the meaning of Article 2 (1) or that the State has not taken adequate and appropriate steps to protect life.[1343]

Risk assessments are, however, not limited to those rights which are perceived as containing predominantly negative obligations, that is, the obligation to abstain from a certain conduct. The prohibition of inhuman treatment implies, for example, that a State Party analyses a certain planned action vis-à-vis an individual under its jurisdiction with a view to the severity of suffering it produces. In the absence of such a positive obligation to assess the conformity of future conduct under the ECHR,

[1343] Dec. Adm. Com. Ap. 7154/75, 12 July 1978, D & R 14 p. 31, (32–3).

the system for the 'collective enforcement of human rights'[1344] laid down in that instrument would mainly rest on a 'trial and error' process.

A positive obligation—that is, in the case of Article 3 ECHR, an obligation to prevent ill-treatment—does have its reasonable limits. Such an obligation does not imply that a state has to take *any* conceivable measure to prevent ill-treatment. The process of choice involves with necessity considerations of risk, if the state's scarce protective resources should be used in an efficient manner. To illustrate this relationship, one might look at ill-treatment in the domestic sphere of a State Party to the ECHR. It is clearly a violation of Article 3 ECHR when state agents actively ill-treat a person. When state agents acquiesce to ill-treatment carried out by a third person, this is also regarded as a violation. However, the concept of acquiescence easily slips away into obscurity. Would it be acquiescence, and thus a violation of the ECHR, if the head of a municipal police department ordered downsizing of a district's resources, thereby accepting a higher rate of violent crime? It would not, if she could justify her decision with regard to crime rates in other, more violent districts and the scarcity of resources. Thus, in an effort to comply with the positive obligations flowing from the ECHR, she made a risk assessment to identify a measure providing an optimum of protection from violence.

Moving to an extraterritorial application of Article 3 ECHR, we find structural similarities. In both cases, violence would ultimately be exercised by non-state agents. In the preceding example, the agents would be criminals, and, in the case of refoulement, the agents would presumably be officials of *another* state. There is, however, state action that might aggravate or alleviate the risk of a violent incident. In the first example, such action would consist of the decision to downsize personnel in the police district. In the case of refoulement, it would be a decision of removal. To put it simply, a risk assessment translates the positive obligations abstractly inherent in a norm into concrete guidelines of action. Protection and predictability are interrelated: the more predictable a violation, the stronger becomes the protection claim of the presumptive victim.

A quite different question is the nature of such a risk assessment. In constant case-law, the European organs have stated that a violation of Article 3 ECHR in a refoulement context presupposes that 'substantial

[1344] *Soering*, para. 87 with further references.

grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she was returned'.[1345] The reader will note a triple threshold in this wording, the first regarding the probability of the risk, the second regarding the burden of proof and the third regarding the standard of proof. In the following, we shall focus on the dimension of risk.

First of all, the risk must be a real one, which indicates certain exigencies on the probability of its realisation. In the *Soering* case, the European Court has indicated that this probability need not be high. One commentator holds that any risk but a negligible one will do in cases related to Article 3 ECHR[1346]; another has pointed to the proportionality between the risk requirements and the gravity of the anticipated violation.[1347] We saw earlier that the requirement of intent in Article 2 ECHR entailed a risk approximating 'near-certainty'. As the requirement of risk varies between different provisions of the ECHR, it is important to analyse their wording before setting the yardstick for a risk assessment.

But when is the requirement of risk satisfied and the prohibition of refoulement triggered? This question can only be answered in a relative manner. Our reply draws on Alexy's principle theory, which understands human rights as 'commands of optimisation'.[1348] In contradistinction to rules, principles command that something must be realised to a maximum extent in relation to legal and factual possibilities. In our context, the limitations lie first and foremost in factual possibilities. A host state is limited, first, in its capacity to foresee risks. To a certain degree, accuracy in prediction is a matter of invested resources. Beyond this degree, reality simply defies the most well funded auguries. Second, it cannot accept any risk whatsoever as a basis for non-refoulement, without undermining its resource base for human rights protection. Thus, in the assessment of the magnitude of the risk and the degree of predictability, the divide between

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[1345] *Nsona v. the Netherlands*, para. 92, with further references.

[1346] S. Egelund, 'The Potential of the European Convention on Human Rights in Securing International Protection to Forcibly Displaced Persons', in UNHCR, *The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons* (1996, UNHCR, Geneva), p. 17.

[1347] T. Einarsen, 'The European Convention of Human Rights and the Notion of an Implied Right to de facto Asylum' 2 *IJRL* 361 (1990), p. 371.

[1348] Alexy, 1985, pp. 75 et seq.

universalism and particularism rears its head again. Although the subjectivity of weighing can be limited by the proper delimitation of discretion[1349], a considerable degree of indeterminacy remains.

Let us revert to the possible readings of the European Court's dictum set out in the first section. We recall that the Court underlined that Article 1 ECHR 'cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention'.[1350] In the course of our analysis, we had to discard the first reading, which assumed that there are *some* Convention rights which do not unfold extraterritorial protection.[1351] What, then, about the second reading, professing that, in an extraterritorial context, the protection through each Convention right *is not as far reaching* as in the domestic context? Moreover, we have to ask whether the Court actually rules out the fourth option, and therewith the *congruency of extraterritorial and domestic protection* under the ECHR.

By now, we have to answer both questions in the negative. The extent of Convention protection is exactly as far reaching domestically as in an extraterritorial context, and, accordingly, both domains of protection are congruent. As the perpetrator of an act potentially violating the rights enjoyed under the ECHR is always a third party, and not the state from which protection is sought, extraterritorial protection is a matter of positive obligations only. By contrast, protection from violations within the territory of a State Party to the ECHR relates to both negative and positive obligations.

The notion of positive obligations facilitates our understanding of what the European Court actually meant in its dictum quoted above. As positive obligations have their limits, there cannot be a general principle to the effect that 'a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention'. Clearly, there is no such principle in the domestic arena

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[1349] For a model of weighing see, D. Herling, 'Weight in Discretionary Decision-Making', 19 *Oxford Journal of Legal Studies* (1999), drawing on the background of U.K. case law.

[1350] *Soering*, para. 86.

[1351] This invalidates automatically the third reading, professing that there is a hierarchy both among and within the rights enshrined in the ECHR and its Protocols.

either—no State Party to the ECHR possesses the capacity to ensure *conditions* in its territory that are in full accord with each of the safeguards of the Convention. The term 'conditions' embraces not only conditions created by the state, which are fully subjected to the prescriptions of the ECHR, but also conditions that are not under the control of the state, which are therefore subject to the prescriptions of the ECHR only to the extent of the state's positive obligations.

11.5 Conclusion

Let us conclude. The European organs have opened up the ECHR for extraterritorial application without spelling out the theoretical foundations of their interpretation. This foundation can be reconstructed by focusing on the positive obligations flowing from the threatened right. Our model avoids imposing artificial hierarchies on the rights catalogue of the ECHR and is better apt to explain the language used in the decisions by the European organs. As we shall see in the following, the notion of positive obligations facilitates the analysis of extraterritorial protection by non-state agents of persecution as well.[1352]

However, to make this reconstruction operational for assessing future cases, we must accept a substantial amount of qualitative reasoning—and indeterminacy. In principle, any violation *could* entail eligibility for extraterritorial protection. Whether it actually will, depends on an in casu assessment, leaving much power to the decision-maker.

But this power is not unconstrained. The model expounded here offers the decision-maker a structure to follow. First, the extent of positive obligations under the invoked right has to be identified. As we saw earlier, not all provisions operate with the same threshold of risk exigencies. Second, it has to be determined whether the facts of the case fall within the extent of positive obligations. The facts of the case are a composite of two elements. The first relates to the degree to which the invoked right is violated upon return, while the second consists of the degree of predictability that this intrusion will materialise.

Opening up the ECHR for extraterritorial protection must certainly be regarded as a victory for universalism. However, as our model shows, it was a victory of the judge over the parliamentary legislator as well.

[1352] See chapter 12.2.2.3 below.

Making the concept of positive obligations operational invests the decision-maker with considerable power; in this case, the decision-maker is, ultimately, the ECtHR. From now on, Strasbourg will hold the key to exclusion. This is not unproblematic for the universalist. After all, court majorities can change. What seems to be a victory for universalism in the ivory tower, can very well turn out to be its defeat in the courtroom one day. With a particularist majority amongst the judges, this concept may very well lead to regression in the scope of protection.

12 Three Conflict Zones

WE RECALL THAT PART III seeks to identify whether the EU acquis on immigration and asylum is in conformity with relevant norms of international law. The analysis of the EU acquis in chapters 5 to 8 allowed us to conclude that integration in the field of migration and asylum only brought about four major binding instruments—the Schengen and Dublin Conventions, the Visa Regulation and the Spanish Protocol. In chapters 8 to 10, we sought to identify the precise content of international law norms relevant for assessing the legality of the acquis. Our scrutiny in chapters 10 and 11 was structured along two issues—the existence of state obligations to grant protection and to allow migration to benefit from such protective obligations. In the present chapter, the insights gained during that inquiry shall be confronted with selected parts of the acquis. It is self-evident that such a confrontation must be limited and that not every conceivable normative clash between international law and the EU acquis can be addressed. We have chosen to select three normative conflict zones, involving the core content of all four binding instruments.

First, the legality of visa requirements is scrutinised with regard to the ECHR, thus covering the most significant pre-entry-measure used by EU Member States today. This section puts both the Schengen visa acquis and the EU Visa Regulation to the test. The issue at stake is the legality of

individual as well as collective deflection. To tackle the latter, various concepts of discrimination shall be drawn on.

Second, the potential for conflict between the Dublin Convention and the prohibitions of refoulement in international law is expounded, thus covering the prime deflection measure adopted by Member States for the post-entry stage. Can a claimant be allocated from a Member State that upholds an inclusive interpretation of non-refoulement norms to a Member State that embraces an exclusionary interpretation? As a representative test case, we have chosen to epitomise allocation under the Dublin Convention in cases where the claimant is threatened by non-state agents in the country of origin. For the personal scope of extraterritorial protection, this issue is of utmost importance, and Member States have taken widely diverging approaches to it. Thus the second section covers not only the access filter, but also the filter of protection categories.

Third, we look into the conformity of the Spanish Protocol with the prohibitions of discrimination in international law, thus covering the regulation of access to full-fledged procedures. Although the Spanish Protocol does not affect a large number of protection seekers for the time being, it remains the only binding instrument in the field of procedures. In addition, its symbolic value should not be underestimated, as it is the first and hitherto only instrument by which a regional group of states agrees to downgrade protection for each other's citizens.

A scrutiny of these three areas of conflict covers each of the filter devices identified in Chapter Three. Each area hosts a possible conflict between the acquis and international law. Our task shall be to establish whether and how emerging conflicts can be resolved.

12.1 Access to Territory: Visa Requirements and the ECHR

In the preceding chapter, the ECHR and its Protocols emerged as the sole instrument containing an implied right to access to territory for persons seeking entry from abroad. Contracting States to the ECHR may incur liability under this instrument when *denying entry* to their territories, when this has as a direct consequence the exposure of an individual to a violation of her rights under the ECHR.[1353] The following case served as an example. A person risking torture in her home country approaches the

[1353] See chapters 10.2.3.2 and 11.4 above.

Swedish Embassy, asking for an entry visa. Provided that the denial of an entry visa has the direct consequence of exposing that person to torture, the Swedish consular officer must issue it, if Sweden is not to violate Article 3 ECHR.

Now, as the EC Visa Regulation and the visa list attached to the Schengen CCI oblige states to introduce visa requirements vis-à-vis certain third states, it seems that we are facing a compliance conflict between the ECHR and both instruments.[1354] Recalling our explorations in Chapter one, we may state that this conflict manifests itself in four distinct constellations:

1. Secondary international law (the Schengen CCI) versus primary international law (the ECHR);
2. secondary EC law (the Visa Regulation) versus primary international law (the ECHR);
3. secondary EC law (the Visa Regulation) versus primary EC law (Article 6 TEU)[1355]; and
4. secondary EC law (the Visa Regulation) versus the General Principles of EC law (of which the rights enshrined in the ECHR form part).

Generally, all of these constellations would fall under the competence of the ECtHR, but the second, third and fourth could also be brought before the ECJ under the preconditions outlined in Article 68 TEC.

However, a closer look reveals that a compliance conflict can be avoided, if the Schengen CCI and the Visa Regulation are applied in line with the obligations flowing from the ECHR. It has been shown earlier that the EU acquis on visa requirements accommodates an obligation to grant a visa for protection-related grounds. Both the Visa Regulation and the Schengen CCI contain exemption clauses, allowing states to deviate from common visa requirements.[1356] Therefore, we may conclude that *international law and the acquis do not conflict in this respect.* The crucial

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[1354] To be sure, both norms have a mandatory character and cannot be realised jointly. See text accompanying note 54 above.

[1355] Art. 6 TEU is relevant for EC law as well, and thus concurrently forms part of EC primary law. See text accompanying note 105 above.

[1356] See Art. 4 (1) Visa regulation, Art. 15 SC. See text accompanying notes 461 and 493 above.

issue is whether Member States make full use of their competence to exempt protection-related cases from visa requirements. As earlier noted, not all Member States have instructed their consular posts accordingly.[1357] Therefore, in practice, *it is very probable that single Member States violate the ECHR by not issuing visas in protection-related cases or by not exempting such cases from visa requirements.* This is, however, a matter involving the domestic law and practices of Member States, and, therefore, outside the scope of this work.

Nonetheless, even if used with consideration by states, visa requirements still entail significant practical problems for protection seekers. To start with, consular posts are a rare resource in refugee-producing countries. From the outset, it is by no means clear that a protection seeker will find a diplomatic representation of a potential host state. Without such a representation, seeking a visa is practically impossible or entails considerable hardships.[1358] Even where a diplomatic post is available in the country of origin, not all problems are solved. Applying for a visa or for the exemption from a visa requirement and waiting for a response from the diplomatic representation takes time. During this time, the person in need of protection is exposed to the risk of human rights violations. Furthermore, the task of the persecutor is facilitated. An easy method of tracking down political enemies is to check those persons turning to diplomatic representations of other states. Thus, channelling flight through diplomatic representations aggravates the risks to which the potential protection seeker is exposed.

Let us look at a specific example. There is a difference in treatment between, say, a Czech national and a Yugoslav national when it comes to visa requirements. Prima facie, this distinction is based on nationality. While a Czech national may enter the European Union freely[1359], this is not the case for a national of the Federal Republic of Yugoslavia, as the latter country is on the common visa list annexed to the Visa regulation.

[1357] See text accompanying note 522 and 523 above.

[1358] The possibility of seeking a visa per mail would be obviated by the malfunction of postal services in crisis situations. Leaving for a neighbouring country to seek a visa is not a reliable option, as neighbouring countries may be inclined to bar access in situations of large-scale outflows.

[1359] The Czech Republic is not on the Common List. Presently, no Member State maintains visa requirements vis-à-vis the Czech Republic. See Inventory of visa regimes applied to countries not featured on the common list annexed to Council Regulation (EC) No. 547/1999, reproduced in MNS June 1999, p. 3.

In 1999, cases of alleged persecutions of Romany citizens were reported from both countries.[1360] This example indicates that persons of the same ethnic origin and with a roughly equivalent protection request under Article 3 ECHR may be subjected to different treatment by virtue of the negative list. Taken together, a protection seeker who is a national of a country on the negative list is worse off than a protection seeker from a country whose nationals are not subject to a common visa requirement.

The question, therefore, would be whether this difference in treatment is in line with international law. To be sure, we are not dealing with access to territory for individual protection seekers any more, but for whole groups. Put otherwise, is there an obligation not only to grant visas in individual cases, but to exempt nationalities from visa requirements altogether? If there is a duty to exempt, this would not only impact on the individual Member State, which would be obliged to make use of the exemption clauses in the Visa regulation and the Schengen Convention. It would also raise the question whether the EC institutions are under an obligation to remove a country generating refugees from the negative list, so as not to inhibit flight movements. This is the question we shall pursue in the following, and discrimination reasoning is at its core.

Below, we shall introduce the determinants of discrimination concepts in international law. This analysis provides a base not only for the present section, but also for the assessment of the Spanish Protocol in a later section. Then, we shall proceed to analyse whether Member State compliance with the Visa regulation indeed constitutes discrimination under the ECHR, making it illegal under international law. If visa requirements flowing from the Visa regulation can be shown to be discriminatory, we would encounter a compliance conflict between the EU acquis and international law, with two mandatory norms standing against each other. The four constellations of conflict outlined earlier would then become relevant again. Precisely as shown above, such a conflict would be justiciable in Strasbourg as well as in Luxembourg.

[1360] On the situation of Roma in the Czech Republic, see H. O'Nions, 'Bonafide or Bogus?: Roma Asylum Seekers from the Czech Republic', 1999 *Web Journal of Current Legal Issues* (1999), available at < http://webjcli.ncl.ac.uk/1999/issue3/onions3.html >.

12.1.1 Determinants of Discrimination Arguments

To argue equality is to re-politicise legal norms within the limits of legal argumentation. If the legislative process can be conceived of as a gradual structuring and freezing of a political conflict, an equality argument works in the opposite direction, constituting a gradual thawing of the political conflict feeding the norm. However, most intriguingly, this thawing process does not restore the original conflict. Instead, it restructures the conflict, regulating the gradual admissibility of arguments, forcing them into predetermined sequences and creating distinct hierarchies between different lines of argument. Quite obviously, this affects the outcome. Arguing equality is reminiscent of the ethical-political discourse antecedent to the stipulation of the norm, but it is not identical with that discourse. Discourses antecedent to the stipulation of a norm are *discourses on validity*. Legal discourses on equality and non-discrimination are *discourses on application*.[1361] While the former deal with the legitimacy of abstract norms, the latter look into the legitimacy of concrete outcomes. Validity is ultimately created by potential norm addressees; application is determined by judges. Equality arguments must also be distinguished from arguments on interpretation, although both pertain to discourses on application. The latter balances divergent norms against each other; the former balances divergent outcomes against each other.

Earlier in the discussion, it emerged that arguing equality means reconciling *both* a limited universal validity of human rights *and* the boundedness of communities. Very roughly, this tension sets out the poles within which equality arguments are to be framed. One pole is survival of the individual; the other is system survival. Assessing proportionality means identifying a segment, hosting several legitimate norm applications, on the scale between the poles. Indeed, the term 'segment' suggests that a variety of proportional outcomes is conceivable. This variety is necessary: if the judge pointed out only one optimum application, she would usurp the role of a legislator.[1362]

[1361] The terminological distinction used here has been introduced by Klaus Günther, who separates *Begründungsdiskurse* (discourses of justification) from *Anwendungsdiskurse* (discourses of application). K. Günther, *Der Sinn für Angemessenheit* (1988, Suhrkamp, Frankfurt am Main), p. 25.

[1362] See note 1373 below.

Yet equality is not a unitary concept in law.[1363] On the contrary, different human rights instruments offer different delimitations of it. What distinguishes them is *the degree to which an equality right allows a re-politisation of a legal norm*. Suffice it here to structure the various dimensions or equality arguments as to whom they typically support—the individual claiming to be the victim of discrimination, or the state defending itself against such a claim. A limitation of the concept to formal and negative equality, prohibition of arbitrariness and a requirement of proving discriminatory intent will typically facilitate the position of a state defending itself against discrimination claims. Conversely, an expansion of the concept to embrace material and positive equality, equality of opportunity and the admissibility of proving discriminatory effect, will typically support claimant interests. Ancillary prohibitions of discrimination narrow the scope of action that the individual can challenge. Hence, they work for the state, while stand-alone equality rights are more advantageous for the individual.

Another aspect to be taken into consideration is the empirical environment in which proportionality tests take place. Balancing is rather simple where a single person may be compared to another single person, and the point of reference is quantifiable; it becomes more complicated when groups are compared to each other, and the point of reference is non-quantifiable. Therefore, substantiating claims of discrimination in open and complex environments is more demanding for the claimant. Without a certain cognitive determinacy, any proportionality argument will simply fail. Conversely, closed and simple environments work for the claimant.

At this point, we possess a backdrop for assessing the potential and limitations of equality arguments in the law relating to extraterritorial protection. We shall inquire whether visa requirements constitute direct discrimination based on nationality. As we shall see, this question is situated in an extremely open empirical environment, which hampers the prospects for a determinate outcome. The aim is a) to present the framework of equality reasoning derived from the case-law of the European Court on Human Rights, b) to complement this framework with a differentiated model of proportionality reasoning developed in doctrine

[1363] For a clear-cut exploration of equality reasoning, see P. Kirchhoff, *Die Verschiedenheit der Menschen und die Gleichheit vor dem Gesetz* (1996, Carl Friedrich von Siemens Stiftung, München).

and c) to conclude on whether visa requirements under the Visa Regulation constitute discrimination under the ECHR.

12.1.2 Discrimination under the ECHR?

What concept of discrimination was envisaged by the drafters of the ECHR, and how has it been used in the case law of the Strasbourg organs? Article 14 ECHR provides for prohibition of discrimination, which is ancillary to the other rights enshrined in Section I ECHR:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

To wit, where a violation of e.g. Article 3 ECHR is found, the Strasbourg organs do not proceed to the question whether the same facts would serve for concluding that discrimination under Article 14 ECHR has taken place.[1364] The reasons may seem obvious: to stipulate specific human rights is to cast the comparability and proportionality reasoning, at the heart of any equality argument, into a fixed form. In that sense, the stipulation of human rights drains the right to non-discrimination of material content. Where the right is violated, equality before the law is violated concurrently.[1365]

However, the material drainage is not a total one, as the European Court of Human Rights reminds us:

> Article 14 complements the other substantive provisions of the convention and the Protocols. It has no independent existence, since it has effect solely in relation to the enjoyment of the rights

[1364] 'Once it has been held that the restriction on the applicant's right to respect for his private sexual life gives rise to a breach of Article 8 by reason of its breadth and absolute character [...], there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right.' ECtHR, *Dudgeon Case*, Judgment of 22 October 1981, Series A no. 45, para. 69.

[1365] Equality before the law is tautological: as legal norms are universal, such equality merely demands that norms be complied with. See Alexy, 1985, p. 358, with further references.

> and freedoms safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter [...].[1366]

This means that an alleged violation of Article 14 ECHR is only meaningful to consider under the following circumstances:

1. There is no violation of a substantive provision in the ECHR or its protocols.
2. The facts fall within the ambit of one or more of the substantive provisions in the ECHR or its protocols.

Quite logically, Article 14 ECHR demands non-discrimination even beyond the command of equality already inherent in the substantive norms of Section I. The Court has formulated this obligation as follows:

> The notion of discrimination within the meaning of Article 14 [...] includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.[1367]

Therefore, a claimant who cannot substantiate a violation of Article 3 ECHR may very well be able to substantiate a claim of discrimination under Article 14, based on unequal protection from ill-treatment.

Let us recur to our example. Provided the Swedish representation denies a potential torture victim a visa, the obligations of Sweden under Article 3 ECHR can be engaged. Assuming for a moment that the facts support the contention that Article 3 ECHR indeed were violated, there would be no necessity to proceed to a discrimination reasoning under Article 14 ECHR.

Now, let us consider the opposite. In the individual case, the facts do not allow to conclude on a violation. Could the claimant successfully

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[1366] ECtHR, *Abdulaziz, Cabales and Balkandali Case*, Judgment of 28 May 1985, Series A 94 [henceforth Abdulaziz], para. 71.

[1367] *Abdulaziz*, para. 82.

argue that the very fact that she possesses a nationality for which an entry visa is required puts her into an inferior position compared to aliens possessing a nationality which allows them to enter the territory of the respondent state without a visa?

To assess an alleged violation of Article 14 ECHR, the reasoning of the Court passes a number of discernible stages. The Court sets out with a comparability test, deliberating whether the person claiming to be discriminated actually finds herself in a situation similar to that of the person she compares herself with.[1368] If this is the case, the Court proceeds to a justification test. The justification test, in turn, consists of two consecutive operations.[1369] First, the Court scrutinises whether the aim pursued by the difference in treatment is a legitimate one. If and only if this is the case, the Court ponders whether there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[1370] This second step represents the inner core of equality reasoning, its rationale being to assess the 'legitimacy of difference'.[1371] It should be noted that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.[1372] By respecting this margin, the Court avoids a quasi-legislative role: had it spawned precise norms by way of proportionality reasoning, it would have colonised the role of domestic parliaments. The Court is only competent to set limits for the legislator, and not to devise optimum solutions in lieu of the legislator.[1373]

Let us recur to our example and apply this methodology to it. As expounded above, there is a difference in treatment between a Czech national and a Yugoslav national when it comes to visa requirements. Prima facie, this difference is based on national origin, which is one of the

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[1368] See, inter alia, ECtHR, *Case of Moustaquim vs. Belgium*, Judgment of 18 February 1991, Series A 193, para. 49, where the ECtHR denied that Article 14 ECHR was violated on grounds of lacking comparability.

[1369] This two-step methodology was first expounded in the *Belgian Linguistic Case*, Judgment of 23 July 1968, Series A 3.

[1370] *Abdulaziz*, para. 72.

[1371] *Abdulaziz*, para. 78.

[1372] *Abdulaziz*, para. 73.

[1373] The rationale behind this restraint is to preserve the repartition of competencies in the *trias politikas*. For a comprehensive argumentation, see Alexy, 1985, pp. 373–7.

grounds enumerated in Article 14 ECHR. Otherwise, both nationalities hold persons of the same ethnic origin and with a roughly equivalent protection request under Article 3 ECHR. The comparability criterion is thus fulfilled, and one may proceed to the stage of justifying the stated difference in treatment.

The aim of visa requirements is to counter clandestine immigration.[1374] There is no doubt that this aim is legitimate[1375], given that the right to control the composition of its population is internationally recognised as being inherent in state sovereignty.[1376] This opens up the last stage of equality reasoning, drawing on the issue of proportionality.

12.1.3 Refining Proportionality Reasoning

Essentially, the proportionality test consists of a weighing operation. An initial difficulty is that 'means' and 'goals' are incommensurable. To overcome this difficulty, we suggest adopting the concept of intrusion. More specifically, to what degree does the difference in treatment intrude upon the human rights of the individuals affected? And to what degree does the non-implementation of the goal intrude into the human rights of others?

This approach draws first on a perception of human rights as 'commands of optimisation', as developed in Alexy's principle theory[1377], and, second, on the strong linkage between principle theory and the proportionality test. In contradistinction to rules, principles command

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[1374] See the fourth recital of the Common Visa List: 'Whereas risks relating to security and illegal immigration should be given priority consideration when the said common list annexed hereto is drawn up; [...]'.

[1375] In *Abdulaziz*, the Government contended 'that the measures in question were justified by the need to maintain effective immigration control, which benefited settled immigrants as well as the indigenous population. Immigration caused strains on society; the Government's aim was to advance public tranquillity, and a firm and fair control secured good relations between the different communities living in the United Kingdom'. (*Abdulaziz*, para 76). Responding to this argument, the ECtHR seems to accept the amalgam of migration control and public tranquility by stating that it 'accepts that the 1980 Rules also had, as the Government stated, the aim of advancing public tranquillity'. (*Abdulaziz*, para. 81).

[1376] This state right has been recognised in the constant case law of the Court. See, e.g. *Nsona vs the Netherlands*, para. 92.

[1377] Alexy, 1985, pp. 75 et seq.

that something must be realised to a maximum extent in relation to legal and factual possibilities. The degree of realisation depends on factual as well as legal circumstances. A legal circumstance could be a countervailing principle. In the area of constitutional law as well as of human rights law, such conflicts are quite commonplace.[1378] The attempts to solve such conflicts can be further structured by Alexy's balancing rule:

> The higher the degree of non-fulfilment or restriction of one principle, the higher the importance of fulfilment of the other principle has to be.[1379]

This trade-off rule implies that the resistance offered by a right increases with the degree of intrusion.[1380] Reverting to our earlier exploration of proportionality reasoning, this is strikingly familiar. The formulations of the European Court of Human Rights reverberate with this relationship between colliding interests:

> As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.[1381]

[1378] Alexy himself has exemplified them by referring to a case before the German Federal Constitutional Court, where the freedom of expression clashed with the right to personal integrity, both guaranteed by the German constitution. Alexy, 1985, pp. 84 et seq. For the manifestation of principle conflicts in human rights law, see our reconstruction of the proportionality test below.

[1379] Alexy, 1985, p. 146.

[1380] Lindahl describes trade-offs as models in which 'it is assumed that when an amalgamated preference ordering over different states of a society is constructed, values can be "traded" against each other, in the sense that a loss on *one* value-attribute can always be compensated or "outweighed" by a suitably great gain on *another* value-attribute'. [Emphasis in the original, footnote omitted]. Lindahl, 1992, p. 56. Trade-off models compete with lexicographic models, in which values are ordered by their importance. See Lindahl, 1992, pp. 57–8.

[1381] *Abdulaziz*, para. 78.

The existence of a margin of appreciation does not alter the situation, as the European Court affirmed in a case on discrimination on grounds of nationality:

> Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.[1382]

Given this apparent kinship, it comes as no surprise that Alexy holds that the rule of proportionality[1383] and principle theory imply each other.[1384] Understanding his motivation necessitates a further refinement of the proportionality test.

Following an established doctrine, the proportionality test in the broad sense can be broken down into three subordinate rules.[1385] The rule of appropriateness excludes means that are not suitable for the pursuit of a given goal. The rule of necessity lays down the precedence of less intrusive over more intrusive means in pursuit of a given goal.[1386] Finally, the third rule consists of the proportionality test in the narrow sense, excluding such means as are excessive for the pursuit of a given goal.

While the rule of appropriateness and the rule of necessity delimit the factual possibilities of optimisation, the proportionality test in the narrow sense delimits the legal possibilities of optimisation.[1387] The reader will note that this refined model does not provide a solution to the conflict inherent in discrimination reasoning. Even in this form, the proportionality test is beyond a simple, mathematical quantification. The intrusion by differential treatment cannot be unambiguously and

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[1382] ECtHR, *Gaygusuz vs. Austria*, Judgment of 16.9.1996, Reports 1996-IV, para. 42.

[1383] Alexy rightly underscores that the norm of proportionality is not a principle, as it does not require optimisation of a certain value. Alexy, 1985, p. 100, note 84. Due to its binary character, it is to be termed a rule.

[1384] Alexy, 1985, p. 100.

[1385] Alexy, 1985, p. 100, with further references in note 82.

[1386] The test of necessity is structured as a test of pareto-optimality: state A is to be preferred to state B, if a shift from B to A will not leave any of the actors involved worse off than before, but at least one of them better off. Alexy, 1985, p. 149 note 222.

[1387] Alexy, 1985, p. 101.

objectively measured, and the same is true for the intrusion caused by the non-implementation of goals pursued by such treatment.[1388] However, it delivers a procedure to be followed, thereby limiting the degree to which the personal preferences of the decision-maker may influence the outcome. It remains to be seen whether this model produces sufficiently determinate outcomes when applied to the present case of visa requirements.

12.1.4 Applying the Refined Proportionality Test to Visa Requirements

Following the model derived from the Court's case law, we have already stated that the goal pursued by visa requirements—namely migration control—was a legitimate one. Now, complementing the rudimentary proportionality test of the Court with the more complex model exposed in the preceding section, we shall tackle the question to what extent the means used is appropriate and necessary.

There can be no doubt that the means of visa requirements is appropriate for the goal of immigration control. Together with other pre-entry measures, it diminishes the probability of unauthorised entry by erecting a first administrative boundary abroad.[1389] Thus, the first subordinate rule does not provide any further help. At first sight, the second subordinate rule seems to be more relevant. It is all the more likely that states could have chosen alternative means with a less intrusive effect on protection seekers. One of these means is the issuance of specific visas for protection seekers, as practised by Denmark and Sweden during certain periods of the Bosnian refugee crisis. Basically, this option (i.e. protection visas) would imply a modification of the rules and procedures for issuing visas, while visa requirements as such would be retained. Another would be the slashing of visa requirements combined with a simultaneous strengthening of in-country immigration controls and of determination procedures. Further arrangements—such as the establish-

[1388] At large, trade-off models share this problem with lexicographic models. In the latter, a decision on the ranking of values must be made, which is perforce a subjective one. See note 1380 above.

[1389] See chapter 5.1 above.

ment of complex systems for reception in the region of origin with following resettlement—could be imagined.

Looking into the relatively straightforward alternative of protection visas, we find that it reduces the degree of intrusion for protection seekers compared to comprehensive visa regimes. For host communities, it reduces the degree of intrusion compared to the total abolishment of visa regimes. However, the risk of abuse by persons not in need of protection remains, and, with it, the risks entailed by the straining of domestic resources by undeserving cases. But even the inflow of deserving cases would augment, which would draw state resources by its own right. The same applies to more complex solutions involving reception in the region and resettlement. Thus, it is extremely difficult, if not impossible, to argue that two different means are identical when it comes to the promotion of a certain goal. Establishing or denying this identity is quite apparently a step charged with value judgements and thus open to meta-legal reasoning.

Thus, the problem cannot be solved with the rule of necessity. Introducing protection visas or alternative protection regimes merely shifts the conflict of intrusions. Now, lesser risks for the individual protection seekers are bought at the price of higher risks for the potential host state. It still remains to be determined whether this balance of intrusions is a proportional one.

Therefore, we shall proceed to the proportionality test in the narrow sense, attempting to apply the balancing rule expounded above. We chose to leave the issue of protection visas for the time being, and to pursue our original task, which was to assess the distinction in treatment inherent in visa requirements.

What are the rights involved, and what are the possible intrusions that a balancing operation must take into account? Following our example, the right guaranteed in Article 3 ECHR is at stake for the individual protection seeker. On behalf of the host community, it is normally referred to the state right to immigration control. However, this right must not be taken as an autocratic means in itself. The effectiveness of the state as a guarantor of rights and freedoms presupposes the idea of a bounded community. Thus, immigration control is a means to secure not only the interests, but also the human rights of citizens and denizens. Therefore, the term 'immigration control' contains a cluster of individual rights, which would run the risk of being infringed if the state entrusted

with ensuring them were weakened.[1390] As we shall see below, this issue is a complex one; further differentiation is necessary. To conclude, an approach based on the concept of intrusion allows for a translation of the present proportionality issue to one of conflicting human rights. Thus, we are left with an opposition of one right—Article 3 ECHR—with a plurality of rights, some of them contained in the ECHR, some of them not.[1391] Next, then, we must ask whether the intrusions risked by either party are quantifiable.

Starting out with the interest of the individual protection seeker, it is clear that the difference in treatment affects de facto access to extraterritorial protection. First, a Czech citizen could leave her home country right away. By contrast, a Yugoslav citizen would be subject to a visa requirement. This would compel her to apply for a visa with a diplomatic representation of an EU Member State, which could entail considerable practical problems, as many countries had limited their diplomatic presence in the Federal Republic of Yugoslavia during 1999. Where these problems could be overcome, the claimant would have to wait for a decision. During this time, she would continue to be exposed to a persecutory risk, while a Czech citizen would not.

Second, provided that she indicated the true purpose of her journey—namely to seek extraterritorial protection—she would, as a rule, not be granted a visa. Resorting to the services of human smugglers would remain the only option for her. Ultimately, this option is only open for those who can cope with the substantial financial costs, physical hardships and considerable risks linked to being smuggled.

In a worst case scenario, the drawbacks caused by the visa requirement could result in the individual being exposed to torture, inhuman or degrading treatment or punishment. Given that Article 3 ECHR is non-derogable, there is no doubt that State Parties to the ECHR accord a high value to the protection from such forms of ill-treatment. Thus, the intrusion into the individual's integrity has a considerable weight in the present proportionality test.[1392]

[1390] A weakening would not occur by admitting single cases, but it might be conceivable if large numbers were to enter.

[1391] The weakening of economic, social and cultural rights falls outside the framework of the ECHR.

[1392] See text accompanying notes 1381 and 1382 above.

The collective interests involved, however, are not trivial either. Abolishing visa requirements at large would deny a powerful tool of migration control to potential destination countries. Very likely, the consequences would be a marked increase in immigration. Given the dismantling of emigration restrictions during the last two decades and the facilitation of travel, this increase might reach a historically unprecedented level. Even were immigration restrictions to be maintained, the channel of seeking extraterritorial protection would remain open, de facto allowing for a temporary stay on the territory of the destination state until the claim was determined. In egalitarian welfare societies, this temporary stay draws considerable resources; and so does the maintenance of proper determination procedures, compulsory for any *Rechtsstaat* worthy of the name.

Thus there are two options—either the system of extraterritorial protection is further restricted, or even dismantled, or the destination state reallocates resources from other areas to that system.

To wit, the obligations owed to protection seekers under the 1951 Refugee Convention and other instruments of international law have become so entangled with the concept of liberal democracies, that a renunciation of these instruments would be perceived as a foundational change.[1393] It would undermine the self-perception as well as the self-organisation of such societies, creating considerable costs. Although this option is hypothetical at present, it should be kept in mind. It illustrates that an excessive demand for protection might call the survival of treaty-based protection obligations into question. The consequence would be inequality over time: in the first phase of the abolishment of visa requirement, a larger number of persons would enjoy extraterritorial protection. However, in the second phase, states would withdraw from relevant conventions and dismantle the increasingly resource-demanding system of extraterritorial protection altogether. Clearly, a late-born

[1393] It must be recalled that a renunciation of human rights instruments implies a dismantling of protection for citizens as well. It would be impossible to maintain the status as a liberal democracy and to dismantle human rights protection simultaneously. The following episode might be indicative in this regard. In 1998, the Austrian presidency drafted a strategy paper for the EU Council, in which it questioned whether the 1951 Refugee Convention still represented an adequate response to contemporary challenges of migration and asylum. After the paper was leaked, the public reaction was markedly negative, and other Member States hurried to dissociate themselves from this part of the paper.

protection seeker would be worse off in the second phase, if she were to be compared to her predecessors under the first phase. Legally, identical human rights and a very similar degree of intrusion would stand against each other, the only difference being that they related to different right-holders over time. Thus, the first option is intrusive to a considerable degree—for future protection seekers as well as for the ideological foundation of liberal democracies.

The second option would oppose protection seekers with the citizens and denizens of the potential destination country. Legally, it opposition is structured as follows. On one side, there is the protection seeker's right under Article 3 ECHR. On the other, there is the enjoyment of human rights at large by the community of citizens and denizens. This opposition is profound and complex. It involves a heterogeneous set-up of persons involved, and juxtaposes the absolute denial of a right held by the protection seeker to the gradual erosion of rights for a whole community.

Under the first option (abolition of extraterritorial protection) as well as the second option (protection at the cost of host states' population), an exact quantification of intrusion is impossible, as many factors remain the subject of speculation. How many persons will seek protection in the future? How are they going to be distributed between potential host countries? How many resources will a given host country have available in the future? What would be the consequences of a denial of extraterritorial protection? What would be the consequences of large-scale immigration? Nonetheless, it is possible to state that the aggregate intrusion might have a considerable weight in the present proportionality test.

Let us conclude. We have combined the proportionality test used by the Court with a sophisticated procedural model for balancing intrusions. We have been careful to limit the extent of meta-legal reasoning. In doing so, we have accorded both the intrusion caused by the use of visa requirements and the intrusion caused by their non-use considerable weight. We have also been forced to state that a more precise quantification is impossible. This stalemate of intrusions produced by the proportionality test cannot be resolved on a formal level. The outcome is indeterminate: any judgement will be an ideological one, mirroring the universalist or particularist interests of the decision-maker.

12.1.5 Appraisal

We seem to have come full circle. The stalemate of proportionality reasoning is reminiscent of the stalemate we encountered earlier when interpreting single human rights by virtue of Articles 31–3 VTC. Both forms of reasoning break up the reduction of complexity attained by the moulding of political conflicts into legal norms.[1394] Proportionality reasoning and interpretation both feature a gradually increasing consumption of data, augmenting complexity and indeterminacy in a structured escalation. In interpretation, the steps in escalation are the various methods of interpretation, ordered by Articles 31–2 VTC in a consecutive manner. In proportionality reasoning, a corresponding ladder of escalation exists, gradually augmenting complexity by admitting new data to the process of reasoning. None of these steps is purely legal-technical, so as to allow a solution on formal grounds. Instead, each contains a sufficient margin of subjectivity to allow for indeterminate outcomes. This, in turn, opens the path to the next step, escalating complexity further. In the first step, comparability is assessed; in the second step, the legitimacy of the goal pursued is at stake. In the third step, the appropriateness of the means is assessed, while in the fourth, the determination of the means' necessity is questioned. Finally, in the fifth step, the quantification and balancing of opposed intrusions is undertaken.

Without doubt, the case of visa requirements is one of the most extreme examples of the reproduction of complexity by proportionality reasoning. What is at stake is not the distribution of rights within a given society, but, rather, the admission into a society where rights are distributed. We have made frequent use of the *Abdulaziz* case, which is a rich source for tracking the Court's reasoning on discrimination. However, *Abdulaziz* is still about *the right of the included*—namely the

[1394] See also Habermas' general observations on the augmentation of complexity in application discourses: 'Wir haben gesehen, wie sich in der Rechtssprechung unter Anwendungsaspekten das Bündel jener verschiedenartigen Argumente wieder öffnet, die in den Rechtsetzungsprozess eingegangen sind und den Legitimitätsansprüchen des geltenden Rechts eine rationale Grundlage verschafft haben'. Habermas, 1992, p. 345. ['We have already seen how legal adjudication unwraps, for the purposes of application, these variegated arguments that have already entered into the lawmaking process and provided a rational basis for the legitimacy claims of established law.' J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1996a, Polity Press, Cambridge), p. 283].

right to family life enjoyed by persons legally present in the respondent state—and not about the *right to be included*. Due to the absence of a territoriality requirement in its scope of application, the ECHR offers a unique possibility under international law to reopen the discourse on the exclusion of aliens in need of protection.

Claims of inclusion are probably among the most complex issues to be dealt with in law, as they host fundamental contradictions inherent in a system of universal human rights protection entrusted to particularist actors, i.e. nation states. The assessment of visa requirements under Article 14 ECHR and the inquiry into a possible right to access under Article 12 ICCPR reveals striking similarities. Both cases suggest a linkage between the unpredictability of the number and magnitude of inclusion claims and the indeterminacy produced on the legal-technical level.

As the restraints of legal reasoning result in an indeterminate outcome, we are left with the production of determinacy by the ECtHR or the ECJ. In the legal-theoretical stalemate explicated above, their judgement will inevitably be a purely decisionist one.

12.2 Access to Territory and Protection: Choosing between Dublin and Geneva?

Consider the following dilemma. In 1998–9, Swedish policy was not to remove those Bosnian citizens originating from an area in Bosnia where they would be in minority upon return. Therefore, Muslims or Croats of Bosnian nationality originating from places now situated in the 'Republika Srpska' continued to enjoy protection in Sweden. Germany took a different position. Since the conclusion of the Dayton agreement, Germany has been removing Bosnians of the said groups. The German perception is that such return poses no risk, as returnees are free to relocate internally within the Bosnian Federation to avoid threats from other groups.

To avoid return by the German authorities, a number of Bosnian protection seekers left Germany for Sweden. Under the terms of the Dublin Convention, Germany would be required to take them back. However, for the Swedish authorities, requesting such return would mean accepting a considerable risk of removal from Germany to Bosnia, fully in line with the relevant German practice. Granting for a moment that the Swedish stance is based on a correct interpretation of the 1951 Refugee

Convention, return to Germany would amount to indirect refoulement. But if Sweden allowed these groups to stay, this would stimulate secondary movements to Sweden and undercut the deflection mechanism introduced by the Dublin Convention. The described case is a real one.[1395] The Aliens Appeals Board, to which the case was appealed after a removal decision in first instance, referred it for decision to the Swedish government. One year and eleven months after referral, the government still had not decided the case.[1396] What shall prevail: Dublin or Geneva—control or protection?

The example of Bosnians cited earlier makes abundantly clear that the reallocation to safe third countries does not go together with a polycentric proliferation of interpretations. Somewhere, a line has to be drawn, separating permissible from impermissible reallocations. Earlier, we noted that prohibitions of refoulement also encompass indirect removal to a state from which pertinent threats emerge. This suggests that Dublin and Geneva disaffirm each other—it is not possible to realise both jointly. However, we also recall that the Dublin Convention does not *force* Contracting Parties to effectuate removal under its allocation rules. Article 3 (4) DC enshrined an opt-out clause, allowing a Contracting Party to bypass allocation criteria and to assume responsibility for a consenting applicant present on its territory. In legal terms, the question would be the following: exactly at what point do prohibitions of

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[1395] The Bosnian nationals X, Y and their three children applied for asylum in Sweden. They originate from a Bosnian town situated in the 'Republika Srpska', now dominated by Serb inhabitants. The applicants are Muslims. The family had earlier found refuge in Germany, but moved on to Sweden when the German authorities requested them to leave the country by 6 November 1997. The Swedish Immigration Board (SIB) requested its German counterpart to assume responsibility for the asylum application of the Bosnian family under the Dublin Convention. On 27 November 1997, the German authorities declared their willingness to do so, based on Art. 5 (1) and (4) of the Dublin Convention. Upon this decision, the SIB ordered the family to leave Sweden. This decision was appealed to the Alien Appeals Board (AAB). On 2 June 1998, the AAB decided to refer the case to the Government, recommending it to dismiss the appeal. See also text accompanying note 1402 below.

[1396] The political dimension of such cases is aptly condensed in the following quote: 'In short, the "safe country" principle injects an unnecessary and totally unhelpful political element into the refugee determination process. Either we risk offending other nations by declaring them to be unsafe, or we play politics and turn a blind eye to the real risks faced by refugee claimants in the interests of diplomatic harmony'. J. Hathaway, 'The Humane and Just Alternative for Canada', 7 *Refuge* (1987), pp. 10–1.

refoulement *oblige* a Member State to make use of the sovereignty clause in Article 3 (4) DC?

This question cannot be answered outside a specific legal context. However, some of its preliminaries can be clarified abstractly. First, is it at all conceivable that allocation under the Dublin criteria conflicts with prohibitions of refoulement? Provided the answer is yes, it could still be held that Member States enjoy a margin of discretion when implementing the prohibitions. This would make the identification of a precise obligation to abstain from allocation difficult, if not impossible. Closely linked to this issue is the search for a canon of interpretation to be applied. Here, the choice is between domestic canons and Articles 31 and 32 VTC. In the following sub-sections, we shall look into these preliminary questions. Subsequently, we will sift through a test case hinging on what is probably the most pertinent interpretative divergence within the EU—the issue of non-state agents of persecution.

12.2.1 Permissive Tolerance, Margin of Discretion or Unitary Interpretation?

Is there a point where prohibitions of refoulement oblige a Member State to make use of the sovereignty clause in Article 3 (4) DC? If so, where is it located? Let us recapitulate the environment in which all of the named norms operate. The domestic law and practice of Member States vary to a considerable extent, and there is no international body that may offer binding guidance on how prohibitions of refoulement are to be interpreted in general terms.[1397] The question then becomes when is opt-out from allocation under Article 3 (4) DC mandatory? As soon as the authorities of the fellow Member State deviate from the interpretation adopted in the referring country? This is a universalist position, imposing the domestic standards of the reallocating Member State on the rest of the Union. Or is there a margin of discretion to be enjoyed by fellow Member States in their interpretation of non-refoulement obligations?

[1397] Art. 38 GC only relates to disputes between Contracting Parties, which are to be referred to the ICJ at the request of one of the parties to the dispute. UNHCR supervises the application of the 1951 Refugee Convention according to its Art. 35, but lacks the power to offer binding guidance on the interpretation of its norms. The judgmentsissued by the ECtHR are only binding in the specific case they concern. Individual complaints under the ICCPR do not yield binding outcomes at all.

This implies the toleration of deviating interpretations, and goes the particularist's errands. At the same time, it would weaken the authority of *legal* interpretation by the reallocating state: one cannot uphold the determinacy of one's own interpretation and simultaneously tolerate deviating positions by others. Finally, the particularist model begs the question of where to demarcate the limits of tolerance. Where exactly does the margin of discretion end? Or, most radically, could one argue that there are no situations compelling Member States to use 3 (4) DC, and that a permissive tolerance for deviating interpretations shall reign supreme in this area?

For the time being, we can make out five positions. Probably the most extreme particularist position is that allocation under the Dublin Convention cannot collide with the 1951 Refugee Convention, as the latter is protected in a savings clause in Article 2 DC. Another, slightly more moderate particularist claim is that all Member State are formally bound to apply the various prohibitions of refoulement, and thus it can be validly assumed that protection interests are catered for, in spite of varying domestic interpretations. In short, both the first and the second positions tolerate any degree of polycentrism in the domestic implementation of protective norms.

But there are also two intermediary positions on offer, amalgamating universalist and particularist elements. The third position holds that states enjoy a margin of appreciation when interpreting protection instruments. As long as the interpretation embraced by the receiving Member State stays within this margin, there are no reasons to abstain from allocation under the Dublin Convention. However, where its interpretation is beyond that margin, the sending Member State must abstain from allocation. The fourth position is a refinement of the first. It distinguishes between cases of interpretation and of application. While states enjoy a margin of appreciation in application cases, there is no such margin in interpretation, which must remain faithful to international law. Thus, the second position is more universalist in nature than the first. Both intermediate positions wish to circumscribe polycentricity, but have no ambition of abolishing it altogether. Both revolve around the concept of a margin of appreciation.

Finally, there is a fifth position, holding that there is no margin of appreciation whatsoever, and that the legality of allocation under the Dublin Convention must be measured against a unitary interpretation of

protection instruments, guided by the Vienna Convention. With this position, we have reached the universalist pole. In the following, we shall go through each of the positions mentioned, following the order of their enumeration.

The first position argues that allocation based on the Dublin Convention is per definition in line with the 1951 Refugee Convention. After all, Article 2 DC spells out that

> The Member States reaffirm their obligations under the Geneva Convention, as amended by the New York Protocol, with no geographic restriction of the scope of these instruments, and their commitment to co-operating with the services of the United Nations High Commissioner for Refugees in applying these instruments.

A case preceding the actual entry into force of the Dublin Convention epitomised its compatibility with the 1951 Refugee Convention. In its judgement of 11 June 1993, the U.K. High Court dismissed an application for leave to move for judicial review by three citizens of Afghanistan, who had claimed political asylum on arrival in the United Kingdom.[1398] In accordance with his stated policy, the Secretary of State declined to consider their applications on the merits and proposed to return them to Germany, the safe country whence they had come. Judge Jowitt argued that the Dublin Convention and the 1951 Refugee Convention are not in conflict:

> What I think is significant about the Dublin Convention, despite the fact that it has not been ratified, is that the signatories to the Convention, themselves signatories to the Geneva Convention, have regarded the Dublin Convention as not being in any way inconsistent with the Geneva Convention. Indeed, article 2 of the Dublin Convention reaffirms the Geneva Convention. I do not, therefore, see any inconsistency between the practice of removals to a safe third country and the United Kingdom's treaty obligations under the Geneva Convention to which rule 21 of the immigration rules says full regard shall be given.[1399]

[1398] *R v Secretary Of State For The Home Department ex parte Jahangeer and others*, Queen's Bench Division [1993] Imm AR 564, 11 June 1993.

[1399] Ibid.

The core of the Judge's argument is that the will of the Contracting Parties to the Dublin Convention shall prevail. If they regard the Dublin Convention to be in line with the 1951 Refugee Convention, there cannot possibly be a conflict of the two. Let us consider whether there are any grounds in the Vienna Convention to adopt such a position. The Judge can be understood in two manners. Either, he contends that the Dublin Convention enshrined an agreement on the interpretation of the 1951 Refugee Convention, or that it represents an amendment of the latter instrument.

It is relatively easy to see why both contentions would be flawed. The group of Contracting Parties to the Dublin Convention is far from being congruent with the group of Contracting Parties to the 1951 Refugee Convention. Therefore, the Dublin Convention cannot be regarded as an agreement on the interpretation of Article 33 GC in the sense of Article 31 (3) (a) VTC. True enough, international law does allow the amendment of a multilateral treaty between certain of its parties only. However, such amendments must live up to the conditions set out in Article 41 VTC. The 1951 Refugee Convention neither explicitly allows, nor explicitly prohibits such amendments.[1400] Following Article 41 (1) (b) (ii) VTC, such an amendment is only acceptable if it

> does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Article 42 (1) GC spells out that Article 33 GC is a non-derogable provision. Therefore, it simply cannot be amended due to the limitations spelt out in Article 41 (1) (b) (ii) VTC. Thus, we have excluded the possibility of construing the Dublin Convention as an agreement on the interpretation of the 1951 Refugee Convention or an amendment of that instrument. The Judge in *Ex parte Jahangeer and Others* erred. Reallocation under the Dublin criteria can very well conflict with the 1951 Refugee Convention.

The present Swedish practice is a good reflection of the second position, insisting on the legality of removal as long as the receiving Member State is legally bound to follow protective instruments under international law. In one case before the Swedish Aliens Appeals Board,

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[1400] The modalities for a revision of this instrument are laid down in Art. 45 GC.

an Iraqi citizen challenged a removal decision under the Dublin Convention. He feared that, once removed to Germany, the latter country would send him to Jordan, which Germany regarded as a safe third country, while Sweden did not, as Jordan has not signed the 1951 Refugee Convention. Faced with this rather decisive dissimilarity in the protection systems of Germany and Sweden, the Aliens Appeals Board retreated into formalism:

> However, for the outcome of the case, it will be decisive that both Germany and Sweden are bound by the obligations in Article 33 of the Geneva Convention, as well as by those in CAT and the ECHR. With reference to the legislation in Germany, its international obligations and its notorious conduct with regard to persons seeking asylum there, it must be ruled out that Germany would not follow its obligations under the conventions [...].[1401]

The decision contains no exploration of the German legislation or practice whatsoever. Quite apparently, this reasoning confounds the level of international law with the level of domestic practice: as Germany is bound by international instruments, the Aliens Appeals Board argues, it must be ruled out that the country violates them in practice. The Board must be held to believe that the formal equality between Germany and Sweden with regard to their international obligations overrules factual inequalities in the application of the instruments. On a matter-of-fact level, the result is manifestly absurd. While Jordan is not regarded as a safe third country on formal grounds—i.e. the fact that it is not bound by the 1951 Refugee Convention—and the direct return of a protection seeker there would be disallowed on these grounds, it is apparently correct to send her there via a Member State, again on the basis of formal grounds.

In an earlier case, this denial to subordinate reality to law is made manifest. This case, alluded to in the introduction to this chapter, turned

[1401] ['Avgörande för ärendets utgång bör emellertid vara att såväl Tyskland som Sverige är bundna av åtgandena i art. 33 Genèvekonventionen ävensom av bestämmelsena i tortyrkonventionen och Europakonventionen. Med hänvisning till Tysklands lagstiftning, internationella åtaganden och kända agerande när det gäller personer som ansöker om asyl där, måste det anses som uteslutet att Tyskland inte skulle fullfölja sina åtaganden enligt konventionerna [...].' Translation by this author.]. AAB, Decisions of 7 March 2000 (unpublished). On file with the author. This decision referred the appeal to the Swedish government with a recommendation to dismiss it. At the time of writing, it has not been decided upon by the government.

on the issue of a so-called internal flight alternative for Bosnians. Following the German interpretation, there was such an alternative, while the Swedish practice denied that. When seized with the question whether removal to Germany under the Dublin Convention was permissible, the Aliens Appeals Board saw no consequences flowing from these conflicting perceptions:

> The fact that, compared to Sweden, Germany may judge the question of an internal flight alternative differently than Sweden, and thus exclude an asylum seeker from the possibility to receive refugee status, relating to the fact that the person can receive protection in some part of Bosnia-Herzegovina, does not imply that Sweden violates Article 33 of the Geneva Convention by sending the asylum seeker to Germany for a determination of his claim.[1402]

The Board does not motivate further why this difference in removal practices would be legally irrelevant.[1403]

An analogous argument has been developed by the U.K. government in an admissibility case before the ECtHR, which pondered the relationship between the Dublin Convention and extraterritorial protection under the ECHR. In *T.I. vs the U.K.*, the applicant challenged the decision by U.K. authorities to remove him to Germany under the Dublin Convention, claiming that it violated Articles 2, 3, 8 and 13 ECHR. The U.K. Government refuted his claims, arguing inter alia that

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[1402] ['Den omständighet att Tyskland kan göra en annan bedömning än Sverige i frågan om det inre flyktalternativet och således utesluta en asylsökande från möjligheten att få flyktingskap med hänvisning till att personen kan få skydd i någon del i Bosnien-Hercegovina innebär inte att Sverige bryter mot åtagandet i art. 33 Genèvekonventionen genom att sända den asylsökande till Tyskland för att få sin ansökan prövad där.' Translation by this author.] AAB, Decision of 2 June 1998. On file with the author.

[1403] The schizophrenia inherent in such misconceived loyalty to other Member States is fully exposed when contrasted with requirements for reallocation to safe third countries that are not Member States. In its para. 2 (d), the 1992 STC Resolution names protection against chain refoulement as a criterion for qualifying a country as safe: 'The asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention'. If this stipulation flows from Member States' respect for the 1951 Refugee Convention (as the preamble of the quoted instrument suggests), the requirement of *effective* protection against refoulement should equally inform the application of the Dublin Convention.

> this Court should be slow to find that the removal of a person from one Contracting State to another would infringe Article 3 of the Convention, as in this case, the applicant would be protected by the rule of law in Germany and would have recourse, if any problems arose, to this Court, including the possibility of applying for a Rule 39 indication to suspend his deportation. It would be wrong in principle for the United Kingdom to have to take on a policing function of assessing whether another Contracting State such as Germany was complying with the Convention. It would also undermine the effective working of the Dublin Convention, which was brought into operation to allocate in a fair and efficient manner State responsibility within Europe for considering asylum claims.[1404]

However, the ECtHR did not accept this formalistic approach:

> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution [...].[1405]

Thus, the ECtHR has reserved the right to scrutinise removal decisions under the Dublin Convention with a view to their legality under the ECHR. There are, indeed, convincing reasons to do so. The second position is hampered by the same counter-arguments as the first: the Dublin Convention neither represents an interpretative agreement nor a

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[1404] ECtHR (Third Chamber), *Decision as to the Admissibility of Application No. 43844/98 by T.I. against the U.K.*, 7 March 2000 (unpublished), [henceforth T.I. vs the U.K.], p. 13.

[1405] *T.I. vs. the U.K.*, p. 16.

modification of the 1951 Refugee Convention or the ECHR.[1406] In addition, the second position disregards the simple fact that the both instruments oblige a state to ascertain the safety of a third country in a concrete manner, involving not only its international obligations in isolation, but also their implementation.

This brings us to the intermediary positions, distinguishing between permissible variations in the interpretation of protective instruments at the domestic level, and excessive deviations from a proper interpretation, disallowing allocation under the Dublin Convention. The third position has been aptly expounded by the U.K. Court of Appeal in *Kerrouche*. This 1997 case dealt with the lawfulness of returning a protection seeker from the U.K. to France under the Dublin Convention. Faced with deviant interpretations of a critical concept in the refugee definition, the Court took the following position:

> The difference in approach to the interpretation of the [1951 Refugee, GN] Convention and [the New York, GN] Protocol has to be of such significance that it can be said that in making a decision affecting the position of a particular asylum seeker for asylum, the third country would not be applying the principles of the Convention. For this to be the position, the third country's approach would have to be outside the range of tolerance which one signatory country, as a matter of comity, is expected to extend to another. While it is highly desirable that there should be a harmonised approach to the interpretation of an international document such as the Convention, until that harmonisation is achieved, one signatory must allow another signatory a margin of appreciation before treating that other country as being one which did not fulfil its obligations to adhere to the principles of the Convention. [...] Unless the interpretation adopted by the "safe country" was sufficiently different from that in English law to be outside the range of possible interpretations the difference need not concern the authorities in this country.[1407]

Thus, the *Kerrouche* Court allows other Member States a certain margin of appreciation, encompassing 'possible interpretations' of the 1951

[1406] Parenthetically, one should mention that instruments of human rights and humanitarian law are not even protected by a savings clause in the Dublin Convention.

[1407] U.K. Court of Appeal, *Kerrouche v The Secretary of State for the Home Department*, [1997] Imm AR 610, at 615.

Refugee Convention. As long as their interpretations are situated within this margin, allocation under the Dublin Convention is permitted. But where domestic interpretations are situated beyond this margin, the Dublin Convention cannot be applied.

However, later U.K. case law has modified this approach, which brings us to the fourth position, proceeding further into a universalist direction. In the landmark case of *Adan and others*, the Court of Appeal had to determine whether the U.K. Secretary of State complied with the law when authorising the return of three asylum seekers from the U.K. to Germany under the Dublin Convention. In this determination, the Court distinguished between matters of law and matters of application. While a strictly unitarian model should govern the former, a tolerance model would determine the legality of the latter.

> In our judgment a distinction of principle falls to be drawn between the interpretation of the [1951 Refugee, GN] Convention and its application. The duty of the Secretary of State, [...] is to examine the practice in the third country in question in order to decide (a) whether it is consistent with the Convention's true interpretation, and (b) whether, even if so consistent, it nevertheless imposes such practical obstacles in the way of the claimant as to give rise to a real risk that he might be sent to another country otherwise than in accordance with the Convention. (a) is a matter of law; and if the Secretary of State mistakes the law, he is reviewable on illegality grounds as surely as if he erred in the construction of a municipal statute. (b) is a matter of fact; and the Secretary of State's decision upon it therefore falls to be reviewed only upon Wednesbury grounds (see Associated Provincial Picture Houses Ltd v Wednesbury Corp, [1947] 2 All ER 680 [1948] 233), although the test is modified by the need for "anxious scrutiny" in asylum cases [...].[1408]

Materially, *Adan and others* was about protection from persecution by non-state agents, which U.K. courts considered to fall within the protective scope of the 1951 Refugee Convention, while German courts did not. The Court of Appeal regarded this to be a matter of law, while it

[1408] *Adan and others*, para. 62. The term 'Wednesbury grounds' refer to a standard for controlling the legality of discretionary decisions by authorities, first introduced in the case referred to in the quote.

classifies earlier U.K. cases—*Canbolat*, *Kerrouche* and *Iyadurai*—as involving matters of application.

> If a signatory State were to take a position which was as a matter of law at variance with the Convention's true interpretation, and act upon it, it could not be regarded as a safe third country: not merely because the "real risk" test was breached (though it certainly would be) but because in the particular case the Convention was not being applied at all. The essence of the Convention's protective measures is to be found in Art.1A(2), which defines "refugee" (and in the prohibition of refoulement in Art.33). The scope of the definition, which did not fall to be considered in Canbolat, Kerrouche or Iyadurai, must be a matter of law, not fact. Otherwise the protection offered by the Convention would in effect be reduced to a discretionary exercise by the signatory States. But the Convention's very purpose is plainly to afford international protection to persons falling within objectively defined classes. And the Vienna Convention, whose relevant provisions we have cited, would be set at nought. Its provisions imply that every treaty falling within its scope has to be interpreted in accordance with objective canons of construction.[1409]

The message is very clear. If another Member State deviates from 'the Convention's true interpretation' as a matter of law, no matter how little this deviation may be, removal to that state would amount to a breach of the 1951 Refugee Convention. Fully in line with this reasoning, the Court of Appeal considered the removal of the three claimants to Germany to contravene the law, as the German interpretation of Articles 1 (A) (2) GC was too narrow with regard to persecution by non-state agents.[1410] Thus, there is no question of imposing domestic interpretations on fellow Member States. The issue at stake is to identify an authoritative international interpretation.

Let us now move from the fourth to the fifth position. In doing so, we should examine the last particularist stronghold in the judgement in *Adan and others*. This is the allowance to cases of application, where, in the view of the Court of Appeal, a certain margin of appreciation is acceptable. However, the distinction between application cases and interpretation

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[1409] *Adan and others*, para. 68.

[1410] *Adan and others*, paras 71 and 72.

cases, introduced by the Court of Appeal, is not as clear-cut as it might seem. When going through earlier U.K. case law on the Dublin Convention, the Court of Appeal classified three cases as 'application cases'. The first was *Canbolat*[1411], focusing on allegedly sloppy determination procedures in France, while the second, *Iyadurai*[1412], dealt with the standard of proof in Germany, which was said to be more demanding for the protection seeker than in the U.K.. Neither of these issues is explicitly regulated in the 1951 Refugee Convention. Thus, one could argue, as long as they secure the observance of Article 33 GC, different forms of determination procedures all comply with the 1951 Refugee Convention. Against this background, the classification of *Canbolat* and *Iyadurai* as application cases appears to be quite logical. But is the third case, *Kerrouche*[1413], indeed to be considered an application case, as claimed by the Court of Appeal? This is how the Court motivates its position:

> Kerrouche [...] was concerned with the sense given by the French authorities to the notion of a political crime for the purpose of Art.1 F (b) which, where it applies, deprives the refugee of the Convention's protection. "Political crime" is not defined in the Convention. It is an expression which is capable of a range of meanings, as the jurisprudence in extradition cases demonstrates. In our judgment here, too, it is for the signatory States to conclude as a matter of fact what they will regard as amounting to such a crime. The Secretary of State in deciding whether to grant a certificate in a case where there is material to show that the third country in question will or may treat the claimant as a political criminal, will of course examine the factual material available and arrive at a pragmatic judgment as to whether or not the approach taken by the third country lies within a reasonable range, bearing in mind, no doubt, that local conditions may promote a more, or less, restrictive sense of the expression "political crime". [...]

[1411] *R v Secretary of State for the Home Department and Immigration Officer, Waterloo International Station ex parte Canbolat [1997] INLR 198, sub nom R v Secretary of State for the Home Department and Another ex parte Canbolat,* [1997] 1 WLR 1569, CA.

[1412] Court of Appeal, *R v Secretary of State for the Home Department ex parte Iyadurai*, 10 June 1998.

[1413] *Kerrouche v The Secretary of State for the Home Department,* [1997] Imm AR 610.

> Kerrouche, then, also falls to be regarded as an "application" case.[1414]

Here, it seems that the Court of Appeal fails in applying its own distinction. Precisely as for the issue of persecution by non-state agents, the matter of exclusion due to a political crime impacts directly on the scope of protection under Article 33 GC. After all, Article 1 (A) (2) GC, invoked by the Court of Appeal to justify its inclusive position on non-state agents of persecution, forms part of the refugee definition as much as Article 1 (F) GC. The term 'political crime' is in want of interpretation as much as the decisive phrase in *Adan and others* ('unable [...] to return' in Article 1 (A) (2) GC). If *Adan and others* hinges on a matter of law, which the Court of Appeal contends it does, so should *Kerrouche*. And if the precise scope of the refugee definition is a matter of interpretation, so are the procedural implications of Article 33 GC. Thus, the difference between matters of law and matters of fact is not binary in character, but rather one of degree. It is by no means clear that the precise meaning of the term 'unable [...] to return' is per se easier to identify than the procedural requirements implicit in the 1951 Refugee Convention. The bottom line is the precise content of international obligation, even in those cases that the Court of Appeal classifies as turning on 'application'.

In substance, the Court of Appeal has been radical. It claimed nothing less than that Germany is misinterpreting the 1951 Refugee Convention and thus breaking international law. It is to be lamented that the Court of Appeal has not been equally radical in its method. Instead of deploying the double standard of 'law' and 'application', it should have done away with the myth of a discretionary margin altogether, declaring *any* question affecting the enjoyment of rights under the 1951 Refugee Convention to be a matter of law. 'Otherwise', to quote the Court of Appeal itself, 'the protection offered by the Convention would in effect be reduced to a discretionary exercise by the signatory States'.[1415] And by the courts, one must add, which have to operate a distinction between matters of law and matters of application. By conclusion, the fifth position, insisting on a unitary interpretation in any matter affecting state obligations under protective instruments, offers itself as the only viable alternative.

[1414] *Adan and others*, para. 66.

[1415] *Adan and others*, para. 68.

Nonetheless, for the cause of determinacy, the Court of Appeal's particularist step on 'matters of application' is far outweighed by its two universalist steps in 'matters of law'. The first universalist step is, as already outlined, the demand that matters of law be subjugated to one single, unitary standard, with no allowances for domestic deviations. This claim is easily recognisable as a universalist one, taking the Dublin *leitmotiv* 'one for all' at its word. The second universalist step was taken on the issue of interpretation. The Court of Appeal expressly rejected the argument that the third country in question must apply the same interpretation of the 1951 Refugee Convention as has been vouchsafed by the English courts.[1416] Instead, the protective scope of the Convention and, in particular, its Article 33, are to be established objectively by means of the interpretative rules in the Vienna Convention.[1417]

The importance of this conclusion can hardly be underestimated. For a claimant challenging the legality of allocation to another Member State, it is no use to argue that the domestic interpretation upheld by the sending country is more favourable than its counterpart in the receiving country. Instead, the claimant has to measure the interpretation upheld by the receiving country against the 'international meaning' of the relevant norm—a meaning which has to be identified through Articles 31 and 32 VTC. But is there so great a difference between domestic interpretations and international interpretations of protective norms? Yes, there is a difference. It is one thing to interpret a norm of domestic law by means of a domestic canon of interpretation. It is quite another to interpret the norm of an international instrument by means of the Vienna Convention. After all, not all states have copied the refugee definition and the prohibitions of refoulement into domestic law. Some operate home-made norms, which mirror the content of international obligations to a greater or lesser extent.

[1416] *Adan and others*, paras 51–8

[1417] In the *Adan and others* judgment, the Court of Appeal quotes Arts 31 and 32 VTC in the section enumerating legal norms of relevance for the case (paras 34 and 35). It is fully in line with these provisions, that the Court of Appeal attaches much greater importance to the terms of the 1951 Refugee Convention (para. 71), while rejecting historical arguments (para. 72). Moreover, in para. 71, the Court of Appeal motivates its position on non-state agents of persecution by referring to the UNHCR Handbook as 'good evidence of what has come to be international practice within Art. 31 (3) (b) of the Vienna Convention' (VTC).

[1417] See Art. 311 TEC.

But what would be so wrong about referring to the domestic interpretation of the sending Member State? It must be considered possible that it could produce an outcome more favourable to the protection seeker than the canon of interpretation laid down in the Vienna Convention. Therefore, it is by no means self-evident that a universalist would share the Court of Appeal's position and opt for the Vienna Convention. And the Court of Appeal's position is more demanding for the protection seeker as well as for domestic courts and authorities looking into Dublin cases, who must all argue with a methodology of interpretation new to them.

The answer is simple, and brings us back to the conundrum of sharing and concentrating burdens expounded in an earlier chapter. If the legality of allocation to other Member States were to be based on domestic interpretations, those states with the most restrictive interpretations would benefit. As all other Member States would uphold more inclusive interpretations, the Courts in the restrictive states would never have any legal reason to declare an allocation unlawful. On the other hand, those states embracing more inclusive interpretations would be punished. Their Courts would strike down all allocations to other Member States upholding less inclusive interpretations. While the restrictive states would make full use of the Dublin mechanism to shift their protection obligations to other Member States, the inclusive Member States would be stuck with a growing number of protection seekers. They would absorb not only those allocated to them under the Dublin criteria, but also those which they could have allocated to other Member States, had the latter adhered to the same interpretation as the inclusive Member State. In the long run, this would set off a spiral movement towards less inclusive interpretations, fuelled by the domestic legislators in those states bearing the largest protection burdens.[1418]

Clearly, the Vienna Convention is no miracle cure against this development. The canon of interpretation laid down in Articles 31 and 32 VTC can be understood in a variety of manners. Even if States were to

[1418] This logic is not specifically confined to extraterritorial protection. In his brilliant exegesis of the *Hauer case*, Weiler has pointed to a similarly structured problem when protecting human rights in EC law. Going for a maximalist approach and taking the most far-reaching protective provisions among domestic constitutions as a model for the whole Union will create distortionary effects. What represents a workable protection of the right to property in Germany, may very well create unemployment in Sicily. Weiler, 1999, p. 116.

develop a perfectly congruent interpretation of the precise content of Articles 31 and 32 VTC, it nevertheless hosts considerable potential for indeterminate outcomes. Its advantage is, however, that it forces domestic decision-makers to use a unitary language when arguing for certain outcomes. Compared to giving primacy to domestic interpretations, the risk of initiating the spiral of restrictionism is far more limited. Put simply, the Vienna Convention is a tool for speeding up material harmonisation of protective norms among Member States. It is the only Archimedian point available to ensure an operation of the Dublin Convention mindful to international law.

Parenthetically, it should be mentioned that a position insisting on a unitary interpretation finds full support in the drafting process of the 1951 Refugee Convention, during which delegations opted for giving the refugee definition an autonomous content, not allowing discretion on part of the Contracting Parties.[1419]

The preceding reflections allow for three conclusions. First, the allocation criteria in the Dublin Convention can very well conflict with norms of international law prohibiting refoulement. Second, there is no margin of discretion for Member States when interpreting prohibitions of refoulement. Therefore, it amounts to a performative self-contradiction, when Member States uphold one interpretation, while sending back protection seekers to another Member State upholding another interpretation. Third, the Vienna Convention provides the relevant canon of interpretation, along which prohibitions of refoulement must be construed.

Next we will embark on an empirical probe. We shall identify whether an interpretation along the methodology set out in the Vienna Convention produces a determinate outcome to one of the most intricate conflicts in European law on extraterritorial protection. The issue of non-state agents of persecution shall be our test case.

[1419] See T. Einarsen, *Retten till vern som Flykting* (1998, Universitetet i Bergen, Bergen), pp. 98–9, with further references to the *travaux*. In the same context, Einarsen refutes that there is any 'margin of appreciation' when interpreting the 1951 Refugee Convention, as this would amount to a modification of treaty obligations to the detriment of the third party it seeks to protect—namely the refugee. Einarsen, 1998, pp. 93–7.

12.2.2 Delimiting Protection Categories: Persecution by Third Parties

Human rights violations by non-state agents are handled differently in different domestic jurisdictions, ranging from outright exclusion to outright inclusion. For protection seekers, the issue of violations by non-state agents is of the utmost importance. As the conflicts in Afghanistan, Former Yugoslavia and Somalia have shown, a large fraction of violations are carried out by non-state agents. Such violations are intrinsically linked to non-international armed conflicts, which have augmented in frequency during the last decades. Failed states are no singular phenomenon either, as the protracted difficulties in erecting effective state structures in Somalia, Liberia and Afghanistan have illustrated. So the question is not merely an academic one, but has considerable impact on the fate of persons in search of a haven. We recall that the non-binding 1996 Refugee Joint Position did little to part the fray. By and large, it accommodates an exclusionary position, while leaving the door open for inclusionary interpretations.[1420]

At this stage, it should scarcely be surprising that the dispute on agency is fed by the same differences in perception of the international legal order as the dispute on non-refoulement under the ECHR and ICCPR. The universalist approach focuses on the protective needs of the individual and denies a contingency of extraterritorial protection on state agency. Instead, it seeks to establish a direct legal relationship between the victim of a violation and the state where extraterritorial protection is sought. The particularist approach relies mainly on an idea of international law as an inter-state phenomenon. Without state agency, there is no possibility of attributing violations to a state; without this possibility, the violation is beyond the protective scope of international refugee law and international human rights law. In the case of failed states, particularists have to accept that the obligation to protect human rights vanishes in a black hole in the universe of state responsibility.

It is no coincidence that the agency dispute came into full bloom after an increasing fragmentation of state protection in the aftermath of 1989;

[1420] See chapter 7.1.2 above.

cynically speaking, restrictive host states must have perceived the enormous exclusion possibilities inherent in this issue.[1421]

In the following, we shall single out the normative content of the 1951 Refugee Convention, the CAT and the ECHR. In this process, manifestations of conflict between the universalist and the particularist approaches shall be tracked, and the possibility of a determinate interpretation explored.

12.2.2.1 The 1951 Refugee Convention

What is the dispute on non-state agents all about? Before entering the niceties of interpretation, some basic distinctions feeding the dispute have to be expounded. The overarching distinction between state agents and non-state agents has already been mentioned. Beyond that, multiple constellations are conceivable. Is the state deliberately choosing to remain passive when violations are taking place? Or is it simply unable to protect the victims of non-state persecution? *Is* there a state capable of protecting its citizens? Or are its functions exercised by a de-facto authority in parts or all of the territory? To attain clarity, we may distinguish five cases, based on the exploration of Vermeulen et al.[1422]:

A) Human rights violations carried out by the state;

B) human rights violations condoned or acquiesced to by the state;

C) human rights violations carried out, condoned or acquiesced to by a de-facto authority;

D) human rights violations by a third party not being a de-facto authority, with the state unable to protect; and

E) human rights violations by a third party not being a de-facto authority in a failed state.

[1421] Marx follows this line of thought when reconstructing the German case law, which introduced a new doctrine on state agency precisely in 1989. This doctrine was based on the existence of an 'order of peace' (*Friedensordnung*) established and maintained by a state, as a precondition for granting asylum. This doctrine was introduced at a time when 'orders of peace' cracked up by the numbers, no longer mitigated by a cold war world order. Marx, 1999, p. 59.

[1422] Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, pp. 7–10.

Categories A) to C) are generally unproblematic. There is consensus that all three categories are within the terms of the 1951 Refugee Convention. Even those states upholding a restrictive interpretation of the Convention mete out protection when persecution stems from a de-facto authority.[1423] This position is also acknowledged by the Refugee Joint Position. Following its paragraph 6, it is suggested that, in a civil war or internal or generalised armed conflict, persecution may stem 'from de facto authorities in control of part of the territory within which the State cannot afford its national protection'.

Rather, cases falling under D) and E) are the focal points of dispute. Let us set out with cases under D). A state exists, but is actually unable to protect from violations by non-state agents. The violators, in turn, do not constitute a de-facto authority. The Refugee Joint Position takes an exclusionary stance on this position. As emerges from paragraph 6 quoted earlier, it requires the persecutor to be a de-facto authority—where it is not, the case falls outside the scope of the 1951 Refugee Convention. Vermeulen et al. note that this interpretation corresponds to that upheld in French and German case law.[1424] In other jurisdictions, however, cases falling under category D) are included under the protective umbrella of the Convention. The constant case law of the Dutch Council of State[1425] as well as the Section 3 Article 2 of the Swedish Aliens Act[1426] provide relevant examples.

Category E) is best illustrated by the situation in Somalia after the fall of Siad Barre's regime in 1991. A violent conflict was fought out by armed factions in blatant disregard of human rights and humanitarian law. There was no state authority whatsoever. Victims of violations had nowhere to turn. The quoted formulation in paragraph 6 of the Refugee Joint

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[1423] Vermeulen et al. refer to Germany (BVerwG 9 C 38.96, BVerwG 9 C 15.96) and France (CRR 5 July 1991 (Kaba), CRR 4 September 1991 (Freemans) and CRR 30 September 1991 (Togbah)). For further references, see Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, p. 8.

[1424] Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, p. 9, with further references. For a good comparison and analysis of French and German case law with regard to the agency issue, see Wolter, 1999, pp. 241–81. See also R. Marx, 'Doktrin der "Friedensordnung" gegen eine unfriedliche Welt: Die Realitätsflucht des Revisionsgerichts in eine Fiktion, 19 *ZAR* 2 (1999), on the development of German case law.

[1425] Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, p. 9.

[1426] For an analysis, see K. Folkelius and G. Noll, 'Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act', 10 *IJRL* 607 (1998), pp. 619–20.

Position also excludes this category. Again, this exclusionary reading corresponds with the German and French case law[1427], while an inclusionary position has been taken by the Dutch Council of State.[1428]

It follows from this brief exposé that refugee lawyers can be divided into two camps, each supporting a theory of its own. Following the terminology suggested by Vermeulen et al., the exclusionary camp professes the accountability theory, while the inclusionary camp promotes the protection theory.

According to Vermeulen et al., the accountability theory limits the types of case in which a claimant might obtain refugee status under the Geneva Convention to situations where the alleged persecution can be attributed to the State. To do full justice to German case law, Vermeulen et al. should have extended the accountability theory to situations where the alleged persecution can be attributed to a de facto authority. The law of state responsibility, which underpins the accountability theory, supports this view. Most prominently, Article 15 of the ILC Draft on State Responsibility provides for the attribution of responsibility to an insurrectional movement which later forms the new government or a new state. Therefore, in our view, the accountability theory should be framed as follows: it limits the classes of case in which a claimant might obtain refugee status under the Geneva Convention to situations where the persecution alleged can be attributed to the State or to a de facto authority.

The protection theory simply holds that 'the absence of adequate protection against persecutory measures is a sufficient condition for assuming the existence of persecution'.[1429] For its proponents, it is irrelevant whether these measures can be imputed to a state or not.[1430] Parenthetically, it should be mentioned that this view is supported by the UNHCR Handbook.[1431]

[1427] See Wolter, 1999, pp. 250–2 (Germany) and pp. 259–60 (France).

[1428] Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, p. 10 with further references.

[1429] Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, p. 11.

[1430] Ibid.

[1431] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992, UNHCR, Geneva), paras 65 and 98.

Which theory is supported by the methodology of interpretation flowing from Articles 31 and 32 VTC?[1432] Let us start with the first stage, focusing on the ordinary meaning of the terms of the 1951 Refugee Convention.

From the outset, it should be underscored that the 1951 Refugee Convention does not address the issue of agency in an explicit manner.[1433] The core provisions of the Convention are the relevant starting point—the prohibition of refoulement in Article 33 GC, and the definition of the term 'refugee' in Article 1 GC.

We recall that Article 33 GC obliges Contracting Parties not to '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'. This seems to make matters clear. The phrase 'to the frontier of territories' allows no other conclusion than that the drafters referred to a geographical rather than an institutional entity. The relevant threat simply has to materialise within a certain territory. No requirements are made with regard to its source. At this stage, any pretensions that Article 33 GC presupposes persecution by a state or a de facto authority would amount to an interpretation contra legem, which is simply excluded by the methodology prescribed by Articles 31 and 32 VTC. Our interpretation could have already come to an end here, yielding an unequivocal support for the protection theory, had it not been for the word 'refugee'. This term is defined in Article 1 (A) (2) GC, and Article 33 GC cannot be properly understood without that definition. Although it is placed in another article, the refugee definition forms part of the prohibition of refoulement, and must be taken into account when establishing the ordinary meaning of the latter. And indeed, this definition opens up the divide between accountability theorists and protection theorists.

Article 1 (A) (2) GC extends the Convention's protection to a person, who 'owing to well-founded fear of being persecuted for reasons of race,

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[1432] Vermeulen et al. construe the Convention along the lines set out in the VTC, and so does the U.K. Court of Appeal in *Adan and others*. However, as will emerge below, our reading is not identical with theirs, although the outcome is the same. Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, pp. 12–7. *Adan and others*, paras 71 and 72.

[1433] When used in the text, the term 'state' refers only to Contracting Parties to the Convention, i.e. potential hosts. With regard to the source of the threat, the text uses the words 'country' or 'territory'.

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 [...]'. What can be inferred from this wording? The threat of persecution is qualified solely by the five grounds of persecution set out in the text. Thus, the term 'persecution' as such cannot support the accountability view. Its ordinary meaning is certainly not confined to persecution by the state.[1434] Neither can the term 'country' serve as an indicator that the drafters wished to limit the protective scope to persecution by state agents. The ordinary meaning of 'country' embraces not only the political state, but also the people of a state or district, and is thus wide enough to accommodate persecution by non state agents.[1435]

However, interpreting the latter part of the quote turns out to be more challenging. What is meant by the words '[he] is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'? We have to assume that this wording does not contain any redundancies, and that the reference to inability *or* unwillingness actually serves a purpose.

Apparently there are two kinds of refugees. One is 'unable to avail himself of the protection of that country', and the other is, 'owing to such fear, [...] unwilling to avail himself of the protection of that country'. Here it can be argued that the second category refers to persons persecuted by the state, while the first refers to those persecuted by third

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[1434] According to Merriam-Websters, the term 'persecution' has the following two connotations:

(1) the act or practice of persecuting especially those who differ in origin, religion, or social outlook

(2) the condition of being persecuted, harassed, or annoyed.

Merriam-Websters Online English Dictionary. Available at <http://www.eb.com:180/cgi-bin/dictionary?va=persecution+> (accessed on 14 December 1999).

[1435] Among the relevant connotations of 'country', Merriam-Websters lists:

(1) an indefinite usually extended expanse of land: Region

(2a) the land of a person's birth, residence, or citizenship, (b) a political state or nation or its territory

(3a) the people of a state or district : Populace, (b) Jury, (c) Electorate

Merriam-Websters Online English Dictionary. Available at <http://www.eb.com:180/cgi-bin/dictionary?va=country> (accessed on 14 December 1999).

parties.[1436] Consider the situation of a person fleeing state persecution. In her home country, state protection is available in general. However, she is unwilling to avail herself of this generally available protection, due to the risk of persecution in her specific case. The availability of protection is not helpful, as protector and persecutor are identical. Now consider the case of a person threatened by third parties. In her case, state and agent of persecution are two different entities, and the former cannot protect her from the latter. As there is no protection available, the person in question is simply unable to avail herself of it. This reading gives a meaning to each single word in the quoted passage[1437] and avoids redundancy.[1438]

[1436] While abstaining from making a clear cut distinction, the UNHCR Handbook enumerates 'a state of war, civil war or other grave disturbance' as examples of cases where a person is unable to return, while the 'term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality'. UNHCR, 1992, paras 98 and 100.

[1437] This corresponds well to the principle of interpretation expressed in the maxim ut res magis valeat quam pereat, also known as the rule of effectiveness. See Yasseen, 1976, p. 71, suggesting that this maxim is implied in Article 31 VTC; and Bernhardt, 1992, p. 1420.

[1438] In its essence, the *Adan* judgment of the House of Lords relies on the same approach: 'It was also common ground that article 1A(2) covers four categories of refugee: (1) nationals who are outside their country owing to a well founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country [...] If category (1) were confined to refugees who are subject to state persecution, then I can well see that such persons would, ex hypothesi, be unable to avail themselves of state protection. On that view the words would indeed serve no purpose. But category (1) is not so confined. It also includes the important class of those who are sometimes called "third party refugees," i. e. those who are subject to persecution by factions within the state. If the state in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of their own country? But if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied'. House of Lords, *R v Secretary Of State For The Home Department Ex Parte Adan*, 2 April 1998 [1999] AC 293 (304 C, 305H, 306C). The *Adan and others* Court of Appeal takes a similar approach, leading to the same inclusionary outcome, deploying a less orthodox reading. '[T]he issue we must decide is whether or not, as a matter of law, the scope of Art.1A(2) extends to persons who fear persecution by non-State agents in circumstances where the State is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective State authority exists) to afford protection. We entertain no doubt but that such persons, whose case is established on the facts, are entitled to the Convention's protection. This seems to us to follow naturally from the words of Art.1A(2): "... is unable or, owing to

Proponents of the accountability theory could turn this argument around. They could argue that the reference to inability exclusively covers cases of persecution by a de facto authority—that is, cases in category C). Categories D) and E) would still be outside the scope of the Convention. This—restrictive—reading would also give meaning to each single word and avoid redundancy. The possibility of such a reading seems to be overlooked by the adherents of the protection theory.[1439] Probably, there are good reasons for this neglect. To be sure, the divide between inability and unwillingness is explicit in the wording of Article 1 (A) (2) GC. The same cannot be said of a further subdivision of the category in the inability bracket. Nothing in the wording of the Convention suggests that such a subdivision is warranted. Therefore, such a restrictive reading has no place within the first stage of interpretation, turning on the ordinary meaning of the terms of the Convention.

Here our interpretation under the first stage has come to an end. The ordinary meaning of the terms of the Convention does not suggest that persecution by third parties is beyond the scope of the Convention. However, the terms of the Convention do not allow for outright exclusion of such a reading either. A limitation of the scope to categories A), B) and C) remains arguable after the first stage. This residual doubt is sufficient to trigger the second stage in our interpretative operation. We recall that the second stage makes available two further sets of data, namely the context and the telos.

The context of Articles 33 (1) and 1 (A) (2) GC gives additional insights. It has been pointed out that Article 31 (1) GC contains a reference to 'territories' analogous to the one chosen for Article 33 (1) GC.[1440] This reinforces the protection theory further.

We would like to introduce a further contextual argument into the debate. Throughout the text, limitations to the protective scope of the 1951 Refugee Convention are made in an *explicit* manner. Earlier it was mentioned that the concept of persecution is linked to five grounds,

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such fear, is unwilling to avail himself of the protection of that country"; and this involves no technical or over-legalistic reading of the provision.' *Adan and others*, para. 71. The Court of Appeal focuses on the inability or unwillingness of the state, rather than on the inability or unwillingness of the refugee, as suggested by the wording of Art. 1 (A) (2) GC.

[1439] Vermeulen, Spijkerboer, et al., 1998 make no mention of it, and neither did the U.K. Courts in *Adan and others*.

[1440] Vermeulen, Spijkerboer, Zwaan, and Fernhout, 1998, p. 14.

which, in fact, limits the protective scope. Furthermore, the reach of the refugee definition in Article 1 GC is explicitly confined by limitative clauses in paragraphs (C) to (F). The same is true for Article 33 GC—its paragraph (2) excludes certain categories of persons from the group protected by the prohibition of refoulement. To set out such limitations explicitly has apparently been a principle followed by the drafters in a systematic manner. It is indicative that the drafters refrained from qualifying persecution as an act attributable to the state or to de facto authorities. Reading such a qualification into the Convention, as the accountability theorists do, runs counter to its layout.

The adherents of the accountability theory have hitherto not adduced contextual arguments. Nonetheless, they could point to the customary law of state responsibility, which forms part of the context of Articles 33 (1) and 1 (A) (2) GC. To a certain extent, its norms are mirrored in the ILC Draft Articles on State Responsibility. It can be pointed out that categories A) to C) are backed up by explicit accountability norms. Category A) would correspond to Articles 5 and 6 ILC Draft, category B) would correspond to the attribution under Article 8 (a) ILC Draft and category C), would correspond to the attribution under Article 15 ILC Draft.

Ultimately, this is a coherence argument, aiming to show that the accountability theory 'fits better' with the normative corpus of international law. Against the existence of such coherence, valid counter-arguments can be adduced. Protective treaties such as the 1951 Refugee Convention draw on a tripartite setting involving at least two states, and, as beneficiaries, human beings. The law of state responsibility is largely based on an inter-state conception of international law, and was not designed to capture the intricacies of the tripartite setting.

Accountability theorists draw heavily on a teleological argument. It is claimed that the object and purpose of the Convention is to protect victims of state persecution.[1441] After all, the refugee problem the Convention sought to resolve was created by persecution by totalitarian states. However, the U.K. Court of Appeal challenges this view:

[1441] BVerwG, Judgement of 18 January 1995, BVerwGE 95, 42.

> But this argument as to the scope of Art.1 A (2) is in our judgment deprived of all its force by the 1967 Protocol to the Convention, [...]. It is clear that the signatory States intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world.[1442]

There is a great deal of merit to this argument. But the teleological argument of the accountability theorists is unconvincing for additional reasons. An important source for deductions on the telos of the Convention is its preamble. However, nothing in the preamble indicates that states solely wished to cater for persons persecuted by a state or by de facto authorities. Thus, the teleological argument may not amount to much more than historical reflections, lacking supportive expression in the instrument to be construed and falling outside the scope of the second stage. Furthermore, the historical accuracy of the particularist argument can be questioned; in the course of the 1930s and 1940s, there were numerous examples of persecution by non-state agents.

Concluding on the second stage, we may state that Article 33 (1) and 1 (A) (2) GC, as modified by the 1967 New York Protocol, extend protection regardless of the source of persecution. Cases falling under categories D) and E) are included under the protective umbrella provided for by the Convention. The doubts remaining after the first stage did not persist in the second and, accordingly, recourse to the third stage is not necessary.[1443] Thus, the methodology flowing from Articles 31 and 32 VTC can assist in resolving a persistent vexation of protection law in

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[1442] *Adan and others*, para. 72. One the face of it,the New York Protocol seems to fall outside the context, as there are a number of parties to the Convention which have not ratified the Protocol. Taking this position would relegate the teleological argument made by the Court of Appeal to the third stage. We recall, however, that any reference to the Convention in this work implies the Convention as modified by the Protocol. Therefore, the present interpretation actually depends on the Member States' obligations under the New York Protocol, which automatically brings in their obligations under the Convention.

[1443] However, given the scarcity of references to agents of persecution in the *travaux*, it is highly unlikely that the third stage would have produced an outcome in line with the accountability theory.

Europe. There is no basis in international law for denying victims of third party persecution extraterritorial protection under the 1951 Refugee Convention.[1444]

This outcome also has repercussions on the normative content of the Refugee Joint Position. As shown above, this instrument does not consider cases under categories D) and E) to come under the protective ambit of the 1951 Refugee Convention. At this stage, we understand that this defies a proper interpretation of the Convention. However, as the Refugee Joint Position is a non-binding instrument, the conflict between it and the Convention is a political one, leaving the realm of the law unaffected. Nonetheless, when deliberating on an instrument on the qualification of third country nationals as refugees under Article 63 (1) (c) TEC, the EC institutions must depart from the solution chosen in the Refugee Joint Position. If they merely copied the quoted paragraphs of the Refugee Joint Position, the result would be a perfect conflict between EC law and international law.

12.2.2.2 *The CAT*

The discussion on agents of persecution is also of relevance for the protection afforded under Article 3 CAT. But as CAT is much more explicit in this respect than its counterpart in the 1951 Refugee Convention, there are no overt divisions in its interpretation.

We recall that Article 3 CAT only protects from return to torture. For the purposes of CAT, the concept of torture is defined in Article 1, which sets out certain requirements as to agency. The relevant pain or suffering must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. It is abundantly clear that cases falling under categories A) and

[1444] Vermeulen et al. point to other valid arguments supporting the protection theory, which, however, fall outside the second stage. A strong argument against the accountability theory is that it would exclude all forms of protection if the persecuting state had not ratified relevant human rights treaties. Moreover, they demonstrate that it is logically incompatible to exclude *persecution* by third parties from the scope of the 1951 Refugee Convention while operating the concept of internal flight alternative to the extent that it relies on the *protection* of third parties. While some jurisdictions deny protection to the victims of third party persecution, they refer refugees to the protection of third parties in the framework of the internal flight alternative. Vermeulen, Spijkerboer, Zwaan and Fernhout, 1998, pp. 14, 17 and 22.

B) are covered. Neither can there be any doubt that cases under categories D) and E) are not covered. In both cases, the agent is not a public official or acting in an official capacity. This understanding is confirmed in the case law of the CAT Committee:

> The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.[1445]

What remains to be clarified is category C). Is the threat of torture by de facto authorities covered by the protective scope of Articles 3 and 1 CAT? The CAT Committee was seized with this question in the case of *Sadiq Shek Elmi vs. Australia*[1446], and answered it in the affirmative. The author of the communication was a Somali national who feared torture at the hands of the Hawiye clan, which represents a de facto authority.[1447] The argumentation of the respondent government, of counsel and of the Committee shall be briefly presented in the following.

The respondent government maintained that the case was outside the scope of the concept of torture enshrined in Article 1 CAT. The government asserted that the members of armed Somali clans were private individuals rather than 'public officials' or persons acting in an 'official capacity'. To support its view, the government relied on the wording of Article 1 CAT, on earlier case law of the Committee[1448] and on the *travaux*. However, the respondent state did not expressly deny that torture by de facto authorities could come under the scope of Article 1 CAT.[1449]

[1445] Committee against Torture, Communication No 83/1997, *G.R.B. vs. Sweden*, 15/05/98, CAT/C/20/D/83/1997 [henceforth G.R.B. vs. Sweden], para. 6.5.

[1446] Committee against Torture, Communication No. 120/1998, *Sadiq Shek Elmi vs. Australia*, 25/05/99, CAT/C/22/D/120/1998 [henceforth Sadiq Shek Elmi].

[1447] *Sadiq Shek Elmi*, paras 3.1 and 5.5.

[1448] The respondent government referred explicitly to *G.R.B. vs. Sweden*.

[1449] *Sadiq Shek Elmi*, paras 4.3–4.8.

The author's counsel maintained that

> when the Convention was drafted there was agreement by all States to extend the scope of the perpetrator of the act from the "public official" referred to in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to include "other person[s] acting in an official capacity". This would include persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority.[1450]

At bottom, this is a contextual argument, in that it distinguishes between 'public official' and a person 'otherwise acting in an official capacity'. Ruling out the possibility of redundant formulations in Article 1 CAT, it can be presupposed that the two concepts are not congruent. In the view of the author's counsel, the inclusion of 'person[s] acting in an official capacity' in the definition relates to persons exercising de facto authority. Now, the Committee proved to be more liberal than the author's counsel:

> The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 [...] The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1.[1451]

[1450] *Sadiq Shek Elmi*, para. 5.3.

[1451] *Sadiq Shek Elmi*, para. 6.5.

Thus, the CAT Committee considers that both public officials and persons acting in an official capacity can denote persons exercising de facto authority. However, it has to be recalled that the government and the Committee did not diverge on the interpretation of the words 'public officials or persons acting in an official capacity'. Rather, they diverged on the qualification of the Somali clan from which the threat emerged. While the government thought of clan members as private individuals, the Committee qualified them as persons exercising a de facto authority. Thus, it remains uncontested that cases under category C) are covered by the protective scope of Articles 3 and 1 CAT.

To conclude, the prohibition of refoulement in Article 3 CAT covers cases falling under categories A), B) and C), while cases falling under categories D) and E) are excluded from its protective scope.

12.2.2.3 The ECHR

Do the rights enshrined in Section I of the ECHR afford extraterritorial protection to persons threatened by third parties?[1452] This question has been contentiously discussed with regard to the protection from torture and other forms of ill-treatment in Article 3 ECHR. In the following, we will present two opposed positions as typecasts for a universalist and a particularist approach. The first one is maintained by the European Court of Human Rights, which accepts violations by non-state agents as a basis for protection.[1453] The second one has been expounded in two judgements by the German Federal Administrative Court (*Bundesverwaltungsgericht*)

[1452] The reasoning expounded in this section is applicable mutatis mutandis to the ICCPR as well. However, as the debate has mainly focused on Art. 3 ECHR, and as the European system makes more powerful remedies available than its universal counterpart, we choose to limit our efforts to the ECHR.

[1453] For a detailed and thoughtful account of the case law of the European organs with regard to extraterritorial threats by third parties, see S. Karagiannis, 'Expulsion des étrangers et mauvais traitements imputables à l'état de destination ou à des particuliers', 10 *Rev.trim.dr.h.* 33 (1999), pp. 66–88.

and limits the scope of protection to violations by state or de facto authorities.[1454]

The ECtHR has summarised its position by stating that the 'principle' of extraterritorial protection under Article 3 ECHR 'has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies in that country when the authorities there are unable to afford appropriate protection'.[1455] The Court's extension of protection to threats by non-stage agents manifests itself in four landmark cases.

In *Chahal vs. U.K.*, the ECtHR held that the removal of a Sikh claimant to India would contravene Article 3 ECHR. In the view of the Court, the Indian authorities had not succeeded in suppressing the frequent human rights violations by certain members of the police forces in Punjab and elsewhere in India. As earlier noted, the Court refrained from exposing the theoretical backdrop of its analysis. The case falls under category D), as India was unable to prevent ultra vires activities of its police forces.

H.L.R. vs. France[1456] provided another clarification. The claimant was a Colombian drug trafficker who had co-operated with the French police by giving information on Colombian drug cartels. He feared that, when removed by the French authorities, the drug cartels would murder him upon his return to Colombia. The Court stated that persecution by persons or groups of persons not being public officials in the country of reception may fall under the protective scope of Article 3 ECHR,

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[1454] For a presentation see W. Kälin, 'Tragweite und Begründung des Abschiebungshindernisses von Art. 3 EMRK bei nichtstaatlicher Gefährdung', in Hailbronner, K and Kokott, J (eds), *Einwanderungskontrolle und Menschenrechte—Immigration Control and Human Rights. Beiträge eines Symposiums am 29./30. Juni 1998 in Potsdam* (1999, C.F. Müller Verlag, Heidelberg), pp. 56–7; H. Maaßen, 'Abschiebungsschutz aus Art. 3 EMRK auch bei nicht vom Staat ausgehenden Menschenrechtsverletzungen und allgemeinen dem Ausländer im Herkunftsstaat drohenden Gefahren für Leib, Leben und Gesundheit?', 18 *ZAR* 3 (1999), pp. 109–11; and A. Zimmer, 'Abschiebungsschutz durch Art. 3 EMRK im Fall nichtstaatlicher Verfolgung', 18 *ZAR* 3 (1999), pp. 119–21. For a discussion of these and related cases with further references to German case law and doctrine, see R. Göbel-Zimmermann, *Asyl- und Flüchtlingsrecht* (1999, C. H. Beck, München), pp. 326–8.

[1455] ECtHR, *D. vs. U.K.*, ECHR Reports 1997-III, No. 37 [henceforth D. vs. U.K.], para. 49.

[1456] ECtHR, *H.L.R. vs. France*, ECHR Reports 1997-III, No. 36 [henceforth H.L.R. vs. France].

provided that 'the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[1457] As the claimant did not satisfy the standard of proof, the Court ruled that there was no violation of Article 3 ECHR. The constellation in this case clearly falls under category D). While the power structures of Colombia were intact, the state proved unable to protect its citizen against the drug cartels.

In the case of *Ahmed vs. Austria*[1458], state structures were simply non-existent in the country of origin. The Somali claimant belonged to a clan opposing the faction of General Aideed. Upon return to Somalia, he feared treatment contrary to Article 3 ECHR at the hands of that faction. The Court held that removing the claimant would contravene Article 3 ECHR. It is not possible to infer from the ruling whether the Court regarded General Aideed's faction as a de facto authority or simply as a private actor in a failed state. Apparently, it attached no importance to such a distinction. Thus, Ahmed could be brought in either under category C) or under category E).

A somewhat odd, but most enlightening case is *D. vs. U.K.*.[1459] Here, the European Court held that the removal of the claimant suffering from AIDS to his home country (St. Kitts and Nevis) would constitute a violation of Article 3 ECHR. This case combines threats in the host country with those in the country of origin, as the risk facing the claimant was a consequence of the termination of medical treatment in the U.K. in combination with very limited medical resources in St. Kitts and Nevis and his lack of resources for subsistence. Thus, as Kälin aptly notes, there is no agent of persecution in this case.[1460] However, *D. vs. U.K.* is particularly supportive of the explicatory model pursued in this work: removal was barred by the positive obligations of the U.K. to avert inhuman treatment in the sense of Article 3 ECHR. This obligation is decoupled from considerations of geographical location or agency—it is simply immaterial *where* exactly the risk is situated or *who* would provide for its realisation. This reading of *D. vs. U.K.* reconfirms that all

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[1457] *H.L.R. vs. France*, para. 40.

[1458] ECtHR, *Ahmed vs. Austria*, ECHR Reports 1996-VI, No. 26 [henceforth Ahmed vs. Austria].

[1459] *D. vs. U.K.*, note 1455 above.

[1460] Kälin, 1999, p. 55.

categories—A) to D)—are necessarily covered by the protective scope of the ECHR and its Protocols.

In two cases related to Somali protection seekers, the German Federal Administrative Court saw itself compelled to take a stand on the position developed by the ECtHR. Both turned primarily on the prohibitions of removal in the German Aliens Act. However, for their proper application, it was critical to identify the precise content of Article 3 ECHR.

The first case was decided on 15 April 1997.[1461] A Somali, who feared persecution at the hands of the Hawiye clan upon return to Somalia, had sought protection from the German authorities inter alia under the prohibition of removal in Section 53 (4) of the German Aliens Act. The latter norm incorporated the extraterritorial protection flowing from Article 3 ECHR into German law. The Federal Administrative Court dismissed this part of his appeal, stating that, as a matter of principle, only ill-treatment by state organs or by de facto authorities (or, in the language of the court, state-like entities) falls under the protective scope of Article 3 ECHR:

> [D]er Begriff der Behandlung setzt ein geplantes, vorsätzliches, auf eine bestimmte Person gerichtetes Handeln voraus. Das ergibt sich aus dem Wortlaut und aus dem Zweck der EMRK, dem Mißbrauch staatlicher Gewalt vorzubeugen und den der Herrschaftsgewalt des Staates Unterworfenen bestimmte Rechte und Freiheiten einzuräumen. Als unmenschliche Behandlungen gemäß Art. 3 EMRK sind daher grundsätzlich nur Mißhandlungen durch staatliche Organe anzusehen. Ausnahmsweise können auch Mißhandlungen durch Dritte eine solche Behandlung darstellen, sofern sie dem Staat zugerechnet werden können, weil er sie veranlaßt, bewußt geduldet oder ihnen gegenüber keinen Schutz gewährt, obwohl er dazu in der Lage wäre.[1462]

[1461] BVerwG, Judgment of 15 April 1997, 9 C38/96, EZAR 043, Nr. 21 [henceforth the April judgement].

[1462] ['[T]he concept of treatment presupposes a planned, intentional action, targeting a certain person. This flows from the wording and from the purpose of the ECHR, which is to prevent the abuse of state power and to mete out certain rights and freedoms to those subject to the exercise of state power. Therefore, as a matter of principle, only maltreatment by state organs is to be regarded as inhuman treatment according to Article 3 ECHR. Exceptionally, maltreatment by third parties may also represent such treatment, in so far as it is attributable to the state, because the state has caused, consciously tolerated, or denied protection from it, although the state would have been in a position to protect.' Translation by this author.] *April judgement*, p. 4.

According to the German Court, no state or state-like power had been exerted in Somalia since the outbreak of the civil war in 1991, and thus the domestic provision replicating Article 3 ECHR could not be successfully invoked by the claimant.

In the following, the Court maintained that its position was supported by the rule on interpretation in Article 31 VTC. In the opinion of the Court, there was no subsequent practice in the sense of Article 31 (b) (3) VTC which could underpin an extensive interpretation. In its own interpretation, the Court deployed three main arguments. First, it construed the term 'inhuman treatment' in the context of the terms 'torture' and 'inhuman or degrading punishment', whose ordinary meaning was said to presuppose state agency. Here, the Court referred explicitly to Article 1 CAT and Article 7 ICCPR.[1463] Secondly, the Court adduced a teleological argument, according to which the ECHR was created to protect against violations by state actors.[1464] As for the third argument, the Court maintained that an interpretation including treatment by non-state agents under Article 3 ECHR would provide better protections to aliens from third countries than to other persons within the jurisdiction of the ECHR, leading to an excessive degree of protective rights for refugees, unsupported by the Contracting Parties.[1465]

Generally, the Federal Administrative Court tried to downplay the impression that its decision conflicted with the ECtHR judgment of *Ahmed vs. Austria*. It disqualified the statements of the ECtHR on protection under Article 3 ECHR from non-state agents of persecution as an 'obiter dictum', not relevant for the outcome of the case. However, in rather unmistakable terms, it warned the Strasbourg Court not to exceed its competencies. Specifically, the Federal Administrative Court underscored that it was not up to the judiciary

> die Grenzen der Aufnahmefähigkeit und Aufnahmewilligkeit der Vertragsstaaten durch eine rechtsschöpferische Konventionsentscheidung weiter auszudehnen und dadurch die auch als Verfassungsentscheidung geschützte Souveränität des nationalen Gesetzgebers [...] und des Verfassungsgesetzgebers außer acht zu

[1463] *April judgement*, p. 4.

[1464] *April judgement*, p. 4.

[1465] *April judgement*, pp. 4–5.

> lassen und damit auch über die Aufnahme von Flüchtlingen und die Grenzen der Belastbarkeit frei zu entscheiden.[1466]

The second case before the Federal Administrative Court, decided on 2 September 1997[1467], was also about a rejected Somali protection seeker, who invoked the prohibition of refoulement in Section 53 of the German Aliens Act. In addition to the risk of persecution, he invoked medical problems, for which adequate care could not be found in Somalia. At that point in time, the Federal Administrative Court had a clearer picture of the position taken by the EctHR—while the April judgement could look back to the *Chahal* and *Ahmed* cases only, the September judgement could also draw on *H.L.R. vs. France*, and *D. vs. U.K.*. Due to the invocation of medical factors, the case dealt with in the September judgement bore apparent parallels to that of *D. vs. the U.K.*.

In the September Judgment, the Federal Administrative Court bluntly refuted the position held by the ECtHR in *D. vs. U.K.*, which it considered to dilute the limits of the protective scope of Article 3 ECHR.[1468] The Federal Administrative Court was particularly disquieted by the following passage in the *D. vs. U.K.* judgment:

> [T]he Court must reserve to itself sufficient flexibility to address the application of that Article [Article 3 ECHR, GN] in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 [...] where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article [...].[1469]

[1466] ['[...] to expand the receptive capacity and willingness of the Contracting Parties by means of a law-making, convention-based decision, thereby neglecting the sovereignty of the national legislator, protected also in the form of a constitutional decision [...] and of the constitutional legislator, and therewith to decide freely on the reception of refugees and the capacity limits.' Translation by this author]. *April judgement*, p. 6.

[1467] BVerwG, Judgment of 2.9.1997, 9 C 40/96, EZAR 043, Nr. 26 [henceforth September judgement].

[1468] *September judgement*, p. 4.

[1469] *D. vs. the U.K.*, para. 49.

The Federal Administrative Court suggested that this statement was not only completely vague, but could be understood to the effect that the ECtHR would reserve itself the right to state a violation of Article 3 ECHR in cases where its factual presuppositions would not be fulfilled. In sum, the Federal Adminstrative Court had now made fully clear that it was on a collision course with the ECtHR in this matter. It qualified the inclusive reading by the ECtHR as an extensive interpretation surpassing the content of the treaty.[1470]

Based on this argumentation, some doctrinal writers have contended that certain judgmentsof the ECtHR 'may not be applied in Germany for reasons of constitutional law'.[1471] The writers esteem that the Strasbourg Court has exceeded the competencies conferred upon it by the Contracting Parties, and that ultra vires acts do not bind the latter.[1472] It must be underscored, though, that the ultra vires-argument is not made by the Federal Administrative Court, but only by the commentators. Nonetheless, the high-pitched contribution of the latter may serve as an indicator that the conflict between Strasbourg and Berlin is not trivial.

The Vienna Convention has been invoked both by the Federal Administrative Court and a number of commentators.[1473] Let us now unfold an interpretation along the lines of interpretative norms enshrined in the Vienna Convention to see whether any of the two positions finds its justification in them. Looking at the ordinary meaning of its terms within the first stage brings only limited gains. We recall the wording of Article 3 ECHR.

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[1470] *September judgement*, p. 5.

[1471] Lehnguth, Maaßen, et al., 1998, p. 45.

[1472] Lehnguth, Maaßen, and Schieffer, 1998, pp. 45–6.

[1473] Among doctrinal commentators, the virtues and vices of earlier writings resurface. In line with his earlier explorations of prohibitions of refoulement, Kälin develops an argumentation with detailed references to Arts 31 and 32 VTC (Kälin, 1999, pp. 57–9), while Maaßen again misconceives the place of historical arguments in the interpretative process under the Vienna Convention and is satisfied with sweeping references to the intentions held by the drafters of the ECHR (Maaßen, pp. 112–3). Compare chapter 10.1.1.3 above.

The circle of beneficiaries is unqualified ('no one'). The use of passive voice suggests that the same is true for the circle of perpetrators ('shall be subjected').[1474] The ordinary meaning of 'to subject' and 'a soumettre' respectively[1475] does not give any indications either. We recall that the former connotes 'to cause to undergo or experience some action or treatment'[1476], while the latter signifies 'exposer à un effet qu'on fait subir'.[1477] It must be concluded that wording neither entails nor excludes any limitations with regard to agency. At any rate, the Federal Constitutional Court is wrong to deduce a limitation of the protective scope of Article 3 ECHR to state action already from its wording. As the dispute does not find a solution in the first stage, it is mandatory to proceed to the second, and to look into the context and the telos of Article 3 ECHR.

Resorting to contextual arguments brings in the positive obligation inherent in Article 1 ECHR, which prescribes that the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention'. Precisely as was the case in our earlier interpretation of Article 3 ECHR, this contextual element delivers the decisive nuance.

To our mind, the issue of agency in the country of origin is simply irrelevant for the delimitation of protection under Article 3 ECHR. Article 1 ECHR puts the focus on the removing state, and not the country of origin. It has been argued above that a Contracting Party would violate Article 3 ECHR by removing a protection seeker to a country where she would be exposed to ill-treatment prohibited by this article. By the act of removal, the removing state acquiesces to the realisation of the threat. Thus, it acquiesces to ill-treatment by a third actor—be it another state, or be it private individuals.[1478] The decisive issue

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[1474] It is perhaps indicative that the drafters refrained from using the phrase 'No State shall...'.

[1475] The English and French texts of the ECHR are equally authentic.

[1476] Websters New World Dictionary of the American Language, (1970, The World Publishing Company, New York and Cleveland), p. 1418.

[1477] *Le Micro-Robert*, 2eme édition (1988, Dictionnaires le Robert, Paris).

[1478] The linkage made here between *Drittwirkung* and the issue of agency has been earlier captured by Karagiannis, 1999, p. 68: 'On mesure ainsi plus facilement l'audace de la solution qui imputerait à l'Etat extradant ou expulsant une violation de l'article 3 produite non pas par l'Etat de destination, qui lui est déjà 'tiers', mais par des individus agissant sur le territoire de ce dernier.' Karagiannis succintly describes the relationship between the removing state and the non-state perpertrators of violations as 'doublement "tiers"'. Ibid. However, whether the third-party relationship between the removing state and the

is the extent of positive obligations on behalf of the removing state, and, of course, the magnitude of the risk in the country to which the claimant is removed. Consider the following two examples. A prison guard, acting in her official capacity, beats up inmate X. There is no doubt that this act is in violation of Article 3 ECHR. Knowing that inmate Y is intensely disliked by a specific group of other inmates, the prison guard locks her into a cell where Y's adversaries are present, and stands idly by, as she is beaten up by them. In the light of Article 1 ECHR, it is safe to assume that Y's rights under Article 3 ECHR have been violated. This understanding is supported by the case law of the ECtHR.[1479]

It also explains the position taken by the ECtHR in *D. vs. U.K.*, which so infuriated the Federal Administrative Court. We recall that the ECtHR was prepared to consider a claim under Article 3 ECHR, 'where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article'.[1480] It would be wrong to perceive this as an act by which the ECtHR gave itself vast discretionary powers. Firstly, the statement reflects an old truth, established at least since *Soering*: the responsibility of the receiving country for acts or omissions impacting on the enjoyment of Article 3 ECHR is immaterial for deducing the responsibility of the removing state. What is at stake is the direct relationship between the removing state and the claimant. In that relationship, it is not required that the receiving state has an intermediary role. Secondly, while admitting the opaqueness of the language chosen by the ECtHR ('factors [...] which, taken alone, do not in themselves infringe the standards of that Article [...]'), we would contend that the quote merely restates that whether or not a violation has taken

individual is a simple or double one, remains immaterial for the legal analysis.

[1479] 'The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals [...].' ECtHR, *A. vs. the U.K.*, Judgment of 23 September 1998, Reports 1998-IV, para. 22.

[1480] See text accompanying note 1469 above.

place, must be established in the light of all circumstances, and cannot be solely a matter of stating the *existence* of certain factors.[1481]

Drawing on the context of Article 1 ECHR affirms the universalist position. Now, we recall that the German Federal Administrative Court also adduced a contextual argument, claiming that inhuman or degrading treatment must be understood as sharing the characteristics of state agency in the concepts of torture and inhuman or degrading punishment. To support this argument, the April judgement invokes the definition of torture in Article 1 CAT and Article 7 ICCPR. Could this argument affect the outcome of interpretation in the second stage? The answer is no. The CAT does not form part of the context of the ECHR—not all Contracting Parties to the latter have ratified the former.[1482] The same is true for the ICCPR.[1483] Therefore, neither the CAT nor the ICCPR fulfil the requirements of Article 31 (3) (c) VTC. Suffice it to note here that the argument of the Federal Administrative Court is ill-founded, not only due to its disregard of the VTC, but also on purely material grounds.[1484]

The Federal Administrative Court further relied on a teleological argument, maintaining that the telos of the ECHR was to protect against abuses of state power. The sole support for this argument is a reference to

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[1481] See text accompanying note 1325 above.

[1482] For example, Andorra, Moldova and San Marino are bound by the ECHR, while not being bound by the CAT.

[1483] As an example, Andorra and Turkey are bound by the ECHR, while not being bound by the ICCPR.

[1484] To start with, Art. 7 ICCPR is inconclusive in this regard, as its wording gives no more indication as to the question of agency than does the wording of Art. 3 ECHR. Furthermore, one should note that Art. 1 CAT *expressly* limits the concept of torture to acts by public officials or persons otherwise acting in an official capacity. The drafters of the ECHR and the ICCPR avoided any limitation in that respect. What the German court does is to disregard the difference in the very wording of Art. 3 ECHR and Art. 7 ICCPR on one hand, and Art. 1 CAT on the other. Second, CAT cannot be construed as an agreement on the interpretation of the torture concept in the ECHR and the ICCPR (Art. 31 (3) (a) VTC) or an amendment of both instruments. As earlier mentioned, the circle of Contracting Parties of the named three instruments is not congruent. Third, the definition of torture in Art. 1 CAT does not prejudice the concept of inhuman or degrading treatment or punishment. Drawing analogies between Art. 1 CAT and the latter concept begs the question as to why the former contains an express limitation, while the drafters settled for an implicit limitation in the latter. Moreover, there is no indication whatsoever that the three concepts relevant here ('torture', 'inhuman treatment or punishment' and 'degrading treatment or punishment') are structured as concentric circles, differing only in the severity of treatment.

the defeat of a draft protocol on asylum in 1961.[1485] We repeat that this is a historical rather than a teleological argument, which would relegate it to the third step.[1486] Furthermore, the Federal Administrative Court also claimed that an extensive interpretation including treatment by non-state agents under the protective scope of Article 3 ECHR would provide better protections to aliens from third countries than to other persons within the jurisdiction of the ECHR. This consequential argument cannot be linked to the context or the telos of Article 3 ECHR, and is thus misplaced in the second stage.[1487] Beyond that, it is simply wrong. This argument disregards that the positive obligation enshrined in Article 3 ECHR makes an identical risk assessment necessary regarding both groups. Thus, there is no preferential treatment for aliens fearing extraterritorial risks. Risk assessments and the extent of positive obligations are the inherent limitations of territorial as well as extraterritorial protection under Article 3 ECHR. There is simply no logical basis for denouncing the inclusion of non-state agency as a new 'carte blanche' for protection seekers.[1488]

Finally, we note that there are no specific teleological arguments at hand which militate for either of the two readings. Inquiring into the *telos* merely brings us back to the initial divide between particularism and universalism.

Summing up, we may state that the second stage provides a clear and unambiguous outcome. If one concedes that Article 3 ECHR can be a base for extraterritorial protection, one has to accept that it stretches over threats from non-state agents as well. We have shown earlier why the first concession is mandatory under the Vienna Convention.[1489] The contextual argument expounded above is but a consequence of that line of reasoning. Article 3 ECHR stretches over cases falling under all of the named categories. Mindful of our argumentation in the preceding chapter[1490], we

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[1485] See text accompanying note 1168 above. We have analysed the impact of that protocol on the interpretation of Article 3 ECHR in chapter 10.1.1.4 above.

[1486] Furthermore, it is wrong and would falter even in a third step. As Kälin has shown in a detailed analysis of the ECHR's *travaux*, its drafters wished to include torture exercised by private agents into the protective scope of the Convention. Kälin, 1999, pp. 59–61.

[1487] See also Kälin, 1999, p. 54

[1488] See also Kälin, 1999, p. 55.

[1489] See chapter 10.1.1.4 above.

[1490] See chapter 11 above.

have to conclude that the same is true for all rights in Section I ECHR and its Protocols, to the extent that they provide a base for extraterritorial protection. Thus, the rights catalogue in Section I of the ECHR and its Protocols is, in principle, applicable to cases under categories A) to E)—that is, all of the categorised cases.

Reverting to the conflict between Strasbourg and Berlin, the German Federal Administrative Court erred in its interpretation. Thus, the ultra vires-argument advanced in doctrine falters as well.[1491]

12.2.3 Appraisal

Our exploration gave the following results. Both the 1951 Refugee Convention and the ECHR cover all categories of cases, and extend protection irrespective of the official capacity of the agents of persecution. In both cases, an interpretation along the lines of the Vienna Convention resulted in an unambiguous result in the second stage, supportive of the universalist approach. By contrast, protection under the CAT only covers cases falling under categories A) to C), i.e. where violations are attributable to a state or to de facto authorities. This interpretation of CAT was a comparatively simple exercise, which must be ascribed to the relatively precise wording of its Article 1. It should be noted that Article 1 CAT is in line with the particularist accountability theory, which may explain its uncontested status.

Our interpretation of the 1951 Refugee Convention and the ECHR does not necessarily imply any criticism of the domestic courts arriving at outcomes supporting the particularist position. After all, as long as these courts construe domestic protection categories on the basis of domestic canons of interpretation, they may validly take the accountability view.[1492] Thus, it is no surprise that Articles 31 and 32 VTC produce one outcome, and domestic canons of interpretation another. What is important,

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[1491] The ultra-vires arguments have been convincingly challenged in Kälin, 1999, pp. 57–9 (invoking Dworkin and Alexy's principle theory), and Zimmer, 1999. Zimmer has turned the ultra-vires argument around and maintains that the Federal Administrative Court was under a legal obligation to follow the case-law of the ECtHR. Zimmer, 1999, p. 124.

[1492] When construing German law, the historical method of interpretation has a given place. See e.g. K. Larenz and C-W. Canaris, *Methodenlehre der Rechtswissenschaft* (1995, Springer, Berlin), pp. 149–53.

though, is that material as well as methodological pluralism becomes problematic, when states wish to apply the allocation criteria of the Dublin Convention. A deference to pluralism forces Member States to take the sovereignty clause into consideration in each single Dublin case. Doing so complicates procedures considerably. What was intended as a formal allocation procedure, ends as a material comparison of protection options in different Member States. The gains of the Dublin Convention—avoiding multiple processing and thus economising procedures—are lost. Cases like *Adan and others* can easily be processed *twice* within the Union. By way of example, U.K. authorities have to assess the concrete protection prospects of the claimant in Germany, which can be a tedious exercise in comparative law. If the U.K. authorities decide that Germany is safe for the claimant, she is returned there, and her case is processed materially. Now, the claimant is present in Union territory for the length of *both* procedures, triggering a corresponding duplication of costs.

The premise underlying the Dublin Convention was the assumption that systems of extraterritorial protection in the EU afford roughly the same standards. Like a boomerang, the fallacy of this assumption reappears in the courts of Member States. As the U.K. Court of Appeal has shown in *Adan and others*, the problems entailed by allocation under the Dublin Convention can be managed if judges in Member States resort to the prohibitions of refoulement in international law and the unitary standard of interpretation flowing from the Vienna Convention.

12.3 Access to Full-Fledged Procedures: The Spanish Protocol and Discrimination

12.3.1 Interpreting the Spanish Protocol in the Light of International Law

For the time being, the Spanish Protocol remains the only binding instrument of the EU acquis relating to procedures. In an earlier section, we have noted the idiosyncrasies contained in the wording of the instrument.[1493] Before concluding on conceivable conflicts between the Protocol and international law, we must clarify its content further.

[1493] See chapter 6.2 above.

Looking solely at the wording of the Spanish Protocol, one might be induced to read it as an abolition of asylum procedures for nationals from other Member States. However, this would be an improper interpretation. A declaration adopted together with the protocol states that the Protocol 'does not prejudice the right of each Member State to take the organisational measures it deems necessary to fulfil its obligations under the [1951 Refugee] Convention'.[1494] The following argument will demonstrate why those obligations include a duty to conduct individual determination procedures or to refrain from removal.

All Member States are under an obligation to observe Article 33 GC. This leaves them two choices. Either they conduct determination procedures to find out which claimants fall under the refugee definition and which do not—in principle, only the latter can be sent back—or they omit procedures and let all claimants stay. If states rule out the last option, as states interested in migration control do, they are actually under an obligation to conduct determination procedures.[1495] Denying a certain group of asylum seekers any form of procedures would only be acceptable under the Convention if the whole group were allowed to stay. The only way of slashing procedures and keeping the option of removal is to denounce the obligation under the 1951 Refugee Convention.[1496] Given that the group of Contracting Parties is larger than the group of State Parties to the Spanish Protocol, the latter cannot amend the former. Therefore, the sole article of the Spanish Protocol cannot modify or abolish the obligation to conduct individual determination procedures inherent in Article 33 GC. If a state were indeed to deny a national of a Member State any form of procedure and remove her to the Member

[1494] Declaration relating to the Protocol on asylum for nationals of Member States of the European Union, annexed to the Treaty of Amsterdam.

[1495] Zimmermann, 1994, pp. 80–1.

[1496] Denunciation is regulated in Art. 44 GC. Further, it is self-evident that a sub-group of Contracting Parties cannot modify the 1951 Refugee Convention without the consensus of all other states bound by this instrument.

State that was allegedly persecuting her, this would amount to a breach of Article 33 GC.[1497]

Recourse to human rights instruments provides for a similar argument. Where removal would violate rights set out in the ECHR, the right to an effective remedy in Article 13 ECHR becomes relevant. Deciding to return a claimant to the Member State from which she originated without a material determination would violate Article 13 ECHR.

Conflicts between the acquis and international law can be avoided, if the Sole Article of the Spanish Protocol is interpreted in line with the obligations under the 1951 Refugee Convention and the ECHR. Drawing on Article 31 (3) (c) VTC, the latter instruments form part of the context of the Spanish Protocol. Such a contextual interpretation would yield the following results:

1. Member States do not possess the choice implied by the wording of the second sentence of the Sole Article[1498] and of the first sentence of its paragraph (d).[1499] Indeed, Member States are *obliged* to consider the substance of any asylum claim filed with its authorities by a citizen of another Member State. Thus, Member States *are obliged to make use of their competence* to conduct a material determination set out in paragraph (d).
2. The Spanish Protocol adds two procedural obligations through paragraph (d) of its Sole Article.

[1497] The obligation to conduct individual determination procedures was reaffirmed in para. 20 of the Asylum Procedures Resolution: 'The Member States observe that, with due regard for the 1951 Geneva Refugee Convention, there should be no de facto or de jure grounds for granting refugee status to an asylum applicant who is a national of another Member State. On this basis a particularly rapid or simplified procedure will be applied to the application for asylum lodged by a national of another Member State, in accordance with each Member State's rules and practice, *it being specified that the Member States continue to be obliged to examine individually every application for asylum*, as provided by the Geneva Convention to which the Treaty on European Union refers'. [Emphasis added].

[1498] 'Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases: [...].' [Emphasis added].

[1499] '[I]f a Member State should so decide unilaterally in respect of the application of a national of another Member State', the case shall be processed according to paragraph (d) of the Sole Article of the Spanish Protocol.

a) First, it prescribes that the Council must be immediately informed whenever a Member State makes use of its competence under paragraph (d). As international law obliges Member States to make use of that competence, the Council will be informed about each single asylum application filed by Union citizens.[1500]

b) Second, it states that 'the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State'. The logic behind this formulation is contradictory. The use of the word 'shall' suggests the existence of a legal obligation. By its very nature, an obligation affects the decision-making power of a state. Unaffected decision-making power would imply the absence of an obligation. At first sight, the quoted phrase is self-cancelling. To some extent, the contradictions can be dissolved by the following interpretation. Member States are obliged to process applications within the scope of the Spanish Protocol on the basis of the presumption that they are manifestly unfounded. But they retain the power a) to deal with such cases in ordinary, full-fledged asylum procedures and b) to issue a positive decision to such an application. This power flows from state obligations under international law, namely the prohibition of refoulement.

Now, the remaining question would be whether the processing of a certain class of claims under the presumption that they are manifestly unfounded is in line with international law. This question raises the issue of discrimination based on nationality, as the class of claimants subjugated to such procedures is limited to Union citizens. In the following subsection, we shall clarify whether or not this aspect of the Spanish Protocol amounts to discriminatory treatment. If it does, we would be confronted with a compliance conflict, in which states are to obey two mandatory

[1500] This is extremely detrimental with regard to the protection of the claimant's personal data. Through the Council, the Member State alleged to persecute the claimant is informed about the case as well. In the course of a Council survey on the implementation of the acquis, Belgium underlined 'that an application for asylum being a confidential act, no information is forwarded to a third country in the absence of guarantees with regard to data protection'. A fortiori, forwarding information to a potential persecutor should be out of the question. 1998 Council Survey, p. 30.

norms with opposed content: while one orders Member States to use a specific form of procedure, the other prohibits Member States to do so.

Before moving on, however, we should clarify the role of normative hierarchies in the potential conflict on the Spanish Protocol. We note that the latter is primary EC law, created not by the EC institutions, but by the Member States themselves. Thus, the Spanish Protocol cannot be simply overruled by the General Principles of EC law, which are on the same hierarchical level in the normative edifice of EC law. Principally, the Spanish Protocol is on a par with the foundational treaties. If a conflict can be shown to exist, it may only be solved beyond simple normative hierarchies—e.g. by means of a successful and justiciable discrimination argument.

12.3.2 Discrimination under the 1951 Refugee Convention?

A starting point for a discrimination argument is provided by Article 3 GC, offering a prohibition of discrimination ancillary to the other provisions in the 1951 Refugee Convention. This article reads as follows:

> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

No doubt, Article 3 GC possesses a central significance for the Convention as a whole. This is underscored by the fact that reservations to this provision are expressly forbidden.[1501] Article 3 GC alludes to the application of the Convention's 'provisions'—a provision at stake is the prohibition of refoulement in Article 33 GC and the procedural rights inherent in it. The Spanish Protocol prescribes a distinction of treatment based on nationality. Protection seekers from Member States are put in a less favourable position than asylum seekers from third countries. Cases filed by protection seekers possessing the citizenship of another Member State shall be treated on the basis of the presumption that they are manifestly unfounded. By contrast, claimants from outside the Union do not have to rebut a presumption of safety. It remains to be asked whether this distinction constitutes discrimination. This issue will be assessed by

[1501] See Art. 42 GC.

following the methodology outlined in the preceding section. Its benchmarks are the legitimacy of the aim, the appropriateness and necessity of means, and the proportionality between means and goal.

From the eighth recital of the preamble to the Spanish Protocol, it is clear that the Member States wished 'to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended'. To protect asylum procedures from abuse is, as such, a legitimate aim. The means used—relegating applications from nationals of other Member States into the category of manifestly unfounded claims—must be said to be appropriate in relation to the goal. The same goes for the necessity of the means used: no alternative means offers itself which is as effective in securing the realisation of the said goal, while intruding less into the procedural safeguards enjoyed by the asylum seeker.

Having ascertained the legitimacy of the aim and the appropriateness and necessity of the means, we may proceed to the proportionality test in the narrow sense. Under the test, we shall balance the intrusion suffered by an asylum seeker from a Member State, exposed to the procedures prescribed in the Spanish Protocol, against the intrusion suffered by relevant Member States, if asylum claims from nationals of other Member States were to be processed precisely as other claims, i.e. in a fully individual procedure.

Let us set out with assessing the intrusion Member States suffer from abusive applications by nationals from other Member States. Between 1989 and 1998, 651 citizens of EU Member States filed asylum applications in thirteen Member States other than their own.[1502] This number must be contrasted to the total number of applications by all nationalities in the group of thirteen EU Member States, which amounted to 3 644 350 in the same period. This goes to show that the group targeted by the Spanish Protocol is of very limited importance for the operation of protection systems within the EU. In the period under consideration, 36 persons were granted Convention status and 109 received humanitarian status. Taken together, these 145 recognitions correspond to a total recognition rate of 22.2 percent. This is to be compared to recognitions of all protection seekers in general, which amount to 18.5 percent in the

[1502] The statistics used here exclude numbers for Ireland and Luxembourg. Moreover, it must be recalled that not all of the remaining 13 states have been Union Members since 1989. Source: Governments, compiled by UNHCR (unpublished tabulations). On file with the author.

same period.[1503] Thus, the probability that applications by EU citizens are well-founded is greater than the corresponding probability for *all* nationalities taken together. A prudent evaluation would allow us to conclude that the risk of 'abusive claims' does not differ to a greater extent between the group of protection seekers at large and the sub-group of EU citizens. At any rate, recognition rates for the former group suggest that there are no statistical reasons for presuming that protection claims by EU citizens are manifestly unfounded. The intrusion Member States suffer due to abusive claims from EU citizens is roughly equal to the intrusion suffered by such claims filed by other nationalities.

The second question was how large an intrusion the protection seeker would suffer by bearing the additional procedural onus flowing from the presumption. Here, our assessment is hampered by the fact that there is no harmonised framework for procedures dealing with manifestly unfounded claims.[1504] Although two non-binding instruments of the *acquis* deal with the subject[1505], practices by Member States diverge. Therefore, relegation to such procedures may constitute a substantial loss of protection in one Member State, while the same is not true in other Member States.

To effectuate a concrete balancing, one is compelled to recur to a single Member State. Germany seems to be a rational choice, as it introduced the concept of safe countries of origin in 1993[1506], and qualifies all other Member States of the European Union as safe. Moreover, Germany relegates claims from the nationals of such countries to accelerated procedures, presuming that they are manifestly unfounded.[1507]

The difference between the accelerated procedure for manifestly unfounded claims and the ordinary procedure is striking.[1508] Under the

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[1503] This rate is on the same premises as the recognition rate for EU nationals in the 13 Member States identified in note 1502 above. In the period 1989–98, 691 704 Convention status recognitions and humanitarian status recognitions are to be contrasted with 3 741 670 asylum applications. Source: UNHCR, 1999, pp. 82, 84.

[1504] See IGCARMP, 1997, p. 440. By way of example, France and Italy do not operate accelerated procedures.

[1505] They are the MUA Conclusions and the Asylum Procedures Resolution. See chapter 6.1 above.

[1506] See Art. 16a (3) of the Federal Constitution.

[1507] See Sections 29a and 30 of the Asylum Procedure Act.

[1508] For a brief overview, see IGCARMP, 1997, p. 205. For a comprehensive presentation in German, see Göbel-Zimmermann, 1999, pp. 99–114.

procedure for manifestly unfounded claims, it is presumed that the claimant is not persecuted. Where the claimant succeeds in rebutting this presumption, her case is dealt with under the ordinary procedure (Column 4 in Table 8). Otherwise, rejection of a manifestly unfounded claim (Column 5 in Table 8) entails an expulsion warning with a term of seven days for voluntary departure. The claimant is given a delay of one week for appealing to an administrative court for a reversal of the rejection decision and provisional legal protection from expulsion. Normally, the Court should take a decision within one week. Only where serious doubts as to the legality of the ruling exist, may the court suspend expulsion. The decision by the administrative court is final, save for exceptional cases where an urgent motion can be filed with the Federal Constitutional Court, based on a complaint of unconstitutionality of the appeal decision.

In the ordinary procedure, an appeal possesses suspensive effect as to expulsion. There is no requirement of 'serious doubts' for such a suspension. Moreover, after a negative decision by the Administrative Court, a further appeal to the Higher Administrative Court is possible. Under certain circumstances, a third appeal to the Federal Administrative Court will be allowed. Having exhausted these possibilities, the claimant may also turn to the Federal Constitutional Court under specific preconditions. The difference between the procedures mainly consists of access to two further tiers of appeal, the absence of narrow time limits and the unqualified suspension of expulsion. It is quite obvious that this difference in treatment is highly relevant for the procedural standing of the individual asylum seeker.

A look at official statistics on decisions taken at first instance is indicative for our further assessment (see Table 8). In 1998, all decisions taken on asylum applications by EU citizens were negative. Further, the 1998 total of six new applications and eight decisions relating to asylum claims from nationals of EU Member States must be opposed to the total of 98 644 asylum claims filed in Germany in the same year. Precisely as stated for the whole of the EU earlier, the cases filed by Union citizens in Germany are simply insignificant for the acceleration of procedures. However, two of the six rejected cases decided were sufficiently complex to necessitate a switchover to the ordinary procedure. This corresponds to 25 percent of all cases. This suggests that it is far from self-evident that applications by nationals of other Member States can be dealt with in a

summary fashion, involving the use of presumptions. The gains for Germany were marginal compared to the intrusion into the legal standing of the applicant.

1	2	3	4	5	6
Country of origin	**Number of new applications in 1998**	**Number of decisions**	**Rejected**	**Rejected as manifestly unfounded**	Remarks
Austria	1	2	—	1	One case closed on formal grounds
France	3	1	1	1	Two cases pending
Greece	1	1	—	1	—
Italy	1	1	—	1	—
Netherlands	—	1	1	—	—
Spain	—	1	—	—	One case rejected due to protection option in a safe third country
U.K.	—	1	—	—	One case closed on formal grounds
Other Member States	—	—	—	—	—
Total	6	8	2	4	

Table 8: Asylum claims filed in Germany by nationals of other Member States (1998).[1509]

[1509] Source: Bundesamt für die Anerkennung ausländischer Flüchtlinge, 31.12.1998. All numbers relate to persons, not to cases.

The statistical evidence for Germany offers ample proof that the Spanish Protocol may produce discriminatory treatment on the domestic level. We do not know whether its effects would be less intrusive, or, indeed, more intrusive in the domestic systems of other Member States.[1510] For our needs, it is sufficient to establish that the Spanish Protocol entails discriminatory effects in *one* Member State. Against the backdrop of statistical evidence from Germany, the conclusion would be that compliance with the Spanish Protocol violates Article 3 of the 1951 Refugee Convention. However, the 1951 Refugee Convention does not offer any remedies for an individual whose right under its Article 3 has been violated by the application of the Spanish Protocol. But, as we shall see below, other instruments do.

12.3.3 Discrimination under the ICCPR and ECHR?

The 1951 Refugee Convention is not the only instrument prohibiting discrimination based on nationality. At first sight, the International Convention on the Elimination of All Forms of Racial Discrimination[1511] might suggest itself, as it contains a prohibition of discrimination based on 'national origin'.[1512] However, CERD does not apply to 'distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'[1513], which is precisely the issue at stake.

Having excluded CERD, we shall proceed to the ICCPR. Article 26 ICCPR contains an autonomous right to equality, which would cover discrimination that implementation of the Spanish Protocol might effectuate. Compared to the 1951 Refugee Convention, the ICCPR offers important advantages with regard to justiciability. Monitoring is primarily based on the consideration of state reports by the Human Rights Committee. In addition, by ratifying the First Optional Protocol

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[1510] Establishing the effects of the Spanish Protocol along the same lines as used for Germany would be a demanding exercise, as detailed statistics of domestic decisions are not readily available in the public domain.

[1511] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195. Entry into force: 4 January 1969 [hereinafter CERD]. All 15 Member States are bound by CERD.

[1512] Art. 1 (1) CERD.

[1513] Art. 1 (2) CERD.

to the ICCPR[1514], State Parties can authorise the Human Rights Committee to receive and consider individual communications.[1515] Save for the United Kingdom, all Member States have done so. However, Germany has exempted Article 26 ICCPR from the Committee's scrutiny in individual claims.[1516] To be sure, the decisions of the Human Rights Committee are not binding upon states.[1517] Should the Committee conclude on the existence of a violation, the responsible State Party is not compelled to act upon such a finding. From the perspective of the discriminated individual, this shortcoming is not trivial.

The monitoring system of the ECHR has the advantage of producing judgments binding upon State Parties. However, as earlier noted, the prohibition of discrimination in Article 14 ECHR is ancillary to other provisions. Therefore, the discrimination argument developed above cannot stand alone. It must be related to one of the rights guaranteed by the ECHR. Thus, two approaches offer themselves.

First, one may claim that the Spanish Protocol affects the claimant's procedural standing not only with a view to Article 33 GC, but also with a view to extraterritorial protection under the ECHR. The most pertinent example is Article 3 ECHR, protecting from removal to a third country from which the threat of ill-treatment emanates. Being relegated to accelerated procedures under the Spanish Protocol augments the risk of removal contrary to Article 3 ECHR, simultaneously raising the question of discriminatory treatment under Article 14 ECHR.

[1514] First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 302. Entry into force 23 March 1976.

[1515] Art. 1 of the First Optional Protocol.

[1516] This flows from the reservation made upon ratification of the First Optional Protocol by the Federal Republic of Germany:

'The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2(a) to the effect that the competence of the Committee shall not apply to communications

[...]

c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant.'

[1517] Art. 5 (4) of the First Optional Protocol: 'The Committee shall forward its views to the State Party concerned and to the individual'.

A more differentiated approach would integrate the right to a remedy into the present argumentation.[1518] This right is enshrined in Article 13 ECHR:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

To be sure, the right to a remedy is ancillary to other rights in the ECHR. Therefore, the following would be a relevant line of argument. The Spanish Protocol affects the procedural standing of a protection seeker with regard to any of the rights enshrined in the ECHR and its Protocols, including Article 3 ECHR. It also affects the right to an effective remedy against a removal violating any of the rights enshrined in the ECHR and its Protocols, which brings in Article 13 ECHR. Drawing on the example of Germany, the remedies available for a Union national seeking asylum in another Member State are substantially diminished in comparison to those available to third country nationals. The proportionality assessment expounded in the preceding sub-section indicates that this difference in treatment is discriminatory. Provided that the German case-study is representative for the whole of the Union, the Spanish Protocol is in contravention of the ECHR.

Undoubtedly, basing a discrimination claim on the ECHR might be more demanding than arguing on the basis of autonomous equality rights. On the other hand, of the four instruments dealt with hitherto, the ECHR was the only one offering the prospect of a binding decision in the end. Apart from the ECHR, there is another track to compulsory judgements, leading to the ECJ. However, as we will see in the next sub-section, it is hardly rewarding to pursue it at present.

[1518] It is not advisable to base an argumentation on procedural rights guaranteed under Art. 6 ECHR, as the ECtHR does not classify asylum procedures to determine the 'civil rights or obligations' of the claimant. For a critical analysis, see P. Billings, 'The Influence of Human Rights Law on the Procedural Formalities of the Asylum Determination Process', 2 *The International Journal of Human Rights* 1 (1998).

12.3.4 Discrimination under the TEC?

Keeping the goal of justiciability in mind, the question imposes itself whether the prohibition of discrimination on grounds of nationality in Article 12 TEC would be a suitable basis for redress. If this were the case, another door might open for achieving a binding judgement.[1519]

Article 12 TEC reads as follows:

> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Spanish Protocol forms an integral part of the Treaty[1520], which brings it under the scope of Article 12 TEC. Moreover, by virtue of the Treaty of Amsterdam, asylum and immigration issues, including the issue of asylum procedures, have been moved over to the first pillar. They are now dealt with under Title IV. Drawing on the proportionality argumentation expounded in the preceding sub-section, the implementation of the Spanish Protocol could very well entail discrimination on grounds of nationality. Is Article 12 TEC applicable, and does it provide a better remedy than those available under international law?

In this author's view, the first answer should be a 'no', which might turn into a 'yes' over time. Whether it actually will do so depends greatly on the secondary legislation to be adopted by the Council. For the moment, the answer to the second question is a straight 'no'. Even here, depending on coming legislation by the Council, this might change in a not too distant future.

We would first need to ponder whether Article 12 TEC actually covers the discrimination at stake here. The letter of the provision would suggest so. The provision is on discrimination on grounds of nationality. It is only restricted thematically, as the discriminatory act must come within the scope of application of the TEC to be covered.[1521] Furthermore, the general prohibition of discrimination does not prejudice 'special provisions' of the Treaty. This might be relevant, because the Spanish

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[1519] See Art. 228 TEC.

[1520] This flows from Art. 311 TEC.

[1521] von Bogdandy, 'Artikel 6 EGV', in E. Grabitz and M. Hilf (eds), *Kommentar zur Europäischen Union* (1994, C.H. Beck, München), p. 10, mn 35.

Protocol must be seen as an integral part of the Treaty, as already noted. However, as it does not specify the prohibition of discrimination, it falls outside the group of 'special provisions' in the sense of Article 12 TEC.[1522]

Nonetheless, discrimination under Article 12 TEC could be assessed only if nationals of Member States could be validly compared to third country nationals, since the latter, in contrast to the former, are not subject to accelerated procedures. Such a comparison is very unusual: discrimination issues normally involve comparisons between nationals of a Member State and nationals of other Member States. Even the few cases dealing the discrimination of third country nationals vis-à-vis nationals of Member States are of limited relevance. The Spanish Protocol actualises the precise reversal of such discrimination, as it entails that third country nationals are better off than citizens of other Member States.[1523]

Some commentators hold that Article 12 TEC is only applicable to nationals of Member States, and thus third country nationals are excluded from its benefits.[1524] On this basis, one might go a step further and exclude third country nationals from serving as means of comparison as well. This would bring down the whole discrimination argument—if there is no comparator external to the Union, there is no distinction in treatment. To wit, nationals of different Member States are all to be treated alike under the Spanish Protocol.

However, given the wording of Article 12 TEC, the position taken by the restrictive commentators is questionable. Resorting to case law cannot decide the matter, as the ECJ has not pronounced itself explicitly on the applicability of the general non-discrimination clause to third country nationals.[1525] Other commentators reject a limitation of its personal scope

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[1522] von Bogdandy, 1994, pp. 15–6, mn 55–8.

[1523] The sole difference is that the nationals of the Member State in which asylum is sought must be evidently excluded from the analysis, as asylum, by definition, is a benefit for non-nationals of the host state.

[1524] C. de Keersmaeker and T. Pauwels, 'Article 6', in H. Smit and P. E. Herzog (eds), *The Law of the European Community. A Commentary on the EEC Treaty* (1998, Matthew Bender, New York), pp. 1–116, § 6.04: 'Though Article 6 does not say so explicitly, it is generally recognized that it protects only nationals of the Member States against discrimination'. Accord: *EU-Karnow, EU:s rättsakter med kommentarer*, 1st ed. (1999, Fakta Info Direkt, Stockholm), p. 49.

[1525] This issue has to be distinguished from issues where the claimant possesses the nationality of a Member State and the nationality of a third country. In these cases, the latter nationality is irrelevant for the outcome.

by the criterion of nationality. In von Bogdandy's view, this stance is supported by a systematic interpretation. He refers to Articles 39 (2), 43 (1) and 49 TEC, all featuring an explicit linkage between the core content of personal freedoms and nationality in a Member State.[1526] Given the different construction of Article 12 TEC, a corresponding restriction to Union nationals was simply not intended by the drafters. This interpretation, drawing on the wording and the context of Article 12 TEC is, in our view, plausible. It does not imply, however, that this provision is limitless—the nexus to the scope of the TEC has to be recalled.[1527] Let us name one example. If the Council is to adopt a measure on asylum procedures, the rights of the third-country national under such a measure could be scrutinised as to their consistence with Article 12 TEC.[1528] Vice-versa, after the adoption of such a measure, the position of third-country nationals in asylum procedures can serve as a comparator in the assessment of discrimination of Union nationals. Therefore, in the absence of a measure adopted under Article 63 (1) (d) TEC, it is prudent to argue that there is no basis for making a comparison between Union nationals and third country nationals.[1529]

This conclusion opens up the issue of justiciability. In theory, the tension between Article 12 TEC and the Spanish Protocol could very well be brought before the Court. Article 12 TEC is directly applicable in the domestic domain.[1530] On the basis of Article 234 TEC, domestic courts may choose to request a ruling on the domestic implementation of the Spanish Protocol in the light of Article 12 TEC. Where this question is raised before a domestic court or tribunal against whose decisions there

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[1526] von Bogdandy, 1994, pp. 9–10, mns 32–5, at mn 34. Accord: M. Zuleeg, 'Artikel 7', in von der Groeben/Thiesing/Ehlermann (eds), *Handbuch des Europäischen Rechts,* October 1997 ed. (1997, Nomos, Baden-Baden), p. 147, mn. 16; R. Geiger, *EG-Vertrag. Kommentar zu dem Vertrag zur Gründung der Europäischen Gemeinschaft,* 2nd ed. (1995, C.H.Beck, München), p. 55, mn 5.

[1527] For an exemplification of how Art. 12 TEC could protect third country nationals, see von Bogdandy, 1994, p. 10, mn 35.

[1528] Compare von Bogdandy, 1994, ibid.

[1529] This conclusion finds support with a doctrinal analysis of the Art. 6 of the EEC Treaty, which was the identically worded predecessor of Art. 12 TEC. Reitmaier states that a comparison of groups whose status is regulated by the EEC Treaty and groups whose status is not regulated by that treaty must be excluded. M. Reitmaier, *Inländerdiskriminierung nach dem EWG-Vertrag. Zugleich ein Beitrag zur Auslegung von Art. 7 EWGV* (1984, N.P. Engel, Kehl am Rhein), p. 69.

[1530] von Bogdandy, 1994, p. 2, mn. 2.

are no legal remedies under national law, that court or tribunal is even obliged to request a ruling from the ECJ. However, as it is probable that the ECJ would deny the existence of discrimination in the absence of a pertinent comparator, nothing would be won by pursuing that track.

The situation may change, however, when the Council has complied with its assignments flowing from the Treaty of Amsterdam and adopted a measure under Article 63 (1) (d) TEC, determining minimum standards on the granting of refugee status. If such a measure incorporated the concept of safe countries of origin, a valid comparator would have come within the reach of the ECJ by virtue of Article 234 TEC.

12.3.5 Appraisal

The case of the Spanish Protocol confirmed that arguments on equality among non-nationals have a place in the discourse on extraterritorial protection. Prohibitions of discrimination limit the freedom of states to treat groups of protection seekers differently in their quest for targeted migration control. Theoretically, the construction of a successful discrimination argument moved into the realm of the possible. Provided that the German case study is indeed representative for the whole of the Union, the Spanish Protocol conflicts with the 1951 Refugee Convention, the ICCPR and the ECHR. The conflict is a genuine compliance conflict. The Spanish Protocol as well as the quoted norms of international law are mandatory and dictate a certain conduct. This conduct cannot be realised jointly.

In a relevant case, the ECtHR or the Human Rights Committee might state that a Member State presuming a claim as manifestly unfounded along the lines of the Spanish Protocol is simply in violation of the prohibition of discrimination. Neither of these bodies is charged with maintaining coherence between the human rights instrument they are set to monitor and other legal systems. By contrast, had the ECJ possessed jurisdiction in a case involving the Spanish Protocol and found the discrimination argument developed above to be persuasive, it would certainly exert great effort to find an interpretation of the Spanish Protocol which upholds the image of coherence between EC law and international human rights law—informed, inter alia, by the strong impetus of Article 6 TEU.

This would not be an overtly difficult task. An interpretation of the Spanish Protocol in line with the three named instruments would imply that Member States are duty-bound to process asylum claims by nationals of other Member States without presuming that they are manifestly unfounded. The imperative 'shall' in paragraph (d) of the Sole Article is wholly eradicated by the discretion accorded to Member States in the same provision. Actually, Member States are obliged by international law to use this discretion to process claims by Union citizens precisely as they process claims by persons holding the nationality of a non-Member State. This conclusion strips the Spanish Protocol further of its normative content, and the only obligation still intact is the duty to inform the Council on asylum applications made by nationals of other Member States.

Let us compare the itinerary to this conclusion with our earlier reasoning on visa requirements. In both cases, the setting was straightforward. Distinction in treatment was expressly based on nationality, which actualised the issue of direct discrimination. This unambiguous setting implies an initial advantage for the individual claimant arguing that she is discriminated.

The closed environment in which the Spanish Protocol operates turned out to be the decisive element for the successful formulation of a discrimination argument. For the affected individual, the consequences of the Spanish Protocol can be specified by comparing accelerated and normal asylum procedures. For the affected state, the degree to which its aim is realised can be substantiated by statistics. This is a far cry from the situation we met when assessing visa requirements. Using the German asylum system as a paradigmatic example for quantification of intrusion, we could come to a reasonably determinate conclusion: the means devised by the Spanish Protocol are not proportional to its aims, and an implementation of the Protocol implies discrimination.

In the case of visa requirements, a discrimination argument would ultimately fail on the extremely open empirical environment. Legally, this makes the reliance on equality reasoning a highly uncertain option. Are there any indicators as to when such indeterminacy will occur?

We recall that it was simply very difficult to predict what states would lose by the abolishment of visa requirements. The determinacy of outcomes is contingent upon the predictability of claims and the predictability of claims is contingent upon the size of the claimant group

and the resource-demands made by their claims. This size of the claimant group can be governed by e.g. exclusion on grounds of nationality and territoriality. Equality arguments drawing the outcomes of such exclusionary mechanisms into question generate, by necessity, indeterminate outcomes in themselves. The degree to which such indeterminacy is manageable depends on several factors. Indeterminacy will grow with the size of the claimant group and of the resource-demands made by them. At a given point of complexity, any equality argument will collapse. Recurring to our case studies, the complexity generated by equality reasoning with regard to the Spanish Protocol was manageable. The inclusionary claims could be shown to be so limited in number that a determinate outcome was still in reach. By contrast, assessment of the consequences of modifying visa requirements, as well as the consequences of retaining them, proved to be extremely demanding. While the imposition of visa requirements is probably the most important regulator in the whole protection regime, equality reasoning only opens up the complexity of the political discourse again. This overstretches the capacity of application discourses in law and, as a result, the outcome will be subjectively decisionist rather than technically determinate. Thus may we conclude on the theoretical aspects.

But material determinacy is not all. In the case of the Spanish Protocol, the effectiveness of equality norms was hampered by procedural norms diminishing their justiciability. We looked into options for redress under four relevant instruments. A synoptic view boils down to the rather prosaic conclusion that the degree of justiciability is contingent on limitations in scope. This general observation can be specified in two particular relationships. First, the degree of justiciability hinges on the geographical scope of the instrument. Typically, a regional instrument yields greater leverage than an international one. This holds true when comparing the ECHR and the TEC on one hand with the ICCPR and the 1951 Refugee Convention on the other. Second, the degree of justiciability is related to the material scope of the norm prohibiting discrimination. Ancillary or thematically restricted prohibitions of discrimination are equipped with better options for implementation than autonomous prohibitions of discrimination. A comparison of the ECHR with the ICCPR provides a telling example in that respect.

To prove this point, let us order the relevant instruments as to the degree of justiciability available under them (see Table 9 below). A first

group comprises instruments with a potentially universal geographical scope. The 1951 Refugee Convention would assume the lowest position, as it lacks any form of monitoring mechanism. At the next level, we find the ICCPR, featuring a monitoring machinery built on state reports, and an optional mechanism for individual grievances.

The second group is made up of regionally confined instruments, and it leaves the first group far behind with regard to justiciability. The next position is held by the ECHR, automatically allowing for individual grievances and offering the advantage of binding judgements. Finally, the top position is assumed by the TEC. In comparison to the ECHR, its applicability is geographically limited to the circle of Member States. Further, it covers only discrimination based on nationality within the material scope of the Treaty. However, with regard to justiciability, the advantages offered by it exceed those under the ECHR. The prohibition of nationality-based discrimination in the TEC enjoys direct effect in the domestic fora of the Member States. The seamless integration of EC law with domestic law is an advantage which is hitherto unparalleled by the monitoring mechanisms available under international treaties. However, for the moment, the usefulness of the TEC is conditioned on future action to be taken by the Council. In practice, this confines a claimant to the ECHR as the single remaining option.

A comparison between the first group (universal instruments not yielding binding decisions) and the second group (regional instruments yielding binding decisions) illustrates the relations of geographical and material scope expounded above (see Table 9).[1531] As rational actors, states strive for predictability in their commitments. One way to achieve predictability is to fine-tune the relationship between material obligation and formal enforceability. It is prudent not to endow a generously framed concept of equality with justiciability. Conversely, a minimalist conception of non-discrimination, confined to specific grounds and ancillary to a limited number of rights, limits the risks entailed by state obligations

[1531] Both relations can even be applied within the second group. It should be noted that they do not apply within the first group. The 1951 Refugee Convention offers only an ancillary right to non-discrimination, which must be contrasted with Art. 26 ICCPR, which grants an autonomous right to equality. Thus, compared to the latter, the 1951 Refugee Convention is more limited in material scope and offers no possibilities for individual redress. This deviation from the overall pattern fails to affect our general conclusion, however.

under it. Therefore, it is more likely that such restricted concepts are complemented by a mechanism for individual redress.

Instrument	Geographical scope	Material scope of prohibition of discrimination	Reporting system	Individual claims	Binding outcome
GC	Universal	Ancillary to GC rights	No	No	N/A
ICCPR	Universal	Autonomous	Yes	Facultative	No
ECHR	Europe	Ancillary to ECHR rights	No	Yes	Yes
TEC	EU Member States	Autonomous within scope of application of TEC	No	Yes	Yes, direct effect

Table 9: Prohibition of discrimination on grounds of nationality and justiciability. Comparison of four international treaties.

12.4 Conclusion

This chapter sought to answer the question whether central parts of the binding EU acquis are in conformity with international law. Our analysis can be condensed into the following conclusion. All of the scrutinised instruments can be interpreted and applied in a manner conforming to international law, but a conforming interpretation and application *strips the acquis instruments of their central control functions.* Conformity is bought at the price of efficiency.

In the light of the ECHR, visa requirements under the Schengen acquis and the EU Visa Regulation must be waived if they inhibit single individuals from reaching territories where they can find protection. However, whether visa requirements as such represent discriminatory treatment of the nationalities subjected to them could not be conclusively determined.

Member States must abstain from allocation under the Dublin Convention, if the receiving Member State upholds an interpretation of international legal norms prohibiting refoulement that deviates from an interpretation of such norms under the Vienna Convention. The example of persecution of third parties proved that large sub-groups of protection seekers and important host countries—Germany and France—are affected by such divergences in interpretation. Conformity to international law suggests that the allocation mechanism of the Dublin Convention risks becoming inoperable due to the widespread disharmony among domestic protection systems in the EU.

Finally, conformity to international law requires Member States to disregard the central element of the Spanish Protocol, namely the presumption that applications by Union citizens are manifestly unfounded. This conclusion largely empties the Protocol of its normative content. What remains is a mere reporting obligation to the Council, whenever a Member State receives applications by Union citizens.

In all, the resistance offered by the protective norms of international law is considerable. Conforming interpretations of the central instruments perforate the filters of pre-entry and post-entry measures to control access to territory—the Visa Regulation and the Dublin Convention—as well as the sole binding procedural filter—the Spanish Protocol.

13 Demos, Determinacy and Justification

AS OUR INQUIRY APPROACHES ITS END, we may conclude that many contentious issues could be resolved by a rigorous and consequent application of the canon of interpretation prescribed by international law. However, we were left with a number of indeterminate outcomes:

1. Is there an obligation to share protective burdens under the law of the European Union? This question could not be resolved in chapter 8.
2. Is there a right to immigration under Article 12 ICCPR? This question could not be resolved in chapter 10.
3. What is the precise extent of positive obligations to accord extraterritorial protection under the ECHR and its Protocols? This question could not be resolved in chapter 11.
4. Do visa requirements represent a form of collective discrimination prohibited under international law? This question could not be resolved in chapter 12.

These four issues actualise the last of the three basic questions with which this work was tasked: can questions on the content of relevant legal norms be answered in a determinate manner?

Before embarking on further explorations, we note that the four indeterminate issues enumerated above are no mere details in the

normative edifice of European integration. On the contrary. Each of them is of considerable significance for the extent of obligations incumbent on the single Member State in the areas of migration and asylum law. The first question, on burden-sharing, is the prime determinant of how domestic and supranational protection systems will develop in the years to come, and how much each Member State will contribute to this development. Access to territory—the issue uniting both Article 12 ICCPR and the legality of visa requirements under discrimination prohibitions—is presently the critical question in the design of protection systems. It has a much greater impact on protection costs in Member States than does the level of individual rights accorded to protection seekers already present on state territory. Finally, the ECHR turned out to be a wildcard with considerable protection potential, hampered only by the unclear extent of positive obligations to mete out extraterritorial protection. The implications of the last observation are anything but trivial.

Neither the canon of interpretation prescribed by the Vienna Convention nor elaborate proportionality arguments could dissolve the indeterminacy engulfing these four issues. Yet it is no coincidence that formalism fails in matters of great significance. Legal rules governing these matters are frozen political conflicts. As earlier noted, interpretation as well as discrimination arguments are nothing less than a gradual unpacking of the political tension feeding the legislative process. The greater the original political tension crammed into a norm, the more likely it is that interpretation and discrimination arguments arrive at a full restoration of that conflict. The larger the claim, the greater the risk of indeterminacy. And the underlying tension is indeed a large one: after all, it is not incidental that legal indeterminacy runs precisely along the same fault lines that sever universalists from particularists in the realm of political theory. Hence, the hope expressed by the end of Chapter 2 has come to naught: there is no presumption for either universalism or particularism *implied* in the edifice of international law, as far as it is relevant for the issue of extraterritorial protection. We are faced with two questions, springing from the same source: one is about the delimitation of communities, the other about the determinacy of legal norms governing such delimitation.

What does the law do with indeterminate issues? One response is to institutionalise them. A court or some other decision-making body is

entrusted with the task of finding an answer. Even where the crutches of formalism fail, such bodies are obliged to deliver a decision. This response aims at creating determinacy through justiciability. With one significant exception, we find that the indeterminate issues emerging in the course of this inquiry are largely beyond justiciability. It is inconceivable that the question of burden-sharing can be formulated in such a manner that it would fall under the competence of a court. With regard to the access question, practical difficulties inhibit affected individuals to turn to courts. It is practically impossible to file a claim on access to territory from outside that territory, and to pursue it in an efficient manner. Finally, our discrimination arguments revealed that entitlement and justiciability are linked: justiciability decreases, where the scope of discrimination prohibitions increases. Thus, we may complement the preceding paragraph with the following conclusion: the larger the claim, the less justiciable it is.

But there is one significant exception to both correlates. It is the ECHR and its monitoring by the Strasbourg organs. By its case law relating to extraterritorial protection under Article 3 ECHR, the ECtHR has shown that it is willing to consider claims of a considerable magnitude. Moreover, the Contracting Parties to the ECHR have entrusted the Court with the competence to pronounce judgments binding in the individual case. Although this mechanism of justiciability is hampered by a number of needle's eyes—among them the considerable length of procedures—it represents a singular, and indeed revolutionary, forum for creating determinacy in matters of inclusion and exclusion.

Now, although formalism failed, the cause of determinacy is not necessarily lost for good. Theoretically, it is conceivable that determinacy is produced by a material rather than a formal rule. Put simply, it could be that the legal system contains an intrinsic rule, tilting the balance of indeterminacy into one direction or another. We could imagine a rule letting state interests prevail in cases of doubt. Actually, we saw earlier that the existence of such a rule has been argued by doctrinal writers.[1532] Or we could imagine a rule prescribing the contrary, and presuming that a universalist understanding of human rights should supersede particularist state interests. If such a presumption exists, what is its content? In dubio pro communitate or in dubio pro humanitate? We recall that this question

[1532] See text accompanying note 1192 above.

was brought up in chapter 2, when expounding the conflict of universalism and particularism feeding the legal issues in this work. However, the question was never answered. Such an answer is our last resort, before we have to concede that indeterminacy reigns supreme. The existence—or, indeed, the impossibility—of a material presumption shall be the subject of the following section.

We shall proceed in three steps. First, we shall illustrate how conflicts of delimitation and determinacy are aggravated at a supranational level; the European Union shall serve as a self-evident example. Second, we shall look into three possible answers: essence, contract or indeterminacy. Third, and finally, we shall reinterpret the function of the Strasbourg Court as an imperfect institutional response to the challenges entailed by essence, contract and indeterminacy.

13.1 Tilting the Balance: Constructions of the Demos

Who is the demos? From chapter 2 onwards, we have encountered the difficulties of political theorists, philosophers and international lawyers to consent upon a valid method for singling out valid delimitations of the scope of protection. Basically, the search for a threshold is about identifying the group to which institutional protection is extended—a demos. The variety of decisions on inclusion and exclusion are all predicated on the foundational question of 'who is the demos'. The totality of these decisions in a given society forms its answer to that question. In brief, the demos is a formula by means of which a given society specifies the right balance between inclusion and exclusion.[1533] To exemplify, one may refer to nationality law with its principal choice between formulas based on jus sanguinis or jus soli. Taking another example, one may tolerate the continued stay of rejected protection seekers, or one may handcuff them and force them onto an aeroplane destined to their country of origin.

To validate such answers, a variety of assumptions on the ultimate linkage between individual and society are on offer. As we have seen earlier, some thinkers recur to 'embeddedness'—e.g. kinship, descent, language, or common heritage—while others focus on contractual

[1533] On the exclusionary aspect of the demos concept, see F. Müller, *Wer ist das Volk? Die Grundfrage der Demokratie—Elemente einer Verfassungstheorie VI* (R. Christensen ed.), (1997, Duncker & Humblot, Berlin), pp. 47–56.

bounds—e.g. hypothetical social contracts or actual human rights instruments.[1534] Evidently, non-consensual models build on an organismic-particularist perception of what constitutes a demos, while consensual models reflect an artefactual-universalist approach to that question. Below, we shall introduce Carl Schmitt's conception of the demos as an example of a non-consensual model. Such models are problematic for a number of reasons, one being their essentialist foundation, whose core is inaccessible to rational reconstruction.[1535]

The non-consensual understanding of demos is countered by consensual models, drawing on some form of contract, either as a mere hypothesis, or in the form of a constitutional agreement. Contractual models are products of modernism, having their basis in the experience of the bourgeois revolutions. Their centrepiece is the idea of the human being as a rational actor. Below, we shall introduce Jürgen Habermas' reconstruction of basic rights and democratic rule by means of a contractual approach. But contractual models beg questions as well. Who is to determine the circle of participants constituting themselves as a demos in the original discourse situation? And how does the contractual model handle claims for inclusion which are made *after* the constitution of society and demos has taken place? Apparently, within such models, a new divide of universalist and particularist positions opens up.

Before embarking on explorations of essence, contract and an indeterminate in-between, let us recapitulate how the dispute on demos is aggravated by the process of European integration.

[1534] The dichotomy of consensual and non-consensual models has been used by Jean Hampton when criticising nonconsensual models (as practiced in Germany and Japan) as incompatible with liberal democratic principles. See J. Hampton, 'Immigration, welfare and justice', in W. F. Schwarz (ed.), *Justice in Immigration* (1995, Cambridge University Press, Cambridge), pp. 76–93.

[1535] Another pertinent question for essentialists is how to handle situations where not all parts of a state population belong to the essentialistically defined demos. As already pointed out in 1814 by Heinrich Luden, the choices on offer are eviction or integration (H. Luden, *Das Vaterland oder Volk und Staat* (1814)). Luden himself esteemed eviction to be ethically unacceptable. However, historical expertise has shown that its practice represents a marked feature of our century. Eviction, or, as a popular euphemism has it, 'ethnic cleansing' has been exercised repeatedly in various forms, ranging from voluntary population transfers to physical extermination. Since World War II, historical research has counted between 40 and 80 million victims of such policies. For a brief overwiew, see Karl Schlögel, *Kosovo war überall*, and *Europas verschobene Völker*, both in Die Zeit Nr. 18 (29 April 1999), pp. 14–7 and p. 16 respectively.

13.1.1 The European Union and the Demos Dilemma

If identifying the demos is painstaking even at the level of the nation state, these difficulties are amplified in a supranational setting. For all that is certain, the project of a European Union can be described as simultaneously extending and limiting protection. Seen from the perspective of the Member States, the Union is about sharing protection with the populations of other Member States. Seen from the outside, the Union appears as a merger of mighty sovereigns promoting protection for its populations at the expense of others. This actualises two dimensions—one on the extension, the other on the limitation of protection.

Extending protection to others than one's own people[1536] means giving up parts of the established linkage between a preconceived, essentialist demos and inclusion. Limiting protection to the citizens of the Member States begs the question of justification: why stop here, why not extend protection further eastwards or southwards? Hence, to justify this shifting of boundaries, the Union would need a demos of its own—or a social contract of its own.

To be sure, the establishment of a new, pan-European demos was expressly not envisaged by the drafters of the foundational treaties. It is indicative that the preamble of the TEC speaks of 'an ever closer union among the peoples of Europe'. Weiler asserts rightly that the allusion to *peoples* rejects 'any notion of melting pot and nation-building'.[1537] Regarding the conjuration of an 'ever closer union', he points out that 'something which goes on for "ever" incorporates, of course, the "never"'.[1538]

Keeping this rejection in mind, it is simply misconceived to answer the demos question by lanuching an essentialist conception of 'European culture' as an organising principle, as attempted by the European Commission.[1539] Firstly, it represents a retrogression to nation-building techniques of the past, as Hansen aptly noted: '[i]n some meaning then, the European Union resembles the Western European nation-states prior

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[1536] The flagship of this extension is the prohibition of discrimination on grounds of nationality, enshrined in Art. 12 TEC as well a number of context-specific norms.

[1537] Weiler, 1999, p. 93, note 212. See also pp. 336–47.

[1538] Weiler, 1999, p. 93, note 212.

[1539] For an elaborate analysis, see P. Hansen, *Europeans Only? Essays on Identity Politics and the European Union* (2000, Department of Political Science, Umeå), pp. 51–71.

to the expansion of voting rights and large scale population mobilization from below, in that it seeks to disseminate a mythical cultural identity rather than the practical tools with which a process of democratization could be initiated'.[1540] Secondly, and most importantly, it is a deeply ironic contradiction that archaic nation-building techniques are used in a situation where the foundational treaties *reject* the existence of a single European demos.[1541] The conclusion is inevitable: a 'Union identity' capable of competing with the foundational qualities of its national counterparts, does not exist. Ultimately, the core of the legal regimes spawned within the Union framework is citizenship in a Member State.[1542]

In the absence of any common 'national identity' predicated on a traditional demos concept possessing mythical force, integration and the ensuing sharing of resources can only be justified by the universality of certain values. Here, the necessary responsiveness to universality and equality poses specific problems for the supranational particularist professing *d'abord l'Europe*. If free trade is a common good, it is definitely so for all, not only for Member State populations. And the same goes for the other freedoms, including the freedom of movement under scrutiny in this work. In the same vein as the particularist argument of 'national interests' loses power within the Union, arguing the exclusion of non-Union interests becomes more difficult to justify.

In the absence of a mythically delimited demos, the particularist justification of exclusion hinges solely on functional arguments. That is: building the European Union is only justifiable as a *first step* in the global realisation of freedom, security and justice. To be successful, this step needs to be taken in a secure and controlled environment, limiting the amount of outside interference. Thus, the move to an ever-closer Union produces its own Orwellian paradoxes: integration is attained by means of

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[1540] Hansen, 2000, p. 66.

[1541] See also the concise analysis in D. Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy* (1997, Kluwer Law International, The Hague), pp. 48–51. This rejection has been seconded, most famously, by the Maastricht-judgment of the German Federal Constitutional Court.

[1542] This becomes particularly clear in the formulation of European Citizenship in Part II of the EC Treaty. From a national perspective, the EU is a regulatory mechanism for the differentiated treatment of aliens. Citizens from other Member States are generally accorded a more favourable treatment than other citizens. Ultimately, the nation state's divide between citizen and non-citizen remains intact.

exclusion, freedom achieved by means of control. The liberal-universalist paradigm behind the dismantling of borders is violently forged together with a particularist control paradigm erecting new ones.

These paradoxes become particularly visible in the regulation of free movement in the European Union. As we have seen, the abolishment of internal borders is bought at the expense of erecting ever-higher external borders. Such a trade-off tends to undermine the very ideal of freedom of movement, as its justification hinges precisely on universality. The only defence would be, once more, to display the elitist solution as a first step to the universal implementation of rights. Compared to an essentialist delimitation inherent in the demos concept, the functional perspective is much weaker when it comes to deflecting inclusionary claims. Otherwise put, it is still a particularist perspective, but includes a fair dose of universalism.

If the non-consensual concept of demos cannot be applied to the Union, what about the consensual counterpart? At first sight, this question seems to lead us to the comprehensive debates on the democratic deficit, the need for a European constitution and uncertainties engulfing the draft EU charter of fundamental rights.[1543] While relevant, a more specific indicator seems to be the position of third country nationals in the normative edifice of the European Union. First, we have the situation of third country nationals being legally present in the Union. Had the EU drawn on a consensual demos concept, we could reasonably expect that group to be allowed to participate in the extension of supranational rights within the EU. However, this is not the case. Although the European Commission as well as single governments have repeatedly pushed for a reinforcement of integrative measures to the benefit of third country nationals, the actual achievements have been extremely limited.[1544] With

[1543] For a discussion on the constitutional dimension of European integration, see e.g. J. Habermas, *Die Einbeziehung des Anderen* (1996, Suhrkamp, Frankfurt am Main), pp. 185–91.

[1544] Staples submits that '[t]he net result of Union dealings with third country nationals is that there is not one, comprehensive regime applicable to all third country nationals irrespective of their country of residence or nationality. Key features of the Union's approach are in-equality and a complex legal structure, hardly understandable to specialists in the field, let alone to those whom it really concerns'. H. Staples, *The Legal Status of Third Country Natio-nals Resident in the European Union* (1999, Kluwer Law International, The Hague), p. 184. See also B. Vilá Costa, 'The Quest for a Consistent Set of Rules Governing the Status of non-Community Nationals', in P. Alston (ed.), *The European Union and Human Rights* (1999, OUP, Oxford), p. 437, speaking of a 'plurality of confused legal solutions and an asymmetrical and purblind policy'.

regard to freedom of movement, it is all too indicative that the adoption of measures regulating residence rights within the Union for legally present third country nationals is merely listed among the facultative measures under Art. 63 (4) TEC. This relegates third country nationals to an uncomfortable position between nation and Union. However far-reaching domestic integration policies may be, the absence of a supra-national counterpart leaves them with a mark of inferiority. Second, we have third country nationals, who, for whatever reason, wish to enter the Union. This group is met with a deafening silence: while there is certainly a common policy on immigration *control*, a policy on *immigration* is simply absent. The Union prefers to remain tacit on the future composition of its demos.

Taken together with the absence of a constitutional instrument and a charter of rights on a par with domestic counterparts, the Union's absent demos concept makes a contractual reconstruction of European integration extremely difficult. Reverting to Carens' demand that we should allow immigrants to sign our social contract[1545], it has to be admitted that the EU simply possesses no social contract to sign.

So much for empiry. As long as the Union fails to develop a credible notion of its demos, the setting of exclusionary thresholds remains a technical exercise, predicated on the tools designed for the framework of the nation-state and governed solely by a rationale of controlling migration.[1546] In all, the Union's demos is controlled, yet undefined. Our question on determinacy and delimitation reached further, though. Could an essentialist or a contractarian approach lend itself to justifying the delimitation of the demos and the determination of the law in the future? If the answer is a twofold 'no', what are the consequences? We shall pursue these questions in the following sections.

[1545] See text accompanying note 241 above.

[1546] It is highly ironic that Member States enforce a control paradigm even if it strikes back against their own citizens. The Spanish Protocol stipulates that all Member States shall regard each other as safe countries of origin when determining asylum claims from Union citizens. This is unique insofar as the EU consciously places citizens from other Member States in a *less favourable* position than citizens of third states. See chapter 12.3 above.

13.1.2 Essence: Distinguishing Friend and Foe

To exemplify non-consensual approaches, we choose to reflect on the conceptualisation of the demos elaborated by Carl Schmitt. To be sure, Schmitt is a problematic figure in a twofold sense. First, his affiliations to the power structures of the Third Reich have haunted and continue to haunt his oeuvre. Until today, the debate on Schmitt's biography as well as his writings remains polarised.[1547] Second, his radical antiuniversalism and critique of liberalism have experienced a renaissance in the aftermath of postmodernist scepticism.[1548] In the fields of political as well as legal theory, Schmitt presently evokes a fascination reminiscent of the earlier postmodernists' enormous interest in Friedrich Nietzsche: both combine radicality, originality and intellectual agility with a sinister aura and a certain *haut gout*. Given the political distance between Schmitt—a Catholic conservative fiercely critical of the Weimar democracy—and postmodern scepticism of radical-democratic progeniture, one may speak of a paradox.

Why Schmitt? In the realm of essentialist conceptions of the demos, his writings offer a considerable degree of transparency, stringency and eloquence which is largely unparalleled in particularist approaches discussed earlier.[1549] By exemplifying particularism with Schmitt, we do not wish to discredit particularism by a creeping association to the Third

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[1547] For a concise biographical discussion on the relationship between Schmitt and the power structures of the Third Reich, see M. Kaufmann, *Recht ohne Regel? Die philosophischen Prinzipien in Carl Schmitts Staats- und Rechtslehre* (1988, Verlag Karl Alber, Freiburg im Breisgau/München), pp. 31–43. A balanced and reflective introduction, intertwining biography and *oeuvre*, can be found with R. Mehring, *Carl Schmitt zur Einführung* (1992, Junius, Hamburg).

[1548] For a well-argued reflection of the reasons behind this rising interest, see D. Dyzenhaus, 'Introduction: Why Carl Schmitt?', in D. Dyzenhaus (ed.), *Law as politics : Carl Schmitt's critique of liberalism* (1998, Duke University Press, Durham and London). One recent exploration can be found with J. Derrida, *Politics of Friendship* (1997, Verso, London), ch. 6, looking into the friend/foe distinction discussed in the present section. For a sharp criticism of the Schmittian renaissance, see J. Habermas, *Die Normalität einer Berliner Republik* (1995, Suhrkamp, Frankfurt am Main), pp. 112-22.

[1549] Compare the particularist approaches discussed in chapter 2.3 and 2.6 above. Even from the perspective of the 'true universalist', there are reasons to study Schmitt to detect 'the deadlocks of post-political liberal tolerance', it is argued in S. Žižek, 'Carl Schmitt in the Age of Post-Politics', in C. Mouffe (ed.), *The Challenge of Carl Schmitt* (1999, Verso, London), pp. 35–6.

Reich. Rather, we would like to flag for the potential for political manipulation and exploitation inherent in essentialist approaches.[1550]

The particularist core distinction in Schmitt's thinking is the distinction between friend and foe. Before looking into the latter, we need to clear our thoughts on how Schmitt conceived of democracy, equality and the pluralist structure of the international community.

In line with his definition of democracy as the identity of rulers and ruled[1551], Schmitt points to the homogeneity of a people as a prerequisite for its capacity to exert sovereignty.[1552] To Schmitt's mind, a people is more than an aggregation of individuals, it is an essence in itself. However, as Chantal Mouffe has pointed out in her distinct essay on Schmitt and political liberalism, Schmitt was not necessarily having ethnic homogeniety in mind: 'Schmitt never postulated that this belonging to a people could only be envisaged in racial terms. [...] He says for instance that the substance of equality "can be found in certain physical and moral qualities, for example, in civic virtue, in *arete,* the classical democracy of *vertus (vertu)*".[1553] Hence, Schmitt's demos is not necessarily an ethnos.

This axiomatic linkage between homogeneity, equality and the exercise of sovereignty suggests that the state is an ultimate entity of the political,

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[1550] The manipulate dangers of—particularist or universalist—essentialism can be illustrated by Schmitt's claim that 'he, who says mankind, intends to deceive'. (C. Schmitt, 'Staatsethik und pluralistischer Staat', in *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles 1929-1939* (1988, Duncker & Humblot, Berlin), p. 143). Turning around this warning for the imperialist potential in universalism, one could say that he, who says demos, intends to deceive as well. Judging who is to be included and who is to be excluded under an essentialist concept of demos is, pro tanto, subject to the same manipulative dangers as are inherent in an uncritical, mythical concept of humanity.

[1551] C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1991, Duncker & Humblot, Berlin), p. 20 and C. Schmitt, *Politische Theologie* (1985, Duncker & Humblot, Berlin), p. 64.

[1552] 'Zur Demokratie gehört als notwendig erstens Homogenität und zweitens—nötigenfalls—die Ausscheidung oder Vernichtung des Heterogenen.' ['Necessary attributes of democracy are, first, homogeneity, and, second, where necessary, the exclusion and annihilation of the heterogenous.' Translation by this author.] The piece containing this statement was written in 1926—nine years before Germany passed the laws prohibiting marriage and sexual intercourse between Jews and Non-Jews. C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles 1929-1939* (1980, Duncker & Humblot, Berlin), p. 59.

[1553] C. Mouffe, 'Carl Schmitt and the Paradox of Liberal Democracy', in D. Dyzenhaus (ed.), *Law as Politics. Carl Schmitt's Critique of Liberalism* (1998, Duke University Press, Durham and London), p. 162. Emphasis in the original.

which inevitably entails a situation of pluralism in the international arena.[1554] Schmitt traces the advent of the nation state back to a liberation process from the universal demands of a global emperorship and the political demands of papal power. Following Schmitt, the plurality of states is the genuine expression of a correctly grasped pluralism.[1555] This explains why Schmitt is deeply sceptical of the universalist concept of humanity, which he associates with imperialist aspirations for dominance.[1556] Very much in line with later communitarian thought, the state is regarded as the ultimate vehicle for self-determination of the demos.

This alone does not exceed where our earlier explorations of particularism had brought us. The added value lying in Schmitt's approach surfaces in his inquiry into the political. To start with, he suggests that 'the concept of the state presupposes the concept of the political'.[1557] The state is but a status of the people; however, Schmitt underscores, in comparison to any other conceivable individual or collective status, it is the 'decisive' one.[1558] Hence, the concept of the political is at the core of the demos:

> Alle Merkmale dieser Vorstellung—Status und Volk—erhalten ihren Sinn erst durch das weitere Merkmal des Politischen, und werden unverständlich, wenn das Wesen des Politischen mißverstanden wird.[1559]

What, then is the essence of the political? Schmitt localises it in a specific political category: it is the distinction between friend and foe.[1560] He attempts to develop this distinction not by inquiring into the concept of friendship, but by probing the concept of the foe:

[1554] Schmitt, 1988, pp. 141–4.

[1555] Schmitt, 1988, p. 142.

[1556] See note 1550 above.

[1557] Schmitt, 1963, p. 20.

[1558] Schmitt, 1963, p. 20.

[1559] ['All attributes of this representation—status and people—receive their meaning only through the additional attribute of the political, and become incomprehensible, if the essence of the political is misconceived.' Translation by this author.] Schmitt, 1963, p. 20.

[1560] Schmitt, 1963, p. 26. The parallels between Schmitt's bipolar categorisations and Luhmann's systemic codes are striking.

> Feind ist nur eine wenistens eventuell, d.h. der realen Möglichkeit nach *kämpfende* Gesamtheit von Menschen, die einer ebensolchen Gesamtheit gegenübersteht. Feind ist nur der öffentliche Feind, weil alles, was auf eine solche Gesamtheit von Menschen, insbesondere auf ein ganzes Volk Bezug hat, dadurch öffentlich wird. Feind ist *hostis*, nicht *inimicus* im weiteren Sinne [...].[1561]

Schmitt uses the attribute of the political to support his thesis of a pluralist world of states:

> Aus dem Begriffsmerkmal des Politischen folgt der Pluralismus der Staatenwelt. Die politische Einheit setzt die reale Möglichkeit des Feindes voraus. Es gibt deshalb auf der Erde, solange es überhaupt einen Staat gibt, immer mehrere Staaten, und kann keinen die ganze Erde und ganze Menscheit umfassendenden Welt"staat" geben.[1562]

At the same time, Schmitt is careful to maintain a high degree of flexibility in the classification of friend and foe, and to detach it from the concept of the state. He underscores that associations and dissociations along the friend/foe divide may change over years, and that the political can draw power from any area of human life, be it from religious, economic, moral or other oppositions. Moreover, the foe can be both external and internal to the state.[1563] Thus, the political demarcates a *degree of intensity* attached to associations or dissociations between human beings.[1564] Compared to traditional modes of delimitation, drawing on territoriality or ethnicity, this is a decisive difference.

[1561] ['The foe is solely a totality of persons, at least possibly *fighting*, that is, according to the real possibility, which is opposed to an identical totality. The foe is solely the public foe, because everything which has a bearing on such a totality of humans, especially a people, turns public. The foe is *hostis*, not *inimicus* in a wider sense [...].' Translation by this author.] Schmitt, 1963, p. 29. Emphasis in the original.

[1562] ['From the conceptual attribute of the political flows the pluralism of the state sphere. Political unity presupposes the real possibility of the foe. Therefore, as long as a state exists in the world, there will always be several states, and there cannot be a world "state", embracing the whole world and humanity as a whole.' Translation by this author.]Schmitt, 1963, p. 54.

[1563] Schmitt, 1963, p. 46.

[1564] Schmitt, 1963, pp. 38–9.

Following Schmitt's conceptualisation of the foe, the element of struggle is at the base of the political. And this element is circumscribed strictly by Schmitt. The concepts of friend, foe and struggle receive their meaning only through their relationship to the actual possibility of physically killing the foe.[1565] Preparedness to kill, and preparedness to die[1566]—this couplet is the water-shed severing the political foe from other concepts of the foe, and demarcating the concept of the political as such.[1567] But the violence inherent in armed struggle merely *evidences* that a distinction between friend and foe has been made. The core of that distinction remains occult, and Schmitt no more than hints at it in his later works: *'Der Feind ist unsere eigene Frage als Gestalt'*—the foe is our own question qua *gestalt*.[1568] As Meier has pointed out, this recognition of the foe is concurrently the recognition of one's own identity, which therewith attains a perceptible *gestalt*.[1569] This fits nicely with constructivist contemporary models, seeking to explain restrictive immigration practices in the North as an important factor in the fabrication of national identities.[1570] Where communitarians devise identity from the embeddedness of the individual within community, Schmitt—and his postmodern epigones—construct identity as a function of collective opposition.

Mirroring Schmitt's approach on the reality of migration and asylum law in the EU certainly creates uncomfortable feelings. All talk of 'fighting illegal migration', lamentably present in EU instruments

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[1565] Schmitt, 1963, p. 33.

[1566] Schmitt, 1963, p. 46.

[1567] Schmitt's approach has been repeatedly criticised for its bellicose character, a critique which he has tried to refute ex ante in Schmitt, 1963, pp. 33–4. See W. Palaver, *Die mythischen Quellen des Politischen. Carl Schmitts Freund-Feind-Theorie* (1998, Verlag W. Kohlhammer, Stuttgart), pp. 14–5, who identifies important differences between Schmitt and ideologically proximate intellectuals of the German 'conservatory revolution' of the 1920s. See also Kaufmann, 1988, p. 51 note 15; and the foreword of the 1963 edition of 'Der Begriff des Politischen'.Schmitt, 1963, pp. 9–19.

[1568] C. Schmitt, *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen* (1975, Duncker & Humblot, Berlin), p. 87. Schmitt has taken this phrase from Theodor Däubler's 'Sang an Palermo' ('Der Feind ist unsre eigene Frage als Gestalt./Und er wird uns, wir ihn zum selben Ende hetzen.').

[1569] H. Meier, *Carl Schmitt, Leo Strauss und 'Der Begriff des Politischen'. Zu einem Dialog unter Abwesenden* (1998, Verlag J.B. Metzler, Stuttgart), p. 35.

[1570] For a recent example, see C. Dauvergne, 'Confronting Chaos: Migration Law Responds to Images of Disorder', 5 *Res Publica* (1999), claiming that migration law addresses disorder within the nation by reflecting a coherent picture of national identity.

presented earlier, takes on a sharper, indeed bellicose, tinge. The fact that EU Member States deploy their armed forces to control borders attains an increased significance, and so do the lethal incidents during forcible expulsions.[1571] Beyond all metaphors, one may de facto speak of an armed struggle between human smugglers and the Italian border authorities in the Adriatic Sea. Futhermore, the strong linkages between protection seekers, human smugglers and organised crime, crafted in the deflective rhetoric of Western European governments, seem to confirm Schmitt's description. Indeed, in such company, the protection seeker risks becoming part of the 'hostis', that is, the public foe, opposed to the citizenry of the Union. On a descriptive level, Schmitt's approach appears to adduce a vocabulary, jarring as it may be, capable of capturing the sinister parts of European deflection policies.

Beyond description, is there a justificatory potential in the Schmittian conception of the political? This is the issue at stake in the present chapter. Within the offer of particularist approaches, Schmitt's model appears to draw on voluntariness rather than organismic essentialism. The distinction between friend and foe is not a product of nature, it is the product of a decision by a collective of human beings. Concurrently, this is the problem with Schmitt's conception of the political: who decides? To be helpful in our context, we would need an answer to that question.

Kaufmann has shown that Schmitt is unable to provide an answer, and that his reasoning turns circular at this point. Schmitt gives the concept of the political a double task. On the one hand, it shall delimit *one* political entity from *other* political entitities; on the other, it shall sever *political* entitities from other entitites.[1572] It cannot fulfill this double requirement, as the concept of the foe remains linked to the concept of the political. On one hand, the political entity—i.e. a totality of human beings—is defined by the fact that it will not resort to armed struggle internally. On the other hand, this entity shall concurrently decide who shall be regarded as its foe. Kaufmann underscores rightly that Schmitt denies this decision to be an objective one, and he bars neutral third parties from judging on it.[1573] But, as Schmitt postutlates that the foe can be external or internal to the state, any person may be any other's foe. The sole indicator of who is

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[1571] See note 746 above.

[1572] Kaufmann, 1988, p. 50.

[1573] Kaufmann, 1988, p. 51. The decision on who is to be a foe can only be made on the basis of existential participation in the potential conflict. Schmitt, 1963, p. 27.

to be regarded a foe would be the facticity of armed struggle.[1574] Ultimately, Schmitt remains silent on who shall determine the foe, and his theory cannot be extrapolated to provide an answer beyond its circularity.

Žižek has formulated the Schmittian failure in identifying the core of the political decision in a wider context:

> The basic paradox of Carl Schmitt's political decisionism—the rule of law ultimately hinges on an abyssal act of violence (violent imposition) which is grounded in itself; that is, every positive order to which this act refers, to legitimize itself, is self-referentially posited by this act itself [footnote omitted, GN]—is that his very polemics against liberal-democratic formalism inexorably gets caught in the formalist trap.[1575]

Žižek identifies this trap as the inability of abstract formalism to bridge the gap to actual life. It resurfaces in Schmitt's combination of material pluralism with a universal conception of order.

> This is the main feature of modern conservatism which sharply distinguishes it from every kind of traditionalism: modern conservatism, even more than liberalism, assumes the lesson of the dissolution of the traditional set of values and/or authorities—there is no longer any positive content which could be presuspposed as the universally accepted frame of reference. [...] The paradox thus lies in the fact the only way to oppose legal normative formalism is to revert to decisionist formalism—there is no way of escaping formalism within the horizon of modernity.[1576]

This brings us back to the universalist foundations of particularist models, discussed earlier in chapter 2. In Schmitt's thinking, the universalist element lies in the decision for order, whatever its content.[1577] But most importantly, as the Schmittian decision remains grounded in itself, there is no rational justificatory potential to be hoped for. We may inquire into its

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[1574] Kaufmann, 1988, p. 53. Kaufmann traces Schmitt's fallacious reasoning back to his conception of the state. See Kaufmann, 1988, pp. 55–76.

[1575] Žižek, 1999, p. 18.

[1576] Žižek, 1999, p. 19.

[1577] Žižek, 1999, p. 18.

faith, rather than its reason.[1578] Nonetheless, although scrutiny of Schmitt's thinking has contributed to a clearer picture of the tensions surrounding migration and extraterritorial protection, it is ultimately unhelpful for determining and justifying the delimitation of the demos.

13.1.3 Contract: Universality by Consent

To introduce social contract reasoning, we would like to reformulate somewhat the original conflict between organism and artefact. In the following, we shall recap that narrative, based on the idea that the social contract means bartering freedom for equality, and equality for exclusion.

There are few legal arenas where equality arguments seem to be so disjointed as in migration and asylum law. The reason is apparently straightforward. After all, is not the exclusion of non-citizens the price to be paid for equality among citizens? How could the freemen of Athens have pursued their own public good if women, slaves, or Spartans had been admitted to the debates at the Athenian agora? The institutionalisation of equality—whether in politics or in law—is contingent on its delimitation. Thus, the public good is always a private affair of the delimited collective. In the international system, this logic translates into the constitution of sovereign nation states.

On the face of it, the universalist potential of human rights is a spoilsport in the system of segregated egalitarian communities. Once consented upon by governments, human rights stretch over national boundaries and are—at least in part—no longer at the disposal of single political constituencies. If the exercise of sovereignty is subject to human rights obligations, delimitation no longer reigns supreme, and distinctions on the basis of nationality become questionable again. The folkloric discourse on human rights tends to overlook this catch in its own universality claims. Questioning the exclusion of non-citizens entails two problems—one is about resources, the other about legal theory.

Practically, a large-scale unleashing of this universalist potential would eradicate the resource-base of human rights: as long as the single state is the bearer of human rights obligations, it will necessarily be overburdened with the satisfaction of human rights-based claims from other than its

[1578] For a theological and mythical analysis of Schmitt's conception of the political see Palaver, 1998. For a psychological interpretation, see Žižek, 1999.

own population. Thus, legal universalism would be conditioned upon a revolutionary reordering of global resource distribution. One of the first victims of such a reordering would be the nation state, together with its potential to protect citizens, denizens—and protection seekers.

Pursuing the track of theory, the universal applicability of human rights brings us back to the dichotomy of equality and freedom. This dichotomy seems to be tamed in the metaphor of the social contract, which has become the modernist's standard mode of reasoning when justifying the distribution of rights and goods. The social contract metaphor has been criticised for its failure to specify criteria for membership in a group of contractarians.[1579] In the following, we would like to pursue a related, but distinct, track and question the capacity of the social contract metaphor to justify international human rights norms. Let us set out with some simple reflections.

This is the essence of the social contract metaphor: the actual disparities in power between various actors are diminished by rules constraining their usage. The body-builder is disallowed to use his or her physical capacities to mug people in the street, and the state may not make use of its might by torturing citizens. Reciprocity is the magic formula: what you do not unto me, I shall not do unto you. Thus, we are confronted with a trade-off: equality is bought at the price of freedom. As we saw above, equality is also bought at the price of exclusion, which translates into curtailing the freedom of non-members. Thus, the social contract entails a double limitation of freedom. Internally, the freedom of citizens is constrained; externally, the freedom of non-members is limited. The loss of internal and external freedom is converted into a gain of equality. So far, we are fine.

The going gets rough when the model of a social contract is used to justify human rights as universally binding legal norms. Deducing human rights from a truly universal level would presuppose either a social contract by all human beings or a paternalist social contract, affording protection to non-parties.

[1579] 'It seems rather that the two institutions of the contractual paradigm, consent and property, have contradictory implications, because of the failure of the contract metaphor to specify criteria for membership in the contracting group. While such a neglect is of no importance in the case of bilateral 'spot contracts' in which we assume no further social bonds or lasting effects outside the exchange, such an assumption is incoherent in the case of contracts setting up political authority and negotiating distributive schemes.' F. Kratochwil, 'The Limits of Contract', 5 *EJIL* 465 (1994), p. 466.

An all-embracing social contract is a contradiction in terms. First, a truly universalist community, consisting of mankind as a whole, lacks non-members whose freedom can be restricted. By consequence, there is no external freedom, which can be converted into internal equality. Or, in Schmitt's somewhat bellicose terms: 'The concept of humanity excludes the concept of the foe'.[1580] Approaching the same issue from a different tack, one may state that a universalist community cannot create predictability by limiting the number of contracting partners. The result would be an extremely open contract, and it is questionable whether this can be termed a contract at all. Second, the postulation of such a universal contract is a mere hypostasis, approximating the essentialism of natural law. While the social contract metaphor makes empirical sense on the constitutional level—after all, each citizen has a voice in a democratic process capable of changing the constitution—it represents an idealisation on the level of international decision-making.

A paternalist social contract entails its own problems. It could very well be imagined that a group of persons agree to extend certain benefits to non-members of the group. However, there are no contractual impediments that a consenting group of paternalists withdraws these benefits one day. By reconstructing human rights in this manner, two classes of human beings are introduced—group members and non-members. This violates the axiom of equality so essential for social contractarians.

Therefore, it is quite indicative that the reconstruction and justification of human rights by contractarians is regularly based on the nation state.[1581] This is fully sufficient for vindicating basic rights under constitutional law. But it entails considerable problems when it comes to vindicating human rights on a supranational or international level. Let us demonstrate these problems by putting Habermas' 'system of laws' to the test. It is a model that has been widely acknowledged for its success in

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[1580] 'Der Begriff der Menschheit schließt den Begriff des Feindes aus.' C. Schmitt, *Der Begriff des Politischen* (1963, Berlin), p. 54.

[1581] Interestingly, Rawls does not reconstruct universal human rights from a *universalist* original position, but merely explains them as expressing a minimum standard of well-ordered political institutions of all those people who are ordinary members of a just community of peoples. J. Rawls, 'International Law', in S. Shute and others (eds), *On human rights. Oxford Amnesty Lectures* (1993, BasicBooks, New York). It should be noted that Rawls derives human rights from the national level, following a two-pronged model. As shown below for Habermas' approach, this is bound to fail.

moulding universalism into a proceduralist form, well fit to represent the cutting edge of social contractarianism.

In 1992, Habermas elaborated a discourse-theoretical model of a 'system of laws', premised on equality. His starting point is the autonomous individual entering into a specific form of discourse[1582] with other individuals and thereby accepting them as legal consociates with equal rights. The institutionalised acceptance of the other participants' equality and of discourse rules enables these consociates to create legal norms. Equality in discourse will produce a number of basic norms ensuring the potential for continued participation. In the real world, those norms are reflected in basic constitutional rights. Thus, these basic rights are concurrently preconditions for the exercise of individual autonomy and a borderline for the exercise of collective autonomy.[1583]

This model distinguishes between norms of action in general and legal norms of action. The validity of the former is governed by the *discourse principle:*

> Just those norms of action are valid to which all possibly affected persons could agree as participants in rational discourses.[1584]

This principle contains the normative nucleus in Habermas' model. A precondition for its viability is that all 'persons possibly affected' have equal access to participation in discourse. Equality of the autonomous individuals is the axiomatic value, which has to be legitimated outside the discourse itself.

From this principle, Habermas derives the *principle of democracy* for the specific case of legal norms of action. This principle states that

> only those statutes may claim legitimate validity that can meet with the assent of all legal consociates in a discursive process of legislation that in turn has been legally constituted.[1585]

[1582] According to Habermas, discourse is the place for the intersubjective creation of truth. J. Habermas, 'Wahrheitstheorien', in H. Fahrenbach (ed.), *Wirklichkeit und Reflexion. Festschrift für W. Schulz* (1973, Neske, Pfullingen), p. 226.

[1583] Habermas, 1992, pp. 151 et seq.; J. Habermas, *Die Einbeziehung des Anderen* (1996c, Suhrkamp, Frankfurt am Main), pp. 160 et seq.

[1584] 'Gültig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen könnten.' Habermas, 1992, p. 138. Translation in Habermas, 1996a, p. 107.

The difference is obvious: while the discourse principle operates with a general criterion of affectedness, the democracy principle limits participation to 'legal consociates'. An empirical criterion is replaced by a formal one, tailor-made for the needs of the nation-state. As we shall see, this limitation is of major importance.

True enough, Habermas manages to merge sovereignty and basic constitutional rights in a contractarian co-originality. But it is no coincidence that he is careful to limit the applicability of his theory to constitutional law.[1586] Although basic rights enshrined in national constitutions and human rights enshrined in international instruments are sometimes congruent, their legitimation is not. While it is fully possible to track the former to a contractarian original discourse of individuals, the latter are negotiated by governments and approved by national constituencies. And governments as well as parliaments are, after all, the representative of particularist communities of legal consociates. It is quite understandable that such a representative cannot stipulate universalist norms on the same footing as constitutional rights, which are stipulated by legal consociates. This would undermine the very exclusion of non-consociates so vital for the constitution of the state.[1587]

The problem is a serious one indeed: deriving universalist human rights via particularist communities generates control by the latter over the former. The particularist community would be automatically endowed with a veto, which could be activated when universalist human rights ran counter to the interests of the said community. Put briefly, in universal human rights, the norm creators and the norm addressees are not

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[1585] '[...] daß nur die juridischen Gesetze legitime Geltung beanspruchen dürfen, die in einem ihrerseits rechtlich verfaßten diskursiven Rechtssetzungsprozeß die Zustimmung aller Rechtsgenossen finden können.' Habermas, 1992, p. 141. Translation by this author. For criticism of Habermas' approach *see*: R. Alexy, 'Basic Rights and Democracy in Jürgen Habermas's Procedural Paradigm of the Law', 7 *Ratio Juris* 227 (1994); O. Weinberger, 'Habermas on Democracy and Justice. Limits of a Sound Conception', 7 *Ratio Juris* 239 (1999); I. Maus, 'Freiheitsrechte und Volkssouveränität', 26 *Rechtstheorie* 507 (1995).

[1586] In this context, it should be recalled that Habermas' discourse principle is much more radical than his democracy principle. While the former gives all those possibly affected by the stipulation of a (moral) norm a place in discourse, the latter only admits legal consociates to the stipulation of (legal) norms. Habermas, 1992, p. 138 and p. 141.

[1587] Determining the group of consociates and thus the members in discourse also determines the visibility of interests in the process of norm stipulation. Non-consociates have not participated in the process of reciprocal recognition. As they lack the leverage of reciprocity, there is no reason to take their interests into account in discourse.

necessarily identical.[1588] This divergence between rulers and ruled is the reason why democracy theory is capable of *explaining* legitimacy deficits inherent in asylum law[1589], but, simultaneously, remains incapable of *justifying* the equal enjoyment of human rights on the universal level.[1590] The former strikes against the legitimacy of particularist sovereignty, and the latter against the legitimacy of universally valid human rights law.

For the universalist supporter of human rights, the consequences are devastating. The explanation of legitimacy deficits only results in an argument de lege ferenda. The justification deficit, however, is not a moral, but a legal one. If this deficit cannot be filled, according human rights to non-nationals remains an unjustified legal anomaly.

Now, Habermas is not the only thinker who has contemplated the issue of rights. What marks him out is an ambition to ponder not only the moral[1591], but also the legal justification of basic rights. Probably more

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[1588] The identity of rulers and ruled is a classic definition of democracy, embraced inter alia by Carl Schmitt. See note 1551 above.

[1589] See Noll, 1997b, pp. 429–51.

[1590] It is significant that those parts of Habermas' essay 'Kampf um Anerkennung im demokratischen Rechtsstaat' dealing with the asylum issue remain exceptionally feeble (J. Habermas, 'Kampf um Anerkennung im demokratischen Rechtsstaat', in *Die Einbeziehung des Anderen* (1996b, Suhrkamp, Frankfurt am Main), pp. 264–76). Habermas rightly points out that an analysis of migration and asylum issues must embrace not only the perspective of the inhabitants of prosperous and peaceful societies, but also that of the would-be migrants (Habermas, 1996b, p. 269). While he asserts moral claims to immigration in a number of cases, the question of legal claims remains unanswered. Fully in line with his discourse principle, Habermas suggests that immigration must be subject not only to the economic needs of the host country, but to criteria, which are 'acceptable from the perspective of all persons involved' (Habermas, 1996b, p. 271). This begs the question where the process of discursive will-formation spawning such criteria takes place. Both the question on a legal right to immigration and on the forum for the production of legal norms on immigration must remain empty, as long as the justification of human rights is limited to the setting of the nation-state. For all its merit, Habermas' theory does not equip him with the tools to justify transnational rights or transnational claims of inclusion.

[1591] The literature on moral justification of human rights is vast. For an overview of different approaches, see J. S. Shestack, 'The Philosophic Foundations of Human Rights', 20 *Human Rights Quarterly* 201 (1998). For an attempt to justify the principle that all human beings equally have certain rights, see A. Gewirth, *Human Rights. Essays on Justification and Applications* (1982, University of Chicago Press, Chicago/London). However, moral and legal justification are two different things, as the incongruence between the discourse principle and the principle of democracy poignantly illustrate. Fully acknowledging the importance of moral justification, its role is limited to support arguments de lege ferenda only.

than others, he has succeeded in pushing back metaphysics in justification, and replacing it with a far-reaching proceduralisation. It is a serious drawback for the universalist cause that such a model, seemingly fit for a world of diverse value communities, cannot be transferred to a supranational or universal level.[1592] As far as we can see here, this limitation of the Habermasian approach is inherent in *any* approach justifying human rights through the intermediary of the state.[1593] Given this theoretical vacuum in the universalist reconstruction of human rights, there is a temptation to conclude that states always retain a veto on human rights of non-citizens.

13.1.4 Indeterminacy: The Particularist's Last Trump?

The exploration of meta-legal arguments has led us full circle. We recall that both essentialist-particularist and contractarian-universalist approaches were at pains to explain and justify the patterns of inclusion and exclusion in the integrationist environment of the European Union. Our further inquiry forced us to witness the implosion of a Schmittian approach into a tautology. Finally, the contractarian-universalist model

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[1592] Habermas himself is fully conscious of the demos lacuna in the rational reconstruction of constitutional communities. 'In der rechtlichen Konstruktion des Verfassungsstaates besteht eine Lücke, die dazu einlädt, mit einem naturalistischen Begriff des Volkes ausgefüllt zu werden. In normativen Begriffen allein läßt sich nämlich nicht erklären, wie sich die *Grundgesamtheit* jener Personen, die sich vereinigen, um ihr Zusammenleben mit Mitteln des positiven Rechts legitim zu regeln, *zusammensetzen* soll. Normativ betrachtet sind die Grenzen einer Assoziation freier und gleicher Rechtsgenossen kontingent. Da die Freiwilligkeit des Entschlusses zur verfassungsgebenden Praxis eine vernunftrechtliche Fiktion ist, bleibt es in der Welt, die wir kennen, dem historischen Zufall und der Faktizität der Ereignisse [...] überlassen, wer die Macht gewinnt, die Grenzen einer politischen Gemeinschaft zu definieren.' Habermas, 1996c, pp. 139–40. ['The legal construction of the constitutional state hosts a lacuna, inviting to be filled with a naturalist concept of "people". To be sure, it is not possible to explain solely in normative terms, how the *basic community* of persons, who unite to regulate their communal life legitimately by means of positive law, should be *composed*. Regarded in a normative fashion, the boundaries of an association of free and equal legal consociates is contingent. As the voluntariness of a decision on the practice stipulating a constitution remains a fiction of rational legal theory, it is—in the world that we know of—for historical accident and the facticity of events [...] to decide, who is going to gain the power to define the borders of a political community.' Translation by this author.]

[1593] See an earlier remark on John Rawls, note 1581 above.

was ultimately incapable of justifying human rights on the global level, transforming any inclusion of non-nationals to a mere question of benevolence. So far, we can state that there is neither a presumption for particularism, nor a presumption for universalism. There is but a theoretical vacuum and empirical material supporting and undermining both the particularist and the universalist positions. Mouffe describes this stalemate as a paradox:

> The democratic logic of constituting the people and inscribing rights and equality into practices is necessary to subvert the tendency toward abstract universalism inherent in liberal discourse. But the articulation with the liberal logic allows one to constantly challenge, through the reference to humanity and the polemical use of human rights, the forms of exclusion that are necessarily inscribed in the political practice of instituting rights and of defining "the people" who are going to rule. [Footnote omitted.][1594]

While refuting Schmitt's pessimism with regard to the liberal variety of democracy, she warns:

> However, we should not be too sanguine about its prospects either. No final resolution or equilibrium is ever possible between its conflicting logics and there can only be temporary, pragmatic, unstable, and precarious negotiations of their tension.[1595]

The prospect of a constant renegotiation of the equilibrium between universalists and particularists may be appealing for some. It strikes heavily against a central myth of international law—the production of predictability. As Koskenniemi stated at the end of the eighties:

> The idea of one coherent explanation of the character of global social life and a coherent programme for world order needs to be rejected. People act under varying contextual constraints and their ideal social arrangements are dissimilar—indeed conflicting. There is no "deep-structural" logic or meta-narrative (of history, economics, etc.) to which we could refer to wipe existing conflict

[1594] Mouffe, 1998, p. 165.

[1595] Mouffe, 1998, p. 165.

> away. Recourse to such narrative can only appear as power disguised as knowledge.[1596]

A few years later, Gaete added that 'judicial disagreements—which express the diversity of views on the complex social issues that we call today "human rights"—are unresolvable'.[1597] This allows him to conclude that 'human rights decisions are grounded in a [...] rhetoric of reason which conceals its decisionistic (its will-based rather than reason-based) aspects'.[1598]

However, the sceptics to modernism are not out on a mere demasking mission. The false myth of determinate human rights produces adverse effects. Koskenniemi warns that 'the liberal principle of the "priority of the right over the good" [footnote omitted, GN] results in a colonization of political culture by a technocratic language that leaves no room for the articulation or realization of conceptions of the good'.[1599] And Gaete suggests that

> political struggles do not require the complex theoretical apparatus based on a juridical theology of man and a belief in the sovereignty of abstract master principles that we have inherited from the 18th Century. We may need forms of organisation and discipline that have proved to be useful and are systemically indispensable, but we no longer need to believe in the stories we have told ourselves for centuries. And is it [sic] not this ironical distance precisely the message, the inheritance of modernity?[1600]

Against Gaete, one could hold Žižeks rhetorical question: what if that distance, far from threatening the system, precisely signifies the most

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[1596] Koskenniemi, 1989, p. 500.

[1597] R. Gaete, *Human Rights and the Limits of Critical Reason* (1993, Dartmouth, Aldershot), p. 98.

[1598] Gaete, 1993, p. 106.

[1599] M. Koskenniemi, 'The Effect of Rights on Political Culture', in P. Alston (ed.), *The European Union and Human Rights* (1999, OUP, Oxford), p. 1.

[1600] Gaete, 1993, p. 172.

extreme form of conformism, as the normal functioning of the system necessitates the cynical distance to it?[1601]

Transposed into this context, indeterminacy is no longer a technical problem arising due to the insufficiency of formalism. It strikes against the function of law as a system capable of mitigating social conflicts by rational means. If law has no answer, power has. Beyond technique, there is but might—either unconcealed, or cloaked in the disguise of the rational meta-narrator, as described by Koskenniemi.

For the universalist's cause, this dead heat appears to be more devastating than for the particularist's. In reality, it could be identical with defeat. If the world cannot be rationally explained, a free interplay of forces will prevail. Far from being an exclusive quarrel between different strands of international lawyers, this issue forms part of the grand polemic between modernists and their sceptics, severed rather than united by the label of 'post-modernists'. Referring to Derrida's conception of law as 'that which we do not have to touch'[1602], Salter suggests that '[m]ysticism of this kind [...] is rarely entirely innocent of questionable political implications. It can, for instance, imply that there is a duty upon citizens to abandon any critical attitude to questions of law's legitimacy, and instead to respect the authority of law simply because it has an inaccessible and unknowable source'.[1603]

While Salter is certainly right to warn against quasi-essentialist regression inherent in certain figures of postmodernist thought, he cannot wind himself out of the conundrum of axiomatic thinking. Given the difficulties of justifying human rights on a universal level, modernists and human rights lawyers ask us for something not so different: to respect the authority of international human rights, *although* it has an inaccessible and

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[1601] 'Was, wenn die Distanz, weit davon entfernt, das System zu bedrohen, gerade die äußerste Form des Konformismus bezeichnet, da das normale Funktionieren des Systems die zynische Distanz zu ihm notwendig macht?' S. Žižek, 'Immanuel Kant als Theoretiker des Bösen', in F. Rötzer (ed.), *Das Böse. Jenseits von Absichten und Tätern oder: Ist das Böse ins System ausgewandert?* (1995, Kunst- und Ausstellungshalle der Bundesrepublik Deutschland GmbH, Bonn), p. 147.

[1602] J. Derrida, 'Ends of Man', in *Margins of Philosophy* (1982, Harvester, Brighton), p. 128. Salter acknowledges that Derrida's later writings underscore the importance of addressing legal issues at large, and specifically civil rights. M. Salter, 'The Impossibility of Human Rights Within a Postmodern Account of Law and Justice', 1 *Journal of Civil Liberties* 29 (1996), pp. 43 and 52.

[1603] Salter, 1996, p. 47.

unknowable source. And sceptics such as Gaete ask us to struggle with weapons we have precisely unmasked as manipulative.

The oscillation of oppositions continues: indeterminacy is in itself a narrative. Even though it may reaffirm power *pro tanto*, as feared by modernists, it endorses simultaneously *the very possibility* of a meta-narrative. In doing so, its posture of agnosticism falters, and it ultimately affirms universality. Thus, the indeterminacy critique cannot perform the functions of a trump, as it only purports to *explain*, but not to *justify* power. Salter simply overstates its dangers.

Taking a step backwards, would it be permissible to describe the debate between modernists and sceptics as performing just another circle, connecting the twilight of the late twenties and a 'twilight' fin-de-siècle?[1604] Consider Carl Schmitt's apodictic parallel between jurisprudence and theology, drawing on Leibniz: 'Alle prägnanten Begriffe der modernen Staatslehre sind säkularisierte theologische Begriffe'.[1605] He professes that

> die Idee des modernen Rechtsstaates setzt sich mit dem Deismus durch, mit einer Theologie und Metaphysik, die das Wunder aus der Welt verweist und die im Begriff des Wunders enthaltene, durch einen unmittelbaren Eingriff eine Ausnahme statutierende Durchbrechung der Naturgesetze ebenso ablehnt wie den unmittelbaren Eingriff des Souveräns in die geltende Rechtsordnung.[1606]

But, different from Gaete, Schmitt does not reject the metaphysical dimension of law. The miracle is not banned. In the legal arena, it takes on the form of the exceptional[1607], and Schmitt makes it the centrepiece of

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[1604] The last section of Gaete's opus is entitled 'In the twilight'. Gaete, 1993, p. 171.

[1605] ['All concise concepts of the modern theory of state are secularised theological concepts.' Translation by this author.] C. Schmitt, *Politische Theologie*, 4 ed. (1985, Duncker & Humblot, Berlin), p. 49.

[1606] ['the idea of the modern *Rechtsstaat* imposes itself together with deism, with a theology and a theory of metaphysics, which expels the miracle from the world, and which declines the exceptional breaking of natural laws by means of an immediate intervention—contained in the concept of the miracle—precisely as it declines the immediate intervention of the sovereign into the valid legal order.' Translation by this author.] Schmitt, 1985, p. 49.

[1607] Ibid.

his doctrine of the state. Where the fin-de-siècle sceptic Gaete merely reverts to a diffuse 'irony', Schmitt is prepared to go a step further.

Let us walk the road together with him a while. Let us accept the meta-legal stalemate between universalism and particularism, and acknowledge that in much of the law we have looked into, might masquerades as right. If this is normal, let us now look into the exceptional. But we shall not pursue a Schmittian agenda in doing so. Quite the opposite—we shall attempt to track the manifestations of universalism in the exceptional.

13.2 The Anomaly of Transnational Human Rights

This brings us back to the empirical level once more. Given our earlier explorations of the insufficient legitimation of international law as well as the indeterminacy critique, one might expect non-nationals to be excluded outright from any protection under human rights law. But the actors of international law have not opted for such a radical solution. Thus, in some specific constellations, the equal enjoyment of rights and freedoms is assured to nationals and non-nationals alike, overriding the state right of exclusion.

1. If human rights law were subordinate to the sovereign right to exclude, rights catalogues in constitutions and in international instruments would have been exclusively reserved for nationals of the single State Party concerned. While catalogues do make distinctions on the basis of nationality, these are normally reserved to participatory and electoral rights—e.g. the right to vote. In international human rights treaties, the scope of application is usually limited by the territory and by the jurisdiction of the contracting party. The ECHR goes even further, in that its scope is coextensive with the jurisdiction of the contracting party.[1608] This allows for a considerable inclusion of claims by non-nationals.
2. The case law of the ECtHR on the prohibitions of refoulement inherent in the ECHR and its Protocols cannot be explained without resorting to transnationally applicable rights. As the ECtHR has made clear, the exclusionary argument of immigration control is not a

[1608] Art. 1 ECHR.

trump capable of overriding human rights claims by non-nationals. The practical consequences of this argumentation have been accepted by the Contracting Parties to the ECHR, who regularly comply with the ECtHR's requests of interim measures and inhibit removal while cases are pending before the ECtHR.

3. Refugee law at large provides another counter-argument. Given certain preconditions, aliens may not be removed; they enjoy certain minimum rights, although they may never have been legally admitted by the host state.

In the areas above, we may speak of a transnational equality of nationals and non-nationals.[1609] Put succinctly, we are confronted with an empirical fact that represents a theoretical anomaly. Given the incapacity of advanced constructivist theories to justify transnational equality, it is all the more surprising that norms demanding such equality actually exist. It appears that universalism is in urgent demand of a beefed-up theory of transnational equality, in line with the realities of international human rights law.

Now, one could denounce much of this fragmented equality as window-dressing. However, when it comes to the ECtHR, right has been joined by a certain measure of might. In the following section, we would like to re-deploy discourse theory to explain what the Strasbourg Court is doing when it deals with cases on extraterritorial protection.

13.3 Strasbourg and the Exceptional: Legitimation in the Courtroom?

'Souverän ist, wer über den Ausnahmezustand entscheidet'[1610]—sovereign is he who decides the exceptional. With the following, we certainly do not wish to declare the inclusion of non-communitarians as an exceptional phenomenon in the EU. Our point is another one—it relates to the locus of decisions on inclusion. The ultimate decision is made not by the

[1609] The list of transnationally protected rights could be further prolonged. For an overview, see M. Gibney, K. Tomasevski, and J. Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights', 12 *Harvard Human Rights Journal* 267 (1999).

[1610] Schmitt, 1985, p. 11.

national constituencies, the governments or the Council, but by the European Court of Human Rights. In practice, the question 'who is the demos' may find its answer in the transit zones of Schiphol airport, at the Oder river and in the coastlands of Gallipoli in Southern Italy. The answer on the legality of this practice is situated in Strasbourg.

In issues of extraterritorial protection, sovereignty rests with the Court. Indeed, the extent of positive obligations to accord extraterritorial protection is a question of the exceptional in its Schmittian sense. The exceptional 'cannot be subsumed, it shuns a general formulation'.[1611] This fits well with the environment in which the Court's decision are placed. Let us briefly recapitulate. The Court's competencies are limited to producing a norm for the single case only, lacking any general *portée*. As the Court readily reiterates in its judgments, there is no right to immigration under the ECHR, and states maintain the right to control the composition of their population. Any deviations from this orthodoxy are labelled as 'exceptional' by the judges. And that term is fully adequate. After all, with *Soering*, the Court had empowered itself to judge on territorial access. To be sure, our theoretical explorations in chapter 11 did track the existence of a wide margin of subjectivity in the single case. The extent of protection under each right would not only hinge on its precise formulation, but also on an assessment of risk and predictability. Formalism had come to an impasse, and considerable discretionary powers would be vested with the Strasbourg judges. 'The exceptional is what cannot be subsumed; it shuns a general formulation, but, simultaneously, it divulges a specific-juristic element of form, the decision, in absolute purity.'[1612]

Yet one might argue that any case is exceptional if it disallows a purely formal subsumtion, and requires the judge to make a subjective input to find the right judgment. Are not many legal cases structured like that, at least the so-called 'hard cases'? Granting that hard cases on extraterritorial protection share the necessity of subjective input with ordinary hard cases, it must be underscored that the former turn not only on the right interpretation of the right norm, but concurrently on the inclusion in the community of 'legal consociates'. The latter claim can be validly described

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[1611] 'Die Ausnahme ist das nicht Subsumierbare; sie entzieht sich der generellen Fassung, aber gleichzeitig offenbart sie ein spezifisch-juristisches Formelement, die Dezision, in absoluter Reinheit.' Schmitt, 1985, p. 19. [Translation by this author].

[1612] See note 1611 above.

as 'exceptional', and the choice of this term by the Court must be endorsed.

To fully appreciate the difference, we are compelled to leave the Schmittian perspective here, and return to the explicatory tool-box of discourse-theory. Let us start out with a provocation. In matters of extra-territorial protection, Strasbourg is the sole forum producing outcomes that are formally binding and substantially legitimate.[1613]

This may seem absurd. To some, the self-empowerment of the Strasbourg judges qualifies as highly undemocratic.[1614] For all that is certain, they are not elected by the citizens of the Member States of the Council of Europe. Neither is there a mechanism for ensuring that their judgments reflect the political preferences of these citizens. But this criticism reduces democracy to a pinball game in a haphazardly chosen machine.

As we saw above, Habermas has proposed two principles under which moral and legal norms respectively are to be regarded as possessing legitimate validity. Now, it is fairly uncontroversial that legal norms impacting on extraterritorial protection do not satisfy the principle of democracy. While affected by such norms, protection seekers are not 'legal consociates' and do not participate in processes establishing acceptability.[1615] One may conclude that the corpus of norms impacting on extraterritorial protection is not democratically legitimised. From a proceduralist perspective, this is due to the initial exclusion of non-consociates from the process of norm-creation. From a substantial perspective, this is due to the inequality between human beings that such

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[1613] Provided one accepts the following argumentation, the CAT Committee would also qualify as producing legitimate outcomes. However, the views of the Committee are not legally binding upon respondent states.

[1614] Maassen criticises the ECtHR for undermining removal policies which have been decided by democratically elected legislators in the Member States of the Council of Europe. Maaßen, 1997, p. 130, where he accuses the European organs to 'estime democratic legitimation to be something which can be foregone'. For a counter-argument, see Noll, 1998, p. 378.

[1615] First, they have been excluded from their communities and, as a consequence, from participation in norm-creating discourse in their country of origin. This exclusion is precisely what endows them with the quality of 'refugees' or 'persons in need of protection'. Second, as they lack its citizenship, they are not participating in norm-creating discourse of their host state. For a comprehensive argumentation, see Noll, 1997b, pp. 450–1.

exclusion implies. As we shall see, the legitimacy deficit of the drafting process shall resurface in the Strasbourg courtroom.

However, the drafting of norms is one matter, and their application quite another. The test-case of a 'system of laws' is the courtroom. Here, law shall prove its capacity to stabilise 'counterfactual expectations' in a coherent manner. Legal norms legitimised by a democratic procedure are at the disposal of judges, and reduce the complexity of the case. But reduction is not complete. As we have seen, norms can be ambiguous, and interpretations may end up in a state of indeterminacy. Here Habermas once more deploys the discourse metaphor. He frames courtroom proceedings as a structured communication between the two disputing parties and the judge as a representative of those legal consociates that are not taking part in the dispute.[1616] Thus, law stretches over two forms of discourse—a discourse of justification endowing a specific legal norm with legitimacy, and a discourse of application endowing a specific legal outcome with legitimacy. In both discourses, legitimacy is ultimately produced by the transformation of participant perspectives. The communication taking place in discourse shall enable any participant to take the perspective of any other participant. This simplifying reminder will suffice for our needs.

When we compare a case on extraterritorial protection before the ECtHR with an ordinary case on, say, a litigious claim, involving two citizens and a domestic court, stark differences appear. First, we have already stated that the Strasbourg case is on inclusion. This means, more specifically, that discourse not only involves the citizenry of Contracting Parties as 'legal consociates', but also a non-consociate, namely the alien claimant. Thus, cases on extraterritorial protection assemble consociates and non-consociates alike. Second, the invoked norms lack democratic legitimacy, as expounded earlier. The reduction of complexity that the judge in ordinary civil litigation may rely on is greatly reduced. To be sure, the norms are formally valid—even the claimant invokes them—but the presumption of their material correctness is reopened to doubt. In the end, the Strasbourg judge is doubly tasked. She must not only guide the creation of determinacy in an application discourse on the rights enshrined in the ECHR, but also compensate for the lack of legitimacy of the corpus of norms impacting on extraterritorial protection. Thus,

[1616] Habermas, 1992, p. 280.

Strasbourg offers a forum for staging a justification discourse with a much higher degree of inclusion than its national counterparts.

This compels us to a seemingly paradoxical conclusion. Proceedings in Strasbourg cases offer the only option for an inclusive discourse between the protection seeker and the legal consociates holding citizenship in a European host state. It follows that the judgments of the ECtHR are democratically *better* legitimised than the laws of the domestic legislator, or, for that matter, of the EC law and Union law legislator. The assertion that 'judicial review is a deliberately countermajoritarian institution'[1617] attains a new dimension in the Strasbourg context. The majority of particularists has only one voice of two in the Strasbourg courtroom.

What makes ECtHR cases different from cases on extraterritorial protection in domestic courts? It is the representation of discourse participants by the judges. While a domestic court, neutral as it should be, ultimately is an organ of the nation state into which inclusion is sought, Strasbourg is located on a superior layer, representing a regional agglomeration of nation states. Strasbourg judges do not defend basic rights flowing from a particularist social contract underlying the nation state, but rather human rights flowing from an international instrument. Let us grant that the ECtHR still depends on the endorsement of Contracting Parties to the ECHR—legally, fiscally and, to a degree, even politically. The decisive difference is that the degree to which it is representative cannot be reduced to the single nation state into which entry is sought. Strasbourg is much more remote from the domestic immigration authority denying entry than a domestic court is. With a view to the EU acquis, it merits recalling that the Strasbourg judges come from a group of states much wider than the EU. In theory, this secures the representation not only of host countries, but also of transit countries, and a minority of sending countries.[1618]

[1617] M. J. Perry, *Morality, Politics and Law* (1988, Oxford University Press, New York), p. 149.

[1618] The representativity argument applies to a higher degree to the CAT Committee. In contradistinction to the regionally confined ECHR, CAT is a universal instrument, and all parts of the world are represented in the CAT Committee. However, we recall that the scope of CAT is much more narrowly circumscribed in matters of extraterritorial protection than the scope of the ECHR. This restricts not only the number of cases, but also the reach of application discourses before the CAT Committee. Furthermore, in contradistinction to the ECtHR, the CAT Committee cannot issue decisions binding upon respondent states.

This is not to praise the Strasbourg court, or, for that matter, its case law. Nor do we suggest that Strasbourg is performing a full-fledged compensation for the legitimacy deficits inherent in norms impacting on extraterritorial protection, and that there is no reason to worry. The task of this section was merely to recollect the multiple legal conundrums of protective norms in one location. Strasbourg will remain the focal point for transforming these conundrums into binding outcomes endowed with a provisional legitimacy. Let us revert once more to Mouffe:

> The logic of democracy does indeed imply a moment of closure which is required by the very process of constituting the "people". This cannot be avoided, even in a liberal democratic model; it can only be negotiated differently. But this can only be done if this closure and the paradox that it implies are acknowledged.[1619]

This is probably truly exceptional about Strasbourg—it offers a mechanism for bringing a bantam bit of transparency into the construction of closure. And, indeed, it seems to be the only mechanism offering a public arena for staging the paradoxical demands of liberal democracy.

[1619] Mouffe, 1998, p. 164.

14 Negotiating Asylum: A Summary of Observations

UNIVERSALISM AND PARTICULARISM are two poles between which migration and asylum law is situated. While the universalist orders the world along the lines of transnational equality and strives for the global realisation of human rights, the particularist insists on the freedom of delimited communities and the right of state populations to exclude outsiders. Both paradigms are axiomatic, resisting rational reconstruction.

MIGRATION CONTROL AND EXTRATERRITORIAL PROTECTION can be described from two perspectives. From the state perspective, the availability of extraterritorial protection largely depends on the way its costs are distributed. Cost distribution, and therefore the design of protection systems, is affected by three determinants: the number of beneficiaries of extraterritorial protection present on the territory of the host state, the level of individual rights accorded to these beneficiaries, and the degree of burden-sharing among states. By means of various strategies, host states seek to control these three determinants.

From the perspective of the protection seeker, many of the legal devices used by states to regulate protection systems appear as hurdles on the track to safety. They can be structured in three categories ranging

from norms impacting on access to territory, to full-fledged procedures, to protection. Protection seekers have developed various counter-strategies to circumvent normative hurdles erected by states.

As state strategies and protection seeker strategies evoke and affect each other, we are faced with a loop, whereby governmental efforts at control and the individual quest for extraterritorial protection feed back into one another. To this loop linking protection seeker and potential host state, the degree of burden-sharing among potential host states must be added. This brings in a second feedback loop, where non-co-operation among states yields a spiral of restriction, and co-operation produces openness.

EUROPEAN INTEGRATION in the area of immigration and asylum issues suffers from a dual fragmentation. One is of an institutional, the other of a normative nature. Within the institutional world, a slow move towards limited supranationalism is taking place. The Amsterdam Treaty has made binding EC instruments available in the field of asylum and migration and has opened a window for judicial review by the ECJ. However, the perseverance of the veto and a variety of formal opt-outs hamper coherence and harmonisation. In essence, the area of migration and asylum remains entangled in a strait-jacket of intergovernmental decision-making, at least for the duration of the transitional period. While Amsterdam merged the Schengen Group and its achievements into the Union framework, fragmentation was exacerbated by the variable geometry among Member States and the association of Non-Member States to parts of the acquis. Finally, the enlargement process has significant potential for intensifying the existing tendency toward fragmentation.

The existing acquis on asylum and migration is heavily burdened by normative fragmentation. Fourteen years of co-operation yielded only four major instruments of binding nature, all of which seek to control the protection seeker's access to territory: the 1990 Schengen and Dublin Conventions, the 1995 Visa Regulation and the 1997 Spanish Protocol. The discussion of protection-related issues by EU institutions did not yield a single binding instrument. The divide between protection and control is further widened by the schedule set for future measures in the field of asylum and immigration. Both the Amsterdam Treaty itself and the Action Plan drawn up by the Council prioritise mostly control-oriented measures, according control a 'first mover's' advantage over

protection. This gives leeway to a market dynamics, encouraging Member States to compete for increasingly restrictive solutions.

The EU lacks a sufficiently comprehensive and predictable BURDEN-SHARING MECHANISM to inhibit the deflection of protection seekers or the downgrading of their rights. Article 63 TEC exempts the issue of burden-sharing from the obligation to adopt measures under the transitional period. As the outcome of future burden-sharing deliberations remains uncertain, a rational Member State will try to control future risks by minimising the number of beneficiaries of extraterritorial protection as well as the level of rights accorded to them.

Statistics indicate that the Dublin Convention stabilises an inequitable distribution of protection seekers among contracting States. In three associated countries, the number of asylum seekers is on the rise, while recognition rates are extremely low. It is reasonable to conclude that such restrictiveness is causally linked to burden concentration under safe third country arrangements.

As equitable burden-sharing is systemically blocked by the Dublin Convention and other safe third country-arrangements, there are only limited choices left for Member States and candidate countries that fear overburdening. The choices are either to block the access of protection seekers to their territory or to minimise protection obligations by curtailing the level of rights enjoyed during and after procedure, inter alia by adopting restrictive interpretations of existing protection categories and by avoiding the introduction of additional protection categories.

AN INTERPRETATION OF RELEVANT NORMS of international law along the prescriptions of the Vienna Convention was necessary to prepare for a legality analysis of central instruments of the acquis. First, it emerged that Article 14 UDHR, Common Article 3 and Article 32 FC did not entail any legally binding rights to extraterritorial protection. Second, in situations where the claimant is situated within the territory of a potential host state or at its border, Article 33 GC, Article 3 CAT, Article 45 FC, Article 3 ECHR and Article 7 ICCPR oblige states to refrain from refoulement. Third, in situations where the claimant is situated elsewhere, the ECHR and its Protocols remain the sole

instruments on which a claim for extraterritorial protection can be based. Provided the preconditions for the applicability of one or more of the rights enshrined in the ECHR or its Protocols are fulfilled, a Contracting Party is not only legally required to mete out protection, it is also first and foremost obliged not to obstruct access to its territory, e.g. by demanding an entry visa. Given that visa requirements are the prime tool of regulating access to extraterritorial protection in contemporary Europe, this outcome should have considerable practical repercussions on regional asylum and migration policies. Fourth, no determinate conclusion could be reached on an implied right to immigration under Article 12 ICCPR.

POSITIVE OBLIGATIONS are the source of extraterritorial protection under the ECHR and its Protocols. In contradistinction to other explanations, the model of positive obligations developed in this work avoids imposing artificial hierarchies on the rights catalogue of the ECHR. Thus, it is better able to explain the case law of the European organs, especially with regard to cases dealing with potential human rights violations by non-state agents.

In principle, any human right enshrined in the ECHR or its Protocols could entail eligibility for extraterritorial protection. Whether it actually will depends on an in casu assessment. First, the extent of positive obligations under the invoked right has to be identified, making recourse to its inherent risk requirements and, second, it has to be determined whether the facts of the case fall within the extent of positive obligations. The facts of the case are a composite of two elements. The first relates to the degree to which the invoked right is intruded into upon return, while the second consists of the degree of predictability that this intrusion will materialise.

THE VISA REGULATION, the Dublin Convention and the Spanish Protocol *can* be interpreted and applied in conformity with international law, but such interpretation and application strips these instruments of their central control functions.

In light of the ECHR, visa requirements under the Schengen acquis and the EU Visa Regulation must be waived if they inhibit single individuals from reaching territories where they can find protection. However, the

question whether visa requirements as such represent discriminatory treatment of the nationalities subjected to them could not be answered in a determinate manner.

Member States must abstain from removals under the Dublin Convention, if the receiving Member State upholds an interpretation of international legal norms prohibiting refoulement, which deviates from an interpretation of such norms under the Vienna Convention. By way of example, it could be shown that Member States must refrain from removing protection seekers to other Member States who deny protection from persecution of third parties in violation of the GC, CAT or ECHR.

Finally, conformity with prohibitions of discrimination in international law requires Member States to disregard the central element of the Spanish Protocol, namely the presumption that applications by Union citizens are manifestly unfounded. This conclusion largely empties the Spanish Protocol of its normative content. What remains is a mere reporting obligation to the Council, whenever applications by Union citizens are received by a Member State.

THE INDETERMINACY engulfing four issues—the existence of an obligation to share burdens and of a right to immigration under Article 12 ICCPR, the precise extent of positive obligations under the ECHR and its Protocols, and whether visa requirements represent a form of collective discrimination—cannot be dissolved by formal means such as interpretation or discrimination arguments. It is not incidental that legal indeterminacy runs precisely along the same fault lines that sever universalists from particularists in the realm of political theory.

International law proved not to hold an inherent presumption for either particularism or universalism. An exploration of two theoretical models—Schmitt's distinction between friend and foe, and Habermas' reconstruction of a system of laws—suggested that both added explicatory value, but were unable to justify either exclusionary freedom or inclusionary equality. The indeterminacy critique, on the other hand, could not liberate itself from the foundationalism it set out to censure, and risks affirming particularist structures.

A discourse-theoretical analysis of the functions exercised by the ECtHR in cases on extraterritorial protection suggested that the Court offers the only forum in which the inclusionary conflict between

universalism and particularism—indeed, the 'paradox of democracy'—can be negotiated with a legally binding outcome.

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