Part 3: Safe pathways to protection in the light of the responsibility framework

The following chapters analyse and assess safe pathways to protection in light of the responsibility framework. Chapter 11 begins with an assessment of the 'asylum visa' as individual pathway to protection. Chapter 12 addresses resettlement as permanent quota-based scheme on the rise in the EU. Chapter 13 focuses on *ad hoc* humanitarian admission schemes. Finally, Chapter 14 places the focus on sponsorship schemes. With a view to considering the principle of external responsibility for granting protection, the principle of internal responsibility for the security and well-being of States, as well as the principle of inter-State responsibility, safe pathways are promising: they offer options of safe as well as regulated arrival in receiving States. Policy recommendations on safe pathways therefore point to several advantages, from enhanced protection of individuals to better security control, good prospects of integration and international solidarity.[404]

However, there are also critical voices. Depending on their implementation, safe pathways have been criticised for entailing a risk of 'neo-liberalization of refugee policies'[405] and 'containment of refugee flows',[406] or seen as 'founded on the sovereign discretion of the Member State concerned, rather than on an understanding that recognises the legal force of the protection rights of individuals'.[407] All safe pathways discussed hereafter are visa schemes and thus measures of migration control. Offering extraterritorial access to protection therefore means externalising protection responsi-

404 See for instance European Union Agency for Fundamental Rights, *Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox* (2015), available at https://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf; Ray, 'Optimal Asylum', 46 *Vanderbilt Journal of Transnational Law* (2013) 1215.

405 Christoph Schwarz, 'German Refugee Policy in the Wake of the Syrian Refugee Crisis' in Elif Aksaz and Jean-Francois Pérouse (eds), *'Guests and Aliens': Re-Configuring New Mobilities in the Eastern Mediterranean After 2011 – with a Special Focus on Syrian Refugees* (2016), at 4.

406 Tometten, 'Resettlement, Humanitarian Admission, and Family Reunion: The Intricacies of Germany's Legal Entry Regimes for Syrian Refugees', 37(2) *Refugee Survey Quarterly* (2018) 187.

407 Moreno-Lax, *supra* note 153, at 41.

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bilities to some extent, which raises legal and practical issues.[408] Against this backdrop, the following assessment allows to evaluate safe pathways by identifying the consequences for the responsibility principles, depending on the pathway and its implementation. The overall aim is to assess the effect of each pathway on the triad of responsibility principles. The findings will allow for conclusions on the effect of safe pathways to protection – or their specifics of implementation – on the asylum paradox.

11 The asylum visa

This chapter focuses on the 'asylum visa' as *individual* pathway to protection. The requirement of a visa as entry authorisation is a major obstacle for protection seekers to safely access EU territory and is thus a powerful tool of migration control. This chapter flips the coin, considering visas as a protective tool. After delimiting the term 'asylum visa' (11.1) and discussing the role of embassies in granting protection (11.2), this chapter will address the legal context in the EU (11.3), outlining relevant legal grounds and existing State practice on granting 'humanitarian visas'. The chapter will further discuss the decisions of the CJEU and the ECtHR in 'asylum visa' cases (11.4), as well as a proposal for an 'asylum visa' scheme at EU level (11.5). Finally, the responsibility framework outlined in Part 2 will structure the analysis and assessment of this pathway (11.6), to reveal the tensions and trade-offs between the three responsibility principles (11.7.). The chapter concludes on the effects an asylum visa can have on the asylum paradox (11.8).

11.1 Definition: clarifying the term 'asylum visa'

The term 'asylum visa' is used in the following to describe a permanently implemented visa scheme, with the purpose of granting access to a State's territory, to then undertake a national (territorial) asylum procedure, after a preliminary assessment of the claim by an embassy of an EU Member State.

408 Pauline Endres de Oliveira and Nikolas Feith Tan, *External Processing: A Tool to Expand Protection or Further Restrict Territorial Asylum?* (February 2023).

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An alternative term for such a visa in the context of protection claims at embassies is 'humanitarian visa'.[409] However, the notion 'asylum visa' is more appropriate when addressing the specific category of visas for protection seekers.[410] Humanitarian grounds can be various, from cases of illness to other humanitarian reasons, without necessarily matching the criteria for a claim of international protection, including the high thresholds necessary for such a claim. 'Humanitarian visa' is an umbrella term that can refer to any visa granted on humanitarian grounds.[411] As all pathways in the focus of this book entail a visa procedure, all the respective visas could be referred to as 'humanitarian visas'.

In the following, a (humanitarian) visa granted based on an individual claim for protection with the aim of granting access to the national asylum procedure will therefore be designated an 'asylum visa'. This chapter considers an asylum visa scheme as a permanent scheme, distinguishing this pathway from *ad hoc* admission schemes that might grant access to national asylum procedures on an exceptional basis.[412] As this book takes an EU law perspective, this chapter will focus on the option of granting an asylum visa based on EU law.[413]

This visa option is to be distinguished from *diplomatic asylum* – that is, the granting of protection within the premises of an embassy without any kind of visa (and thus territorial access) procedure. It must also be distinguished from so-called 'off-shore' processing, referring to the outsourcing of the entire asylum procedure to third States to then engage into resettlement.[414]

409 LIBE Report, *Committee on Civil Liberties, Justice and Home Affairs: Report with Recommendations to the Commission on Humanitarian Visas* (2018/2271(INL), 4 December 2018); Jensen, *supra* note 152.

410 See Ray, *supra* note 404, also using the term 'asylum visa' over 'humanitarian visa'. Moreno-Lax refers to such an option as 'asylum seeker visa'; see Moreno-Lax, *supra* note 153.

411 Foblets and Leboeuf (eds), *supra* note 48.

412 For an analysis and assessment of *ad hoc* admission schemes see Part 3 Chapter 13.

413 For an assessment in the light of the constitutional right to asylum in Germany, see Holst, *supra* note 160, at 347 ff.

414 See Part 1 Chapter 3.1.2 for a delimitation of the scope of this book and further references to 'off-shore' or 'extraterritorial' processing. See Part 3 Chapter 12 for an assessment of resettlement.

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11.2 Background: the role of embassies in offering protection

To set the scene for the discussion of the current approach to asylum visa schemes in the EU, this section addresses the role of embassies in offering protection by discussing the institution of diplomatic asylum (11.2.1), as well as historic precedents of 'protective passports' in Europe (11.2.2). As will be shown in the following, the issuance of a visa as protective tool has a long tradition, following the abolishment of visa-free travel.[415]

11.2.1 Diplomatic asylum

In exceptional circumstances, diplomatic asylum can go along with offering safe passage to the territory of the protecting State. However, its primary focus lies on protection *within* the premises of an embassy, marking its difference from an asylum visa scheme. Still, it is worth briefly addressing this institution with a view to the role of embassies in offering protection and legal issues with regard to the extraterritorial context, since these are of equal relevance within an asylum visa scheme.

As stated in the Report of the Secretary General prepared pursuant to operative paragraph 2 of the General Assembly Resolution 3321 (XXIX), '[t]he term "diplomatic asylum" in the broad sense is used to denote asylum granted by a State outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships in the territorial waters of another State (naval asylum), and also on board its aircraft and of its military or para-military installations in foreign territory'.[416] The report entails a comprehensive account of the history of diplomatic asylum. While the institution of diplomatic asylum in Europe lost its relevance from the nineteenth century onwards, it continued to be a common practice in Latin America.[417]

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415 The introduction of immigration control is a relatively recent phenomenon in history, for a comprehensive discussion of 'the rise and fall of free movement' from an international perspective see Chetail, *International Migration Law*, *supra* note 73, at 38 ff.; for a historical overview of the 'monopolisation of means of movement' see Torpey, *supra* note 240, at 5 ff.; see also above Part 2 Chapter 7.1.1 on the principle of sovereignty in this context.

416 UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General* UN Doc. A/10139 (Part II), 22 September 1975, available at https://www.refworld.org/docid/3ae68bf10.html, para. 1.

417 *Ibid*., paras. 2, 3, 11 and 15.

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The ICJ's *Asylum Case*,[418] concerning diplomatic asylum granted to a Peruvian revolutionary in the Colombian embassy in Lima, gives important insights on legal issues arising in the context of diplomatic asylum.[419] First and foremost, there is the issue of sovereignty regarding the decision to offer protection on another State's territory. Since diplomatic premises are subject to the territorial sovereignty of another State, diplomatic asylum 'cannot benefit from the shield of territorial sovereignty'.[420] This particularity is elucidated upon by the ICJ, which is worth quoting in full:

> 'In the case of diplomatic asylum the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.'[421]

The ICJ's considerations reflect the legal viewpoint of the 1950s, holding up the tradition of granting asylum as a matter primarily of and between States. The development of international human rights and refugee law that has taken place since adds the individual perspective to the picture: diplomatic asylum can no longer be seen as an issue solely between States, as legitimate individual protection claims must be considered. However, the fact that there is a lack of international codifications on diplomatic asylum adds to legal uncertainties with regard to extraterritorial protection responsibilities.

Codifications of diplomatic asylum can only be found in regional Latin American treaties like the 'Havana Convention',[422] the 'Montevideo

418 *Asylum Case (Colombia v. Peru)*, *supra* note 224.

419 For an in-depth discussion of this case and its relevance to the institution of diplomatic asylum see C. N. Ronning, *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (1965), at 5 ff.

420 den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 107.

421 *Asylum Case (Colombia v. Peru)*, *supra* note 224, at 274–275.

422 Sixth International Conference of American States, *Convention on Asylum*, 20 February 1928, available at: https://www.refworld.org/docid/3ae6b37923.html.

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Treaty'[423] and the 'Caracas Convention'.[424] These instruments are the result of the above-mentioned tradition of diplomatic asylum in Latin America, regarding the granting of asylum as a right of States.[425] There is no codification of an individual right to be granted (diplomatic) asylum in any of these treaties, and beneficiaries are not 'refugees' as defined by the Refugee Convention. Drawing on the Caracas Convention of 1954, a Draft Convention on Diplomatic Asylum was adopted in 1970 as the result of discussions by the International Law Association.[426] However, this non-binding legal draft was not developed further. The institution of diplomatic asylum therefore continues to be tied to State discretion. In den Heijers' view, 'political considerations, rather than clearly demarcated humanitarian principles, guide the practice of offering refuge' in cases of diplomatic asylum.[427]

Several legal issues arising in the context of diplomatic asylum are equally relevant in the context of an asylum visa. Offering any kind of protection extraterritorially can be problematic with regard to the need for the protection seeker to safely leave the embassy or consulate – and, ultimately, the country – at some point. As den Heijer points out, '[b]eing subject to the territorial sovereignty of the host state implies, further, that the state wishing to grant protection must obtain the consent of the territorial state if it wishes to arrange for safe passage out of the country'.[428] This is equally valid in the case of granting a visa with protection purposes: if the host state does not permit a person to leave its territory, a visa issued by another state will most likely not be effective.[429]

Historic examples of diplomatic asylum include the case of East German citizens seeking refuge in West German embassies in Budapest and Prague

423 *Treaty on Asylum and Political Refuge*, 4 August 1939, available at https://www.refworld.org/docid/3ae6b3833.

424 Organization of American States (OAS), *Convention on Diplomatic Asylum*, 29 December 1954, OAS Treaty Series No. 18, available at https://www.refworld.org/docid/3ae6b3823c.html.

425 For a discussion of these Conventions see Ronning, *supra* note 419, at 66 ff.

426 See International Law Association, *Legal Aspects of the Problem of Asylum, Part II: Report, 55 International Law Association Reports of Conferences* (1972), at 176–207.

427 den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 113.

428 *Ibid*., 110.

429 For instance, Afghan refugees wanting to leave Iran after a previous illegal stay faced difficulties in obtaining exit permits; see Human Rights Watch, *Unwelcome Guests: Iran's Violation of Afghan Refugee and Migrant Rights*, November 2013, https://www.hrw.org/report/2013/11/20/unwelcome-guests/irans-violation-afghan-refugee-and-migrant-rights.

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in 1989, demanding passage to the West, or the case of North Korean citizens seeking asylum in foreign embassies in China to ultimately flee to South Korea.[430] A more recent and rather complex example is the case of the whistle-blower Julian Assange, who sought refuge in the embassy of Ecuador in London against potential extradition by the UK to Sweden and ultimately the USA.[431] All these cases vary strongly regarding the attachment of the asylum seeker to either the State offering diplomatic protection or the State hosting the embassy, as well as the question of safe passage. Despite the unclear legal nature of diplomatic asylum, legitimate human rights claims must be considered in each individual case and weighed against sovereignty claims of the State hosting the embassy.[432]

With regard to the above discussed tension between sovereignty and human rights,[433] diplomatic asylum could be compared to the R2P doctrine, as an institution potentially legitimising a breach of sovereignty for the protection of human rights. A relevant example in this regard is the case of US diplomats being offered refuge in diplomatic premises of Canada and covered departure to the USA during the Teheran hostage crisis in Iran. The Canadian government claims that Canada did not violate but, rather, uphold international law in acting against the will of the Iranian government, helping the diplomats leave Iran by providing them with Canadian passports.[434] As will be shown throughout this chapter, these legal issues are mirrored in cases of asylum visas. Before addressing the asylum visa, the next section will focus on pre-existing forms of diplomatic protection implying *safe passage*.

11.2.2 Historic precedents of 'protective passports' in Europe

Important historic precedents of diplomatic protection granting a right to safe passage are the initiatives undertaken by European embassy and consular staff who issued travel documents to European Jews during the

430 den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 111, note 26.

431 For a comprehensive discussion of this case see den Heijer, 'Diplomatic Asylum and the Assange Case', 26(2) *Leiden Journal of International Law* (2013) 399.

432 For a comprehensive contextualisation of this issue, see Behrens, 'The Law of Diplomatic Asylum – A Contextual Approach', 35(2) *Michigan Journal of International Law* (2014) 319, at 341 ff.

433 See above Part 1 Chapter 5.3 and Part 2 Chapter 7 and 8.

434 Cole, 'Is There Safe Refuge in Canadian Missions Abroad?', 9(4) *International Journal of Refugee Law* (1997) 654, at 661 ff.

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Second World War. This type of 'paperwork protection'[435] or 'bureaucratic resistance'[436] was not only life-saving but also a measure to counter visa restrictions and travel bans, which were gradually implemented at the time.[437] A well-known example is the granting of 'protective passports' to Hungarian Jews by the diplomat Raoul Wallenberg at the Swedish embassy in Budapest during the German occupation of Hungary.[438]

This protective document was linked to an extended concept of citizenship, still respected by Hungarian and German authorities at the time.[439] Protective passports were issued in over 3,500 cases, mainly to individuals proving links to Sweden, such as family relations or business connections.[440] As Noll observes in his comprehensive study on access to protection in Europe, this choice of beneficiaries was 'inspired by both communitarian and utilitarian ideas'.[441]All in all, diplomatic measures by Sweden are said to have rescued around fifty thousand individuals.[442]

The Swedish example does not stand alone: Swiss, Portuguese and Spanish diplomatic representations also initiated protective measures at the time.[443] A remarkable observation in this context is the correlation between rescue measures and restrictive migration policies. As Noll describes: 'When diplomats tried to help, regular emigration had long become impos-

435 Gregor Noll, 'From "Protective Passports" to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate' (New Issues in Refugee Research Working Paper 99, 2003), at 6.

436 Paul A. Levine, *From Indifference to Activism: Swedish Diplomacy and the Holocaust 1938–1944* (1996), at 43: 'Bureaucratic resistance can be understood as tactics of obstruction against the implementation of Nazi racial policy conducted not by potential victims but by an ostensibly disinterested third party. As practiced by Swedish diplomats, this form of resistance was carried out most often on behalf of Jewish individuals identified prior to deportation and the immediate aim of the tactics of bureaucratic resistance was to shield Jews threatened with deportation.'

437 See above Part 2 Chapter 7.1.1.

438 On Raoul Wallenberg and his legacy see Harvey Rosenfeld, *Raoul Wallenberg, Angel of Rescue: Heroism and Torment in the Gulag* (1982); Barker, 'The Function of Diplomatic Missions in Times of Armed Conflict or Foreign Armed Interventions', 81(4) *Nordic Journal of International Law* (2012) 387.

439 Noll, 'From "Protective Passports" to Protected Entry Procedures?', *supra* note 435, at 5.

440 *Ibid*., at 4.

441 *Ibid*.

442 Rosenfeld, *supra* note 438, at 37.

443 *Ibid*.

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sible.'[444] One example is the Swiss entry policy of 1938: after the Swiss government terminated visa-free travel for German Jews, it agreed to permit Jews with a specific mark in their German passport to enter Switzerland as long as Germany prevented exit of Jews without respective passports.[445]Another, more recent case is the granting of residence permits on humanitarian grounds to a large group of Bosnian asylum-seekers already in Sweden in 1993 after the Swedish government decided to impose visa requirements for Bosnian citizens.[446] Simultaneously, a newly established visa office in Croatia handled cases of particular hardship to grant entry permits to people considered to belong to particularly vulnerable groups. In that same year, Denmark also introduced visa requirements for citizens of Bosnia-Herzegovina, Serbia, Montenegro and Macedonia, with an equal effect of a high drop in numbers of asylum seekers from these regions. Other European countries followed this kind of visa (*non entré*) policy.[447]

Following Noll's observations, when setting these historic precedents into the context of the responsibility framework leads to the following picture: the tension between internal and external responsibilities of States as defined in Part 2 is mirrored in all the depicted rescue initiatives, particularly whenever there is a trade-off between access and status rights after arrival – that is, between access facilitation on the one hand and restrictions on the other. As will be discussed in Chapter 13, a similar dynamic lies in the humanitarian admission program set up based on the 'EU–Turkey Statement' of 2016 and its so-called 'one-to-one'-scheme.[448]

11.3 From then to now: the relevance of 'humanitarian visas' in the legal context of the EU

This section discusses the relevance of 'humanitarian visas' with regards to safe access to protection in the legal context of the EU. To this end, the section starts with an outline of EU visa regulations impacting on the situation of protection seekers (11.3.1), then discusses the role of carrier

444 Noll, 'From "Protective Passports" to Protected Entry Procedures?', *supra* note 435, at 6.
445 Noll, *Negotiating Asylum*, *supra* note 115, at 3.
446 *Ibid.*, at 4.
447 *Ibid.*, 5 ff.
448 See Part 3 Chapter 13.2.

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sanctions in this regard (11.3.2), and ultimately draws on national practices of granting 'humanitarian visas' (11.3.3).

11.3.1 EU visa regulations with impact on protection seekers

EU visa regulations are not part of the CEAS; however, they have a great impact on the issue of access to protection in the EU. The EU visa policy is governed by the EU Visa Code and based on the Schengen Convention,[449] the legal basis of Europe's internally borderless Schengen area and external border management, which has been further developed by the Schengen Borders Code.[450] Even though Article 3a of the Schengen Borders Code refers to compliance with the Refugee Convention, border and migration control mechanisms lack protection-based approaches.[451] According to Articles 5(4)(c) and 13(1) Schengen Borders Code, people seeking asylum at the border are exempted from visa requirements. However, the Visa Code itself does not entail any equivalent provision, so asylum seekers must reach the border to benefit from a visa exemption. As den Heijer puts it, this legal situation 'brings about the paradox that refugees are not generally exempted from the visa requirement, except at the very moment when that requirement is enforced'.[452]

Protection seekers generally fall under the visa requirements for third country nationals, therefore needing a visa to legally enter EU territory.[453] An important exception in the recent past has been the case of protection seekers from Ukraine, who enter the EU visa-free to then directly obtain a temporary protection status on the basis of the EU Temporary Protection Directive.[454] However, the majority of protection seekers worldwide still

449 The Schengen acquis – Convention implementing 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, OJ 2000 L 239/19.

450 See further on the EU visa regime Thym, *supra* note 63, Chapter 11; see also Part 1 Chapter 3.2. on the legal sources of this book.

451 See Part 1 Chapter 5.1 and 5.2 with further references.

452 See den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 173.

453 See further on visa requirements in the EU and the rationale behind 'black' and 'white' visa lists Thym, *supra* note 63, at 283 ff; see also Part 1 Chapter 3.1.2 in this book.

454 See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving

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needs a visa to enter the EU. Given that there is no 'humanitarian provision' regarding a 'uniform visa'[455] in the Visa Code, the only viable visa options for protection seekers lie either in claiming a derogation from the general admissibility requirements or being granted a visa with limited territorial validity (LTV). While Art. 19(4) Visa Code allows for a derogation from the admissibility criteria for visa applications 'on humanitarian grounds or for reasons of national interest', Art. 25(1)(a) Visa Code provides that an LTV visa 'shall be issued exceptionally', 'when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations'. Even though the Visa Code was meant to consolidate previous LTV provisions to eliminate existing uncertainties regarding the conditions for issuing such a visa, there is still no clarity regarding the interplay between Art. 25(1) and Art. 19(4), nor regarding the application of these norms by Member States.[456] Furthermore, the Code is silent on the question of a legal remedy against a negative decision. While the provisions were already hardly relevant for protection seekers as they stand, their applicability on extraterritorial claims for asylum has been denied by the CJEU in its 2017 decision in the case *X and X*.[457] Before taking a closer look at this judgement, the next section will discuss the role of carrier sanctions with a view to the overall restrictive visa requirements for protection seekers at EU level.

11.3.2 The role of carrier sanctions on access to protection

Restrictive visa policies are backed up by additional mechanisms to impede the arrival of irregular migrants, with detrimental effects on protection seekers.[458] One of the most effective mechanisms is the 'Carriers Liability'

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such persons and bearing the consequences thereof; and Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

455 See Art. 2(3) Visa Code: '"uniform visa" means a visa valid for the entire territory of the Member States'.

456 See Moreno-Lax, *Accessing Asylum in Europe*, *supra* note 42, 106 ff with a critical analysis.

457 For a discussion of this ruling see below at Part 3 Chapter 11.4.

458 See also Thym, *supra* note 63, at 280, stating that together with visa requirements, carrier sanctions are 'the single most effective instrument states employ to "manage" movements of refugees and other potential asylum applicants'.

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legislation. The legal grounds for carriers liability are Article 26 of the Schengen Convention and Article 4 of the Carriers' Liability Directive[459] (CLD), which led to the harmonisation of financial penalties on private carriers in the EU. According to Article 26(1)(a) of the Schengen Convention, Member States undertake to incorporate rules in their national law to sanction carriers for the transportation of aliens refused entry into the state's territory, including the carrier's obligation to return them. Furthermore, Article 26(2) foresees imposing penalties for carriers, which – in breach of their obligation set out in Article 26(1)(b) – transported a person without 'necessary travel documents'.[460]

Since the Schengen Borders Code refers separately to 'travel documents' (Article 5(a)) and 'valid visa' (Article 5(b)), it is questionable whether the carrier sanctions regime even applies when people are carried without a valid *visa* – especially since the original proposal for the Carriers' Liability Directive (CLD) did include a relevant provision.[461] However, EU Member States included respective provisions in national laws on carrier sanctions.[462] Due to carrier sanction policies, safe transportation measures to then claim asylum at the airport or border are therefore not an option. Furthermore, carrier sanctions raise serious human right concerns regarding the transfer of State responsibility to private actors.[463]

This is regardless of the fact that the laws governing carrier liabilities are not insensitive to refugee protection. Articles 26(1) and (2) of the Schengen Convention set out that all measures must be in line with the Refugee Convention and respective obligations of international refugee law. Article 4(1) CLD sets out that respective measures are 'without prejudice to Member States' obligations in cases where a third country national seeks international protection'. While private transport companies are obliged

459 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

460 The provisions of Art. 26(1)(b) and (2) only apply to carriers transporting aliens 'by air or sea'. However, Art. 26(3) provides for an application of these provisions 'to international carriers transporting groups overland by coach, with the exception of border traffic'.

461 See den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 176 ff.

462 For a comparative overview see Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries', 3(19) *European Journal of Migration and Law* (2017) 307.

463 See for instance Moreno-Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', 10(3) *European Journal of Migration and Law* (2008) 315.

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to return individuals without valid travel documents, this obligation only refers to people to whom entrance has been denied at the border. Applying this provision to protection seekers who claim asylum upon arrival would interfere with the right to seek asylum.[464] Arguably, the provisions do not legally prevent carriers from transporting persons entitled to international protection.

The threat of carrier sanctions to refugee protection therefore lies in its implementation in practice, as it is considered unfeasible for transportation companies to engage in an adequate assessment of whether the person concerned is in need of international protection or not.[465] With a view to this argument, however, it has been pointed out that private carriers might not even have to assess the validity of an asylum claim, since according to Art. 7 APD the launching of an asylum application triggers the right to remain in the relevant Member State during the time of its assessment. Carriers could therefore transfer people without necessary travel documents under the condition that they apply for asylum upon arrival at the border. Since an application of the provisions would circumvent the objective of carrier sanctions, several Member States concluded carrier sanction agreements with private companies that foresee fines regardless of protection claims made at the border or impose the obligation to contact national immigration officers in case a person claims protection.[466]

Overall, carrier sanctions back up restrictive visa requirements, making it nearly impossible for protection seekers to safely reach the EU.[467] An alternative to this situation lies in the granting of visas to protection seekers. The next section will therefore outline national policies of granting 'humanitarian visas' in the EU by way of example.

464 See Art. 13(1) Schengen Borders Code.

465 See den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 175 ff.

466 *Ibid*., at 176 note 44 and 45 with reference to the practice in several Member States; with a view to Member State practice see also Baird, *supra* note 462.

467 See Part 1 Chapter 1 on the asylum paradox and Chapter 3.1.2 on the relevance of safe pathways with a view to visa requirements. For a detailed discussion of the impact of visa policies on asylum law see J. Morrison and B. Crosland, 'Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy' (New Issues in Refugee Research Working Paper 39, 2001), at 28, pointing out that '[t]he imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration'.

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11.3.3 National policies of granting 'humanitarian visas' in the EU

While asylum applications or applications on asylum-related grounds were accepted by the embassies of Austria, Denmark, the Netherlands, Spain and the UK until 2002,[468] similar national policies have become scarce in the EU.[469] Only a few Member States accept individual visa applications on protection-related grounds, in exceptional cases and on a discretionary basis, as for instance Germany[470] and France.[471] Although not an EU Member State, Switzerland's practice of accepting protection claims at its embassies until 2012 is often referred to as one of the most significant institutionalised 'asylum visa' schemes in Europe.[472]

Drawing on the Feasibility Study of 2002, the EU Commission concluded with a view to humanitarian visa schemes that 'the present diversity and incoherence of Member States practice diminish their actual impact. There is therefore a strong case for a harmonisation in this area.'[473] Within the existing legal context of the EU, such an entry visa can take various forms: it can either be granted as a national visa, an EU a LTV Schengen visa or as a uniform EU Schengen visa. A study undertaken on behalf of the European Parliament in 2014 concluded that 'data available in various studies suggest that a total of 16 EU Member States currently have or have previously had schemes for issuing humanitarian visas'.[474] However, as pointed out in this same study, these examples mainly refer to visas issued on the basis of other

468 See further Noll, Fagerlund and Liebaut, *supra* note 49.

469 A significant non-European example is the Brazilian humanitarian visa scheme for individual protections seekers; see UN High Commissioner for Refugees (UNHCR), *UNHCR Welcomes Brazil Humanitarian Visas for Syrians Fleeing Conflict* (Briefing Note, 27 September 2013); Jubilut, Muiños de Andrade and de Lima Madureira, 'Humanitarian Visas: Building on Brazil's Experience', [2016] *Forced Migration Review* 76.

470 See further Pauline Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany – Access vs. Rights?' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 199.

471 For an overview see Leboeuf and Foblets, *supra* note 111.

472 On the Swiss example see Outi Lepola, *Humanitarian Visa as Counterbalancing Externalized Border Control for International Protection Needs: Humanitarian Visa as Model for Safe Access to Asylum Procedures* (2011), at 15; see also Ray, *supra* note 404, at 1250 ff.; Noll, Fagerlund and Liebaut, *supra* note 49.

473 European Commission, 'Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy and the Agenda for Protection' (COM(2003)152 final, Brussels 26 March 2003), at 9.

474 Jensen, *supra* note 152, at 7.

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forms of 'humanitarian' grounds, such as illness or family relations, and not specifically based on protection-related claims.[475]

Overall, some EU Member States grant humanitarian visas on an exceptional basis, but there is no permanent institutionalised asylum visa scheme at either a national or EU level. Instead, the focus at EU level lies on resettlement.[476] Against this background, the CJEU ruling in the case *X and X*[477] represents an important decision with a view to Member State practice, as the Court stated that EU law does not provide for any legal grounds for an 'asylum visa'. The next section will discuss this decision, together with relevant rulings of the ECtHR.

11.4 The decisions of the CJEU and the ECtHR in 'asylum visa' cases

As outlined in Part 1, the long-standing scholarly debate on the scope of human rights in 'asylum visa' cases has been reignited by landmark decisions of the CJEU in the case *X and X*[478] in 2017 and the ECtHR in the case *M.N.*[479] in 2020.[480] These cases are mostly discussed as 'humanitarian visa' cases.[481] However, as both cases concern visa procedures to ultimately seek asylum upon arrival in the EU, this book addresses them as 'asylum visa' cases.[482] After a short note on the issue of extraterritorial jurisdiction (11.4.1), this section will outline the CJEU case *X and X* and the ECtHR case *M.N.* (11.4.2), to then set the *M.N.* case into the context of the ECtHR case *N.D. and N.T.*[483] (11.4.3). The section will conclude with balancing the legal standpoint of this book (11.4.4).

475 *Ibid.*, at 48.
476 See Part 3 Chapter 12.
477 *X and X v Belgium*, *supra* note 16.
478 *X and X v Belgium*, *supra* note 16.
479 *M.N. and Others v. Belgium*, *supra* note 17.
480 See Part 1 Chapter 5.1.2.
481 See for instance Tristan Wibault, 'Chapter 8: Making the Case X&X for the Humanitarian Visa' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 271; Thym, *supra* note 112; Sílvia Morgades-Gil, 'Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?', 2(3) *European Papers* (2017) 3.
482 See Part 3 Chapter 11.1.
483 *N.D. and N.T. v. Spain*, *supra* note 245.

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11.4.1 A short note on extraterritorial jurisdiction

Both rulings on 'asylum visa' cases discussed in the following had in common that neither Court assessed whether the rejection of the respective visas violated fundamental or human rights of the applicants – neither the CFR nor the ECHR were considered applicable by the respective Court. While the CFR applies in case EU Member States 'implement' EU law (see Art. 51(1) CFR),[484] most human rights treaties have jurisdiction clauses, raising the issue of extraterritorial jurisdiction.[485] With a view to the ECHR, Art. 1 states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[486] The ECtHR developed a line of case law, in which the exceptional circumstances of the individual case establish either *de jure* or *de facto* jurisdiction in the extraterritorial context, most recently reiterated in the case of *HF and others.*[487] While jurisdiction is primarily territorial, it can be exercised extraterritorially in exceptional cases according to the personal model (effective control and authority over an individual) or the spatial model (effective control and authority over an area), or a combination of both. Landmark decisions are the cases *Bankovíc v. Belgium*, regarding the spatial model, *Al-Skeini v. the United Kingdom*, regarding the personal model, and *Georgia v. Russia (II)*, referring to 'special features' of

484 Art. 51(1) CFR states: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law.'

485 See further Milanovic, *Extraterritorial Application of Human Rights Treaties*, *supra* note 117; Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8(3) *Human Rights Law Review* (2008) 411.

486 On the relationship of Article 1 Jurisdiction and State Responsibility see Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Motoc Iulia (eds), *The European Convention on Human Rights and General International Law* (2018) 97, at 103.

487 *HF and others v. France,* Appl. Nos. 24384/19 and 44234/20, Grand Chamber, 14 September 2022 (CE:ECHR:2022:0914JUD002438419), para. 184 *ff;* for a comprehensive discussion of ECtHR cases on extraterritorial jurisdiction see Isil Karakas and Hasan Bakirci, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' in Anne van Aaken and Motoc Iulia (eds), *The European Convention on Human Rights and General International Law* (2018) 112; see also Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 239 ff.

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the specific case.[488] Formal decisions of consular or embassy staff in cases of migration control could be seen as an exercise of effective legal authority over the respective applicant and therewith as a case of *de jure* jurisdiction, considering the specific features of the case in the extraterritorial context.[489] However, as will be discussed in the following, the ECtHR did not follow this line of argumentation in the *M.N.* case.

11.4.2 The CJEU case *X and X* and the ECtHR case *M.N.*

The case *X and X* concerned a Syrian family who applied for a visa of limited territorial validity (LTV) based on Art. 25(1)(a) Visa Code at the Belgian embassy in Lebanon. The family openly stated that their aim was to claim asylum upon arrival in Belgium. The CJEU considered the Visa Code inapplicable as the applicants' intent was to apply for asylum upon arrival – implying a long-term visa and thus a claim not foreseen by EU law according to the Court.[490] Thus, the CJEU concluded that Belgium did not 'implement' Union law in accordance with Art. 51(1) CFR and the CFR did therefore not apply to the case.[491] Through this line of argumentation, the CJEU avoided addressing the question of whether the rejection of such a visa could amount to refoulement and thus a breach of Art. 4 CFR.[492] In contrast to the Court, AG Mengozzi considered the Charter to apply,

488 *Bankovíc v. Belgium and others*, Appl. No. 52207/99, Grand Chamber, 12 December 2001 (CE:ECHR:2001:1212DEC005220799), para. 59 ff; *Al-Skeini v. the United Kingdom*, Appl. No. 55721/07, Grand Chamber, 7 July 2011 (CE:ECHR:2011:0707JUD005572107), para. 24 ff; *Georgia v. Russia (II)*, Appl. No. 3826/08, Grand Chamber, 21 January 2021 (CE:ECHR:2021:0121JUD003826308), para. 330 ff.; see further Karakas and Bakirci, *supra* note 487, at 133; see also Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 243.

489 See also Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 243.

490 *X and X v Belgium*, *supra* note 16, para. 51.

491 For a comprehensive discussion of the extraterritorial application of the CFR, see Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (1st ed., 2014) 1657; see also Stephanie Law, 'Chapter 2: Humanitarian Admission and the Charter of Fundamental Rights' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 77, at 100 ff with reference to the *X and X* case.

492 See further Wibault, *supra* note 481.

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arguing that the rejection of the visa in this specific case must be seen as a violation of Art. 4 CFR.[493]

In the *M.N.* case, with a similar factual background, the ECtHR denied jurisdiction, thereby dismissing the possibility of a violation of Art. 3 ECHR.[494] With references to the *travaux préparatoires* and previous case law, the ECtHR stressed that 'from the standpoint of public international law, a State's jurisdictional competence is primarily territorial'.[495] The Court further stated that in line with established case law there can be 'an exception to this principle of territoriality' depending on the individual circumstances of the case.[496] Thus, the Court laid out the different case scenarios of extraterritorial jurisdiction, including instances where a State representative 'exercised public powers such as authority and responsibility in respect of the maintenance of security'[497] and 'the use of force' by bringing persons 'under the control of State's authorities'.[498] In sum, neither of the previously established case scenarios applied according to the Court, as this was the first visa case without any pre-existing link of the applicants to the respective State.[499] The Court concluded that acknowledging jurisdiction in the present case would mean accepting that any person 'could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist'.[500] With this, the Court placed the focus on State sovereignty and thus the internal responsibility, without even engaging in the substance of human rights potentially at stake. Overall, both rulings missed out on elements of argumentation, which could be attributed to a consideration of the external or the inter-State responsibility.

493 Case C-638/16 *PPU X and X v Belgium* (EU:C:2017:93), Opinion of AG Mengozzi.
494 *M.N. and Others v. Belgium*, *supra* note 17, at para. 125.
495 *Ibid*., para. 99 and 100.
496 *Ibid*., para. 101 and 102.
497 *Ibid*., para. 104.
498 *Ibid*., para. 105.
499 For a discussion of previous visa cases see Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 243 ff.
500 *M.N. and Others v. Belgium*, *supra* note 17, at para. 123.

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11.4.3 The relevance of the case N.D. and N.T.

The decision in the M.N. case is particularly striking in view of the judgement of the ECtHR in the case *N.D. and N.T.*[501] earlier that same year. Here, the ECtHR affirmed jurisdiction and reassessed the question of whether the so-called 'hot returns' of migrants coming from Morocco by Spanish border guards at the fence of Melilla breached the 'prohibition of collective expulsion of aliens' as set out in Art. 4 of Protocol No. 4 to the ECHR. The Grand Chamber denied that there was a violation of this provision, *inter alia* stating that the applicants 'did not make use of the existing legal procedures for gaining lawful entry'.[502] Making the applicability of procedural rights dependent on personal conduct is disconcerting. With a view to safe pathways, however, this section wants to point to the relevance of the judgment in two other respects.

On the one hand, the mention of 'existing legal procedures for gaining lawful entry' could be progressively interpreted as reasoning that 'implies a broadly framed positive obligation of States, derived from Human Rights, to facilitate legal pathways of accessing the asylum system'.[503] However, read together with the decision in the *M.N.* case, the ECtHR does not seem to imply any imperative for States to establish safe pathways. On the contrary, the reasoning of the ECtHR in the *N.D. and N.T.* case bears a risk with a view to the implementation of safe pathways. As Thym points out, 'the insistence on "genuine and effective" legal pathways could develop into a humanitarian fig leaf for the acceptance of strict control practices on the part of the ECtHR'.[504]

On the other hand, the Court affirmed jurisdiction in the *N.D. and N.T.* case by drawing on the *Hirsi*[505] case and stating that 'the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdic-

501 *N.D. and N.T. v. Spain*, *supra* note 245; this ruling overturned the Chamber judgment of 3 October 2017 that found a breach of the prohibition of collective expulsion (CE:ECHR:2017:1003JUD000867515).
502 See *ibid.*, at para. 231.
503 Bast, Harbou and Wessels, *supra* note 30, at 58.
504 Thym, *supra* note 112, at 578.
505 *Hirsi Jamaa and Others v. Italy*, *supra* note 116.

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tion'.[506] This functional approach to jurisdiction differs from the restrictive territorial approach in the *M.N.* case. Therefore, one must acknowledge the different legal nature of the relevant State conduct – physical interference in the form of arrest and deportation in the *N.D. and N.T.* case, and the legal act of rejecting a visa in the *M.N.* case. Additionally, the applicants had already reached Spanish territory in the *N.D. and N. T.* case. Thus, scholars have argued, for instance, that the decision to reject a visa was – in contrast – not 'severe' enough to meet the high threshold of the principle of non-refoulement.[507]

11.4.4 Summarising the approach of this book: a dynamic interpretation of human rights in asylum visa cases

This book stands for a dynamic approach to the application of human rights of protection seekers in the extraterritorial context. In his discussion of the cases *M.N.* and *N.D. and N.T.*, Thym concluded 'that the rulings may mark a symbolic endpoint of 30 years of dynamic ECtHR jurisprudence which considerably expanded the human rights of migrants and refugees without, however, negating countervailing claims to migration control'.[508] A continued dynamic interpretation (which, as Thym points out, still acknowledges claims to control migration) would be a legal way to counter the asylum paradox, with its inherent protection gap. Shachar discusses this as turning 'the logic of the shifting border on its head by making the severance of the relationship between territory and the exercise of sovereign authority rights-enhancing rather than rights-restricting'.[509]

The *M.N.* case was the first ECtHR visa case to address a claim for an 'asylum visa' with no pre-existing legal links between the applicants and the State concerned. Claims for protection have a distinct characteristic. In (territorial) asylum cases, it is generally the individual who creates the jurisdictional link, not by submitting a visa application but by physically reaching the geographical border of a State. Astonishingly, the ECtHR drew on the notion of 'free will' in the context of flight to deny jurisdiction in the *M.N.* case by stating *inter alia* that the applicants 'freely chose to present

506 *N.D. and N.T. v. Spain*, *supra* note 245, at para. 110.
507 For an overview of the legal debate see Part 1 Chapter 5.1.2.
508 Thym, *supra* note 112, at 596.
509 Shachar, *supra* note 126, at 85.

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themselves at the Belgian Embassy in Beirut'.[510] Applying this same argument to situations at the territorial border, stating that an asylum seeker 'freely chose' to reach this border and not another, would not be a valid legal argument to generally dismiss an asylum claim. Raising this argument in the extraterritorial context, the ECtHR seems to imply that States can leave their human rights obligations 'at home'. Thus, this argument backs up tendencies to extraterritorialise migration control without taking human rights considerations into account. Furthermore, this argument perpetuates an arbitrary allocation of protection responsibilities solely based on geographical proximity.

With a view to the extraterritorial scope of the ECHR in 'asylum visa' cases, this book argues that human rights obligations must follow the (legal) border of States. Arguably, a formal decision over access to territory taken by a State agent may be regarded as the ultimate form of exercising sovereignty.[511] Denying jurisdiction in the extraterritorial context and at the same time affirming that the decision to reject a visa is an expression of the sovereign right of a State to control entry, is inconsistent. This is to be separated from the question whether the rejection of the visa would amount to a violation of the principle of non-refoulement.

Regarding this last issue, this book follows the legal arguments provided by Judge Pinto de Albuquerque in his concurring opinion to the *Hirsi* case, stating that

> 'if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State'.[512]

AG Mengozzi came to a similar conclusion with a view to Art. 4 CFR in his opinion in the *X and X* case. Mengozzi pointed out how it is 'crucial that, at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law'.[513]

510 *M.N. and Others v. Belgium*, *supra* note 17, at para. 118.
511 See above Part 2 Chapter 7.1 on the principle of sovereignty.
512 See Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v. Italy*, *supra* note 116, at para. 73.
513 *X and X – Opinion of Advocate General Mengozzi*, *supra* note 493, at para. 4.

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The fact that the principle of non-refoulement can put a limit on State discretion when deciding over entry in certain circumstances does not negate the right of States to control their borders, as defended by the ECtHR.[514] This book does not stand alone in its criticism of the legal reasoning in these asylum visa cases, which have reignited the legal debate on the matter.[515] The ruling of the CJEU gave rise to a proposal for an 'asylum visa' scheme at EU level, which will be discussed in the following.

11.5 Access through an 'asylum visa' at EU level

While the European Council takes a more security-oriented approach, the European Commission has constantly called for ensuring safe and orderly arrival of protection seekers.[516] In its communication of 2016, the Commission stressed once again that 'the overall objective is to move […] to a fairer system which provides orderly and safe pathways to the EU for third country nationals in need of protection'[517]. However, the 'countermove' at EU level against the abolishment of 'asylum visas' by Member States that Noll had pointed to in 2003 has not yet been pursued.[518] In spite of the CJEU decision in the case *X and X*, the recast proposal[519] on the Visa Code neither includes clarifications regarding LTV visas nor visa options for protection seekers.[520] A step towards a regularisation has been made by the European

514 See *M.N. and Others v. Belgium*, *supra* note 17, at para. 124.

515 For a critical discussion of the case see Moreno-Lax, *supra* note 153, at 65 ff; see also Morgades-Gil, *supra* note 481.

516 See European Commission, 'Towards More Accessible, Equitable and Managed Asylum Systems' (COM(2003) 315 final, Brussels 2 June 2003); European Commission, 'On the Managed Entry in the EU of Persons in Need of International Protection and Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions' (COM(2004) 410 final, Brussels 4 June 2004).

517 See European Commission, 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe' (COM(2016) 197 final, Brussels 6 April 2016), at 2.

518 Noll, 'From "Protective Passports" to Protected Entry Procedures?', *supra* note 435, at 7.

519 Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) (COM/2014/0164 final – 2014/0094 (COD)).

520 On the developments at EU level see further Eugenia Relano Pastor, 'Chapter 10: EU Initiatives on a European Humanitarian Visa' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 341, at 353 ff.

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Parliament in 2018: following the report of the LIBE Committee,[521] the European Parliament adopted a motion requesting the European Commission to table a legislative proposal establishing a European Humanitarian Visa.[522]

The report of the LIBE Report takes what this book refers to as the asylum paradox[523] as the basis for the justification of the proposal. The report states that it explicitly aims at addressing

> 'the current paradoxical situation that there is in EU law no provision as to how a refugee should actually arrive leading to a situation that almost all arrivals take place in an irregular manner. This situation has serious consequences for the individual but also for Member States.'[524]

As outlined in the Explanatory statement of the report, '[t]he LIBE Committee has tried to address this legal gap as part of the review of the Visa Code (2014/0094(COD)) but both Council and Commission have opposed the amendments included in this regard in the trialogue negotiations which started in May 2016'.[525]

Against the backdrop of this proposal, the following sections briefly outline how an 'asylum visa' scheme could potentially be regulated in the EU. The focus lies on the three key aspects of access to protection: 'the who' (11.5.1), 'the how' (11.5.2) and 'the what' (11.5.3).[526]

11.5.1 'Who': protection seekers

A decisive characteristic of an asylum visa is that it offers protection seekers access to an individual procedure that is independent of quotas or group admission schemes. Anyone anywhere can, in principle, approach an embassy with a protection claim. As the purpose of an asylum visa is to grant access to a national asylum procedure, the international protection status, as well as potential national protection statuses, delimit the circle of beneficiaries.

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521 LIBE Report, *supra* note 409.
522 See European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)) P8 TA(2018)0494. 429 MEPs voted in favour, 194 against, 41 abstained.
523 See Part 1 Chapter 1.
524 LIBE Report, *supra* note 409, at 12.
525 *Ibid.*, at 11.
526 See Part 1 Chapter 3.2 on this classification.

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II.5.2 'How': asylum visa procedures

The definition of an asylum visa guides the outline of the procedure: an asylum visa scheme must include basic elements of a visa procedure, a preliminary assessment of the protection claim, and then grant access to the national asylum procedure upon arrival. The visa procedure could be aligned to the granting of short-stay visas, providing online application forms and the collection of data as well as health and security screenings.

While national embassies remain the primary actors responsible for issuing the visas, there are three conceivable options of administrative management and organisation:

1) Visas with territorially limited validity (LTV) could be granted by a Member State, then (solely) responsible for processing the claim before and after arrival.
2) Protection seekers could approach any representation of an EU Member State abroad with their claim, without necessarily being granted a visa to enter this same State. Member State embassies could represent each other and, in the first instance, only be responsible for the preliminary screening of the case and for determining the State responsible for the potential asylum procedure upon arrival, based on a specific distribution key.[527]
3) A third modality could lie in a full centralisation of the procedures by establishing special 'EU representations' abroad, responsible for handling the claims of applicants then referred to different Member States. Together with the previous option, this alternative would also have to rely on a distribution key.

The vast number of issues involved in extraterritorial reception may be the reason reception and accommodation in the region are not addressed in the LIBE Committee's proposal.

Finally, the LIBE Committee's report suggests foreseeing an option of individual judicial appeal against the rejection of a visa,[528] as well as refraining from any possibly precluding effect of such a visa with a view to access to the national asylum procedure or other pathways.[529]

While all these issues concern the procedure before arrival, further procedural aspects should be considered by addressing the situation of benefi-

527 See Moreno-Lax, *supra* note 153, at 99.
528 LIBE Report, *supra* note 409, at 9.
529 *Ibid*., at 7.

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ciaries upon arrival. With regard to the national asylum procedure, it would have to be taken into account that several procedural steps have already been pursued extraterritorially (e.g., security screenings). Furthermore, the travel itinerary and the allocation of responsibility (Dublin) are cleared. The respective territorial asylum procedures are therefore likely to be much shorter than common procedures.

11.5.3 'What': the protection status granted through an asylum visa scheme

One of the main differences between the asylum visa and other pathways discussed within this book is that the status granted after arrival in the EU is not predefined. As the option foresees *accessing an asylum procedure* on EU territory, the legal status after arrival would initially be grounded in the CEAS. This means full application of EU primary law, such as the CFR as well as EU secondary law, such as the APD and QD.

11.6 Analysis and assessment of the asylum visa in the light of the responsibility framework

This section draws on the responsibility framework to structure the analysis and assessment of the asylum visa. The section will identify elements of implementation which correspond more with one responsibility principle or the other, and address the key factors identified in Part 2.[530] The section addresses subsequently the principles of external (11.6.1), internal (11.6.2), and eventually inter-State responsibility (11.6.3).

11.6.1 External responsibility

This section analyses the asylum visa in the light of the external responsibility, considering the above-mentioned three key aspects ('who', 'how', 'what'), referring to the beneficiaries (11.6.1.1), the procedure (11.6.1.2) and the potential status upon arrival (11.6.1.3). The analysis will address the elements implied by the principle of external responsibility set out in Chapter 10: a broad scope of beneficiaries, with a focus on protection needs; individual admission procedures, aligned to human rights standards; addi-

530 See Part 2 Chapter 10.2.

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tionality and complementarity of the scheme, as well as a status based on protection considerations.

II.6.1.1 Beneficiaries: 'anyone anywhere' under a severe human rights risk

An asylum visa aims at granting individual access to the national asylum procedure through a visa application at a State representation abroad. This implies that 'anyone anywhere' can approach a State representation. Further addressing the issue of beneficiaries anticipates a discussion of the potential status granted through such a scheme.[531] Within the overall assessment of visa schemes offering protection undertaken on behalf of the EU Commission in 2002, the refugee status as enshrined in the Refugee Convention was regarded as a minimum approach for delimiting beneficiaries.[532] However, the Feasibility Study was published before the international protection status was enshrined in the QD. As the purpose of an asylum visa is to grant access to an asylum procedure taking place on EU territory, the legal category of international protection would be the minimum requirement to integrate the scheme into the existing framework of the CEAS.[533] While the QD can of course be subject to change, the international protection status defined by it consolidates the protection obligations grounded in the Refugee Convention and the ECHR, incorporated in EU primary law.

The requirement of qualifying for international protection upon arrival could pose difficulties in the extraterritorial context in two ways. First, individuals who have not yet left their country of origin would not qualify as 'refugees' under the Refugee Convention.[534] A solution lies in taking a post-arrival perspective, by focusing on the question whether the person would qualify for international protection upon arrival in the EU. This is in line with the concept of an asylum visa, as it offers access to the national asylum procedure but not yet to a protection status upon arrival.

531 See further on the principle of external responsibility in the context of the situation upon arrival, below at Part 3 Chapter II.6.1.3.

532 Noll, Fagerlund and Liebaut, *supra* note 49, at 73.

533 Violeta Moreno-Lax, 'The External Dimension' in Steve Peers *et al.* (eds), *EU Immigration and Asylum Law (Text and Commentary)* (2nd rev. ed., 2015) 617, at 669.

534 Noll, Fagerlund and Liebaut, *supra* note 49, at 74.

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Upholding the external responsibility calls, in principle, for specifically addressing vulnerable individuals when implementing an asylum visa scheme.[535] However, the notion of vulnerability as for instance set out in Art. 21 of the Reception Conditions Directive (2013/33/EU), which refers to examples such as minors, pregnant women, elderly or disabled people, has to be considered in line with the fact that asylum seekers are *per se* vulnerable, as they are particularly susceptible to human rights violations. Still, a specific focus on *specifically* vulnerable individuals could counter the discriminatory nature of the current regime of territorial access to protection, which can be described as 'asylum Darwinism'.[536] However, generally favouring certain individuals over others could, in turn, have excluding effects.[537] Considering a particular vulnerability therefore requires special sensitivity to issues of discrimination.[538]

Furthermore, making asylum visa schemes dependent on 'utilitarian' considerations, such as an applicant's cultural, religious our professional background, would not be in line with its overall protective scope and restrict the impact of this pathway on the principle of external responsibility.

Ultimately, a focus on individuals who do not qualify for other safe access methods promotes the complementarity[539] and thus the overall effectiveness of safe pathways in favour of the external responsibility.[540]

535 See for instance *X and X – Opinion of Advocate General Mengozzi*, *supra* note 493, particularly emphasising the situation of the three young children of the applicants at paras. 137, 170 and 173; see also the respective suggestions of the LIBE Report, *supra* note 409, at 5; also with reference to this argument, see Ray, *supra* note 404, at 1254.

536 See further Part 1 Chapter 1 on the asylum paradox.

537 For a critical view on the notion of vulnerability see Welfens and Bekyol, 'The Politics of Vulnerability in Refugee Admissions Under the EU-Turkey Statement', 3 Frontiers in Political Science (2021) article 622921; see also Lewis Turner, 'Are Syrian Men Vulnerable Too? Gendering The Syria Refugee Response' (Middle East Institute, November 2016).

538 See further on the vulnerability requirement, Part 3 Chapter 12.4.1.1.

539 See further on this notion Part 2 Chapter 10.2.1.

540 This is in line with the suggestions of the LIBE Report, *supra* note 409; see at 13.

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11.6.1.2 Asylum visa procedures with individual rights and guarantees

The first Part of this book traced the legal discussion concerning the absence of an explicit right to enter a specific State to seek protection.[541] However, if States were to implement an asylum visa scheme, the full range of fundamental and human rights would apply to such a scheme. The respective States would be bound in their actions by human rights and EU fundamental law, in particular by the principle of non-refoulement. Consequently, it must be considered *where* the visa processing would take place. While State obligations deriving from the CFR are triggered whenever a State 'implements' EU law (Art. 51(1) EU CFR), the applicability of the ECHR depends on extraterritorial jurisdiction.[542] The Refugee Convention, in turn, does not apply in case of an asylum claim filed by a person who has not yet crossed the international border of his or her home country. These particularities must be considered.

While an asylum visa grants access to a national asylum procedure, it is not an extraterritorial equivalent of such. The existing framework of the CEAS applies as soon as the applicant arrives in the EU. The question of an extraterritorial applicability of the legal instruments of the CEAS remains an issue with a view to the preliminary screening of the case. While the extraterritorial applicability of the QD has 'not been explicitly excluded',[543] the APD and the Reception Directive[544] are territorially limited to the EU.[545] Still, these acts of EU secondary law reflect legally binding standards deriving from EU primary law.[546] They are therefore important indicators for areas of regulation within an asylum visa scheme aiming at doing justice to the principle of external responsibility.

541 See Part 1 Chapter 5.1., Part 3 Chapter 11.4.
542 See above, Part 3 Chapter 11.4.4.
543 Moreno-Lax, 'The External Dimension', *supra* note 533, at 669.
544 Directive 2013/33/EU.
545 See Art. 3(2) APD explicitly excluding the application of the provision in the context of applications submitted to diplomatic representations of Member States.
546 See also CJEU, Judgement of 8 May 2014, *H.N. v Minister for Justice, Equality and Law Reform and Others*, C-604/12 (EU:C:2014:302), where the CJEU points out the importance of 'impartiality' when assessing a protection claim (paras. 51 and 52), as well as the importance of an assessment within a 'reasonable period of time' (paras. 45, 47, 51, 56).

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A key requirement is access to adequate information.[547] In the extraterritorial context, providing adequate information about the procedure as well as respective rights and obligations is particularly relevant to secure the right to be heard as well as the effectiveness of such a safe pathway.[548] The LIBE Committee's report reflects these considerations.[549] Another key element of an asylum procedure is the individual interview. Although the assessment in an asylum visa procedure is preliminary in nature, an interview is crucial to do justice to the protection claim.[550] Since the requirement of an interview ultimately serves the purpose of determining whether the applicant is granted access to an asylum procedure in the EU, adequate qualification of embassy staff in the sense of 'adequate knowledge and expertise in matters of international protection' is a key issue.[551]

Furthermore, the right to an effective legal remedy is crucial for any asylum procedure on EU territory. Respective provisions of the APD[552] are an outcome of the rights enshrined in Articles 47 CFR and 13 ECHR,

547 Art. 6(1) provides that applicants shall be informed as to where and how their application may be lodged. According to 12(1)(a) APD, Member States shall ensure that applicants are 'informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities'. Furthermore, applicants 'shall receive the services of an interpreter for submitting their case' (Art. 12(1)(c) APD) and 'not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling' (Art. 12(1)(d) APD). Art. 19 APD foresees legal and procedural information free of charge in procedures at first instance.

548 See also Moreno-Lax, *supra* note 153, at 94.

549 LIBE Report, *supra* note 409, at 9.

550 See the respective recommendation in *ibid*., at 13; see also Moreno-Lax, *supra* note 153, at 95.

551 LIBE Report, *supra* note 409, at 9.

552 In case of a rejection of a protection claim made on EU territory, it shall be ensured that 'the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing' (see Art. 11(2) APD). Applicants 'shall be informed of the result of the decision […] in a language that they understand or are reasonably supposed to understand', including 'information on how to challenge a negative decision' (Art. 12(f) APD). Art. 20 APD provides for free legal assistance and representation in appeals procedures granted upon request, unless the appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success (Art. 20(3) APD). Further conditions are laid down in Art. 21 APD. At all stages, applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal advisor or other counsellor' (Art. 22(1) APD).

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which are, in principle, extraterritorially applicable. The CJEU denied an application of the CFR in 'asylum visa' cases, basing its ruling on the fact that the Visa Code did not provide for any respective provision at EU level. By implication, if EU Member States implement an asylum visa scheme granting *individual* access to a respective procedure based on EU law, they would be 'implementing' EU law and the CFR could apply (see Art. 51(1) CFR).[553]

The issue of applicability of human rights in asylum visa cases is directly linked to the controversial (substantive) question of whether a visa rejection can amount to a human rights violation, in particular to a breach of the principle of non-refoulement.[554] The CJEU left the issue untouched in the case *X and X*,[555] despite the concluding statement of AG Mengozzi, who argued that a visa rejection had to be seen as refoulement under certain circumstances.[556]

Assuming a full application of human rights obligations of the State representation touches upon the issue of a potential collaboration of State representatives with other actors, such as UNHCR, other international organisations, NGOs, or even private service providers. On the one hand, these actors can facilitate access to the procedures, on the other hand they can function as 'gate-keepers', with an impact on procedural guarantees. With a view to the external responsibility, this means that the State representation should be directly accessible, independent of the involvement of other actors. Most importantly, only those parts of the procedure should be externalised that have no impact on the (preliminary) assessment of the merits of the claim.

Another issue with impact on the accessibility of this pathway is the availability of electronic application processes, allowing applicants to lodge their application without necessarily putting themselves at risk by trying to physically reach the State representation.[557] This again leads to the question of where and how applicants would wait for the outcome of the preliminary assessment of the claim. An individual who seeks territorial protection in the EU has, in principle, the right to remain in the Member State while the

553 This is a difference to resettlement or *ad hoc* humanitarian admission schemes at State discretion; see Part 3 Chapter 12.4.1.2 and Chapter 13.4.1.2.

554 See Part 1 Chapter 5.1.

555 *X and X v Belgium*, *supra* note 16. See further Part 3 Chapter 11.4.

556 *X and X – Opinion of Advocate General Mengozzi*, *supra* note 493, at para. 176.

557 See for instance the suggestions of the LIBE Report, *supra* note 409, at 13; Moreno-Lax, *supra* note 153, at 95.

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examination of the application is pending (see Art. 9 APD). This right is an outcome of the right to seek asylum, as it secures access to the asylum procedure.

In the extraterritorial context, two scenarios must be distinguished regarding a 'right to remain'. Where the application is made in a third State and not the State of origin (where persecution took place), there is the issue of whether the applicant is allowed to stay in the State hosting the embassy during the procedure, including the issue of legal status in this State. If an application is made at an embassy situated in the country of origin, the question is whether safety issues require the person to be allowed to stay within the premises of the embassy as a form of temporary diplomatic protection. Both scenarios differ substantially from the situation of a territorial protection claim, where territorial sovereignty allows States to provide for protection and shelter during the procedure.[558] However, physical safety is key with a view to doing justice to the principle of external responsibility.[559] The question of a right to remain is especially relevant regarding the length of the visa procedure. The longer the procedure takes, the more urgent the issue of accommodation becomes.[560] Regarding the time frame, the LIBE Committee suggests that 'such visa applications be decided on within 15 calendar days of the date of lodging the application'.[561]

Ultimately, the additionality[562] of an asylum visa scheme is crucial in terms of promoting the principle of external responsibility.[563]

11.6.1.3 Content of protection: access to national asylum procedures

As argued in Part 2, the territorial context marks the beginning of an intersection between the external and the internal responsibility.[564] As soon as a protection seeker reaches EU territory with an asylum visa, the provisions of the CEAS as well as respective national laws would apply in the

558 On legal issues arising in the context of diplomatic protection see above Part 3 Chapter 11.2.1.
559 Similarly, see Moreno-Lax, 'The External Dimension', *supra* note 533, at 671.
560 Noll, Fagerlund and Liebaut, *supra* note 49, at 75.
561 LIBE Report, *supra* note 409, at 8.
562 'Additionality' refers to offering safe pathways in addition to and not as a replacement of territorial access to asylum. See above, Part 2 Chapter 10.2.1.
563 See also LIBE Report, *supra* note 409, at 7.
564 See Part 2 Chapter 8.3.

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same way they apply to asylum seekers who entered the EU irregularly. An asylum visa scheme that grants access to the asylum procedure on EU territory, with the international protection status as possible outcome, could therefore prevent discrimination vis-à-vis protection seekers who entered the EU irregularly. This issue is addressed in the Feasibility Study of 2002, pointing out that the differences in status granted within the analysed national policies lead to 'a trade-off between access and protection: better prospects for legal access are swapped against a deteriorated legal standing'.[565] Such a trade-off between access and status rights after arrival could be prevented with the implementation of an asylum visa scheme.

11.6.2 Internal responsibility

In the following, the asylum visa is assessed in the light of the principle of internal responsibility, again considering the beneficiaries (11.6.2.1), procedure (11.6.2.2) and the content of protection (11.6.2.3). Chapter 10 argued that the principle of internal responsibility implies flexibility regarding the choice of beneficiaries, the outline of the procedure and the status granted upon arrival.[566] The following analysis shows that this pathway limits State discretion on these issues in various respects.

11.6.2.1 Beneficiaries: no margin of discretion

An aspect regarding beneficiaries enhancing the principle of internal responsibility is the option of considering links to the receiving State or any other 'utilitarian admission criteria'. As argued above, such requirements could make it easier for States to adjust their interests to admission commitments.[567] An asylum visa scheme that foresees individual access to the visa procedure solely based on protection considerations would, however, not allow for an inclusion of such criteria.[568]

565 Noll, Fagerlund and Liebaut, *supra* note 49, at 83.
566 See Part 2 Chapter 10.2.1.
567 See Part 2 Chapter 10.2.1.
568 See further on the necessary 'trade-offs' below at Part 3 Chapter 11.6.

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11.6.2.2 Asylum visa procedures: migration control with limits

An asylum visa scheme allows States to regulate protection and access through orderly and State-controlled procedures. This is generally in line with the principle of internal responsibility. At a minimum, the scheme would have to entail an identity check and security screenings. In this sense, Ray cautiously points to a potential 'win-win' situation with a view to the equivalent policy debate in the USA, considering that 'information about potential entrants could enhance security […] in this way, an asylum visa might function as a tool of "externalized border control" that helps both asylum seekers and the asylum states'.[569]

Additionally, elements of the procedure pointed out above as being crucial to the principle of external responsibility – such as a timely processing of the case, trained staff, and informed applicants – add to offering an access alternative to individuals who are likely to qualify for protection. In this regard, the Feasibility Study of 2002 argues that 'territorial procedures have a serious drawback: they bring in persons into the country who are rejected but cannot be removed. This group draws on resources, which could otherwise be used for better purposes, e.g. the needs of bona fide claimants'.[570] This line of thought is reflected in the LIBE Committee's report, suggesting the adoption of a EU visa regulation on the basis of Articles 77(2)(b) and 78(2)(g) TFEU, relating to the regulation of border crossing and 'managing inflows of people applying for asylum or subsidiary or temporary protection'.[571] It could be countered that such a consideration only applies if territorial procedures were to be replaced by an asylum visa scheme. However, the study on economic aspects regarding (complementary) visa scheme for protection seekers at EU level comes to a similar conclusion through an analysis of the shift of choice between three identified groups of protection seekers, depending on the existence of an asylum visa option.[572]

569 Ray, *supra* note 404, at 1255.
570 Noll, Fagerlund and Liebaut, *supra* note 49, at 83.
571 LIBE Report, *supra* note 409, at 12.
572 Meena Fernandes and Brittni Geny, 'Annex II: The Added Value of EU Legislation on Humanitarian Visas – Economic Aspects' in Wouter van Ballegooij and Cecilia Navarra, *Humanitarian Visas: European Added Value Assessment Accompanying the European Parliament's Legislative Own-Initiative Report (Rapporteur: Juan Fernando López Aguilar)* (2018), at 162 ff.

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With a view to financial implications for Member States, the LIBE Report proposes that 'part of the financial implications of the requested proposal should be covered by the general budget of the Union'.[573] The LIBE Report further proposes that 'significant financial support from the Integrated Border Management Fund to be made available to Member States' and 'that a Member State that issues such a humanitarian visa has access to the same compensation from the Asylum, Migration and Integration Fund as when a Member State receives a refugee through the European Resettlement Framework'.[574] Implementation of these proposals would have an overall positive effect with regard to the principle of internal responsibility.

There are two other factors with a potentially positive impact on the principle of internal responsibility. First, national asylum procedures following asylum visa procedures are likely to be shorter than common asylum procedures, since security screenings have been pursued and a Dublin procedure would be redundant – either the Member State granting the visa would be responsible for the asylum procedure or the visa scheme already entailed a decision on the allocation of responsibility upon arrival. Second, an asylum visa scheme at EU level would enhance the harmonisation of policies and the predictability of arrivals, with an overall impact on the stability of the Union and each Member State.[575]

11.6.2.3 Content of protection: access to the national asylum procedure

The number of beneficiaries and the scope of rights eventually accorded to them has an impact on the principle of internal responsibility.[576] As the scope of rights follows the status, it is crucial to determine the status that can be achieved through an asylum visa scheme. The international protection status has already been recognised and administratively provided for by Member States part of the CEAS. Whether Member States decide to grant another (national) protection status, is a matter of national law and discretion. Regarding the consideration of a status other than international

573 LIBE Report, *supra* note 409, at 5.
574 *Ibid*., at 9 ff.
575 On this argument see also Ballegooij and Navarra, *supra* note 572, at 5.
576 Noll, *Negotiating Asylum*, *supra* note 115, at 102 ff., pointing out that important factors in delimiting 'costs' for host States include the number of beneficiaries and the level of rights accorded to them upon arrival.

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protection status, Noll argues that discretion in this regard could offer 'more leeway to states in decision-making'.[577] However, a general recognition of other humanitarian reasons reduces the predictability of the needs of arriving persons, which can make it difficult to prepare administrative structures adequately. A uniform status, such as the international protection status, would also enable a flexible procedure, as the Member States could represent each other in processing the application. The Member State that processes the visa application therefore does not necessarily have to be the Member State that carries out the asylum procedure.[578]

One option could be to apply the current rules of the Dublin system to such an asylum visa scheme, with the Member State that issued the entry visa being responsible for admission (see Art. 12 Dublin III Regulation). This could counterbalance the current effects of the Dublin-System in cases of irregular entry, leading to primary responsibility of Member States with external EU borders. This would not only have a positive impact on the internal responsibility, but also on the principle of inter-State responsibility between EU Member States.[579]

11.6.3 Inter-State responsibility

This section analyses the asylum visa in the light of the inter-State responsibility, once more addressing the beneficiaries (11.6.3.1), the procedure (11.6.3.2) and the status granted upon arrival (11.6.3.3).

11.6.3.1 Beneficiaries: no large-scale admission or consideration of State interests

Chapter 10 argued that the principle of inter-State responsibility implies an allocation of responsibility with a 'common but differentiated approach' to responsibility-sharing. With a view to the beneficiaries of an asylum visa scheme, this would imply a selection of protection seekers for admission in cooperation with States hosting large numbers of protection seekers. Thus, considerations such as the need for medical care could play a role.

577 Noll, Fagerlund and Liebaut, *supra* note 49, at 74.

578 This option was not proposed in the LIBE Report as it could render procedures 'overly complicated'; see LIBE Report, *supra* note 409, at 13.

579 While the (internal) EU dimension of the principle of inter-State responsibility is not in the focus of this book, a brief outline can be found in Part 3 Chapter 9.1.2.

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In view of the large number of protection seekers worldwide primarily hosted in countries near regions of conflict, the principle of inter-State cooperation would also imply engaging into large-scale admissions, ideally based on quotas. The approach of the asylum visa as individual pathway with individual protection needs in the focus does not match these considerations. However, the asylum visa can enhance the principle of inter-State responsibility in terms of its procedural design, as will be discussed in the following.

II.6.3.2 Asylum visa procedures: paradigm change in responsibility allocation and issues of international cooperation

As an asylum visa scheme offers an extraterritorial option to seek asylum in a State that may be far away from the actual location of a protection seeker, this pathway changes the current allocation of international responsibility based solely on geographical proximity. Even if the numerical impact of an individual asylum visa scheme may not be significant in terms of actual admissions, this normative shift in the responsibility allocation would mean a decisive change in paradigm in the current system.

In addition to these overall considerations, there are several details of the procedure which concern areas governed by the principle of inter-State responsibility. These include the fact that the procedures may take place in third States, where embassies are 'hosted'.[580] One legal problem that arises in the extraterritorial context is the question of the freedom and authority of a State representation to take decisions that may affect the sovereignty of another State and thus interstate relations. This can, for instance, concern offering accommodation or safe passage to applicants, or the necessity of granting a legal status to applicants during the procedures.

II.6.3.3 Content of protection: the relevance of a long-term perspective

The status granted upon arrival may have an indirect impact on the principle of inter-State responsibility as it potentially affects the (long-term)

580 See above at Part 3 Chapter II.2.1 for a discussion of these issues with a view to the concept of diplomatic asylum.

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prospects of protection seekers.[581] An asylum visa scheme would offer access to a national asylum procedure and thus access to a system providing for rights and potential long-term prospects. This can have a stabilising effect on the principle of inter-State responsibility at international level.

As argued above with a view to the principle of internal responsibility, the application of common standards regarding the procedure and the status upon arrival could enhance the well-functioning and stability of the Schengen system. The inter-State responsibility between EU Member States is not the focus of this book, and respective positive effects are primarily attributed to the principle of internal responsibility. However, it is worth mentioning here that these positive effects impact not only upon the internal stability of the Union and each Member State, but also on the (inter-State) relationship between EU Member States.[582]

11.7 Tensions and trade-offs raised by asylum visa schemes

The previous section analysed the various effects an asylum visa scheme would have on the triad of responsibility principles. As predicted in Chapter 10, doing justice to one principle could lead to tensions and trade-offs with regard to another.[583] This section outlines the tensions and trade-offs that can arise from the implementation of an asylum visa scheme at EU level.

11.7.1 Safe access to embassies and physical safety during the procedures

The first question is how protection seekers can actually gain access to an asylum visa procedure, i.e. how they can reach an embassy and submit an application. For instance, the closing of embassies in Syria after the outbreak of the war forced protection seekers to cross the border to Lebanon to reach an embassy. It can be dangerous to cross (even regional) borders in times of conflict, as well as returning to one's own country to await the outcome of the procedure. This raises the question of accommodation in the country where the embassy is located. Providing for any kind of reception during the procedure includes addressing issues of adequate stan-

581 See Part 2 Chapter 10.2.2.
582 See Part 2 Chapter 9.2.2.
583 See Part 2 Chapter 10.2.2.

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dards and safety, impacting upon the principle of external responsibility. At the same time, reception in the region would generate costs and take up resources of States involved.[584] Reception in the region also requires a high degree of international cooperation, which has an impact on the principle of inter-State responsibility. The States hosting the embassies must cooperate if a reception facility is to be set up. International cooperation would also be necessary with regard to the legal status of asylum seekers during an asylum visa procedure carried out in a third country. The last point concerns the issue of safe passage, as the person seeking protection must also be able to leave the respective (third) country for the procedure to be effective. How States address the issue of legal status of protection seekers and safe passage impacts on the principle inter-State responsibility, as these issues affect the territorial sovereignty of the State hosting the embassy.[585]

In view of these numerous issues, the duration of proceedings in the extraterritorial context is a particularly important factor. Applicants might still be near – or even in – the country where persecution took place and therefore in a situation of risk. This is especially relevant as the preliminary assessment of the claim depends on just that: the State representation must come to the (preliminary) conclusion that the applicant faces persecution or severe human rights violations if the visa is rejected. Against this backdrop, fast-track procedures can be advantageous in terms of safety, but they also have drawbacks. As pointed out in the Feasibility Study of 2002, 'simple and informal procedures give a leeway to decision-makers which may be used to the detriment of applicants'.[586] The study discusses the duration of the procedure under the question of risk distribution. Overall, there is the risk that protection seekers might choose an irregular flight route and resort to smugglers if procedures become too long or inaccessible.[587] This would run counter to the principles of external and internal responsibility.

584 The assessment of economic aspects of a humanitarian visa scheme at EU level annexed to the EASA of 2018 sets out concrete numbers regarding such costs in three countries qualifying for a pilot, stating that 'current EU per diem rates in Afghanistan, Iraq and Syria would add up to a sum of between EUR 2,775–3,225 for a 15-day stay', thereby also pointing out that 'a negative decision may further extend the stay, leading to higher costs'; see Fernandes and Geny, *supra* note 572, at 160.

585 On issues of safe passage in historic precedents see Part 3 Chapter II.2.

586 Noll, Fagerlund and Liebaut, *supra* note 49, at 76.

587 *Ibid*., at 76; see also Moreno-Lax, *supra* note 153, at 670.

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11.7.2 Legal access to the procedures and legal safeguards

The issues outlined in the previous section show that *de facto* access to the procedures as well as the physical situation of protection seekers during the procedures can have impact on the effectiveness of an asylum visa scheme. This is closely linked to aspects of legal access to the procedures, including legal safeguards. The procedural requirements set out in this Chapter correspond to the ECRE recommendations on procedural safeguards in any kind of humanitarian admission procedure, pointing to the importance of access to independent information, qualified and impartial interpreters, legal assistance and legal remedies.[588]

A solution to issues regarding *de facto* access as well as legal access to the procedures could lie in providing access to the procedures via digital application forms and online interviews. This way, applicants would not have to engage in at times life-threatening journeys to the embassies and could temporarily rely on the preliminary shelter they might have found. Here again, however, a potential exclusion of individuals, who do not have the possibility to access digital application forms, has to be considered. An option for digital application would therefore have to be complementary to the option of personal application. Furthermore, issues of data protection would have to be considered.

Another practical solution lies in the involvement of third parties. On the one hand, an asylum visa scheme implies individual access to a State representation. This is important, as any organisation involved in the referral of applications can have a 'gatekeeper' effect on the procedure. Handling applications on the sole basis of case referrals from UNHCR or NGOs would therefore not be an option in favour of the principle of external responsibility. This, however, increases the workload for the embassies, affecting the principle of internal responsibility.

Delegating parts of the procedure to external service providers – as foreseen by Art. 43 Visa Code or suggested by the LIBE Committee – could certainly be a potential benefit for the States. This could lead to savings in personnel and administrative resources and enhance responsibility-sharing within EU Member States adding to a harmonised structure of the procedures. As outlined in Part 2, this last aspect impacts on the principle

588 European Council on Refugees and Exiles (ECRE), 'Protection in Europe: Safe and Legal Access Channels: ECRE's Vision on Europe's Role in the Global Refugee Protection Regime' (Policy Paper 1, February 2017), at 16.

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of *internal* responsibility of the EU as a political entity, as well as on the *internal* responsibility of each Member State, due to the potentially positive effect on the overall stability of the Union, in turn reflecting on the internal stability of national Member States.[589] Although not a focus in this book, the principle of *inter-State* responsibility could also be relevant, as it could be applied to the relationship between Member States, then even relying on a strong legal concept of solidarity in EU law.[590]

Overall, however, the delegation or privatisation of certain parts of the procedure raises issues of transparency and accountability regarding procedural safeguards, typically to the detriment of the protection seeker.[591] As pointed out above, a solution could lie in delegating only those parts of the procedure that do not concern the merits of the claim. Otherwise, the involvement of third parties could indirectly exclude legal remedies, which are a crucial element of an asylum visa scheme in line with the principle of external responsibility.

11.7.3 The 'floodgate' argument

The enforceability of an asylum visa brings up the 'floodgate argument', also referred to as 'fear of numbers' brought forward by, for example, Belgium and several other Member States during the hearing in the CJEU case *X and X*.[592] A variation of this argument is that creating safe pathways may generate 'pull factors'. To counter this argument, AG Mengozzi pointed out that this is

> 'irrelevant in the light of the obligation to respect, in all circumstances, fundamental rights of an absolute nature, including the right enshrined in Article 4 of the Charter […] Apart from the fact that that argument is clearly not of a legal nature, the practical obstacles to lodging such applications must certainly not be underestimated'.[593]

589 See Part 2 Chapter 7.2. and 7.3.
590 See Part 2 Chapter 9.1.2.
591 On the 'outsourcing' of protection responsibilities see Gammeltoft-Hansen, *Access to Asylum*, *supra* note 22, at 158 ff.
592 *X and X v Belgium*, *supra* note 16. For a discussion of this case see above, Part 3 Chapter 11.4.
593 *X and X – Opinion of Advocate General Mengozzi*, *supra* note 493, at paras. 171 and 172.

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A similar reasoning can be found in the *Hirsi* case, where the ECtHR pointed out that 'problems with managing migratory flows cannot justify recourse to practices which are not compatible with the State's obligations'.[594]

Still, the resulting constraint on State sovereignty, the 'fear of numbers' and limited resources brought forward in arguments against an asylum visa (as well as other pathways), are factors to be considered when delimiting the impact on the principle of internal responsibility. Many of these arguments can be countered with empirical facts as well as the paramount importance of upholding fundamental rights. Moreover, if all signatory States commit to accepting asylum claims at their embassies, there would hardly be one single State having to cope with all applications.

There are further ways to counter the 'fear of numbers' by drawing on international cooperation. For instance, the State handling the asylum application would not necessarily have to be the one granting access to its territory. This, again, has an impact on the principle of external responsibility: thinking of alternatives to the allocation of responsibility affects the choice of country of protection and therewith possibly family unity. Thus, family ties to a specific State would have to be considered to do justice to the principle of external responsibility. Acknowledging that there is no right of protection seekers to choose their country of protection,[595] Moreno-Lax suggests that protection seekers 'could list, e.g., up to 5 Member States, in order of preference, providing reasons for that classification. While the quota of the top 1 country is not yet filled, the asylum seeker may be assigned to it. If already filled at that point, then, the second listed may be considered and so on.'[596] All these suggestions raise further questions of how to implement such schemes in practice. Instead of denying human rights obligations and thus the principle of external responsibility in the extraterritorial context,[597] the feared scenario would make it necessary to rely and act upon the principle of inter-State responsibility.

594 *Hirsi Jamaa and Others v. Italy*, *supra* note 116, at para. 179.
595 See Part 1 Chapter 5.1.
596 Moreno-Lax, *supra* note 153, at 100.
597 See also the arguments of this book with a view to the rulings of the CJEU and the ECtHR in 'asylum visa' cases: above Part 3 Chapter 11.4.4.

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11.7.4 Limits of the asylum visa in terms of scope, numbers and predictability

One of the counter-arguments to the 'fear of numbers' is that the asylum visa is not a pathway likely leading to 'mass entry' of protection seekers, as it is based on individual assessments, focusing on protection seekers who would (*prima facie*) face refoulement if they were refused a visa. The asylum visa does therefore not apply to the situation of numerous protection seekers who might have found preliminary safety in a first State of refuge, but who do not have any long-term perspective. In this regard, the asylum visa has a limited impact on the principle of external responsibility. This could be countered by extending the scope of such a visa. Nevertheless, actual admission numbers might be low compared to quota-based schemes, which rely on a strong infrastructure of established procedures and different actors.[598] Given these limitations of the asylum visa, a complementarity of this pathway with other pathways would be crucial with a view to the principle of external responsibility.

While a normative change of responsibility allocation at the international level would strengthen the principle of inter-State responsibility, the fact that actual admission numbers might be low also limits the *de facto* effect on the principle of inter-State responsibility. Additionally, the absence of quotas makes this pathway less predictable than other pathways, such as permanent resettlement schemes. The lack of predictability impacts on the *internal* as well as the *inter-State* responsibility. To counter this lack of predictability, asylum visa schemes would have to be implemented as permanent schemes, ensuring accessibility of the procedures.

11.7.5 Interim conclusion: the asylum visa as human rights tool

The asylum visa has a predominant focus on the principle of external responsibility. An asylum visa would offer protection seekers the opportunity to individually apply for protection at an embassy. Without being subject to quotas or categorical limitations, an asylum visa is a pathway particularly promoting the individual right to seek asylum. Upholding the position that a State has no discretion in its decision on granting such a visa in case of a possible risk of persecution or serious harm for the applicant, makes the

598 See Part 3 Chapters 12 and 13 on quota-based admissions.

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asylum visa a strong tool to enforce individual human rights and therewith the principle of external responsibility. This aspect of the procedure has the greatest impact on the principle of external responsibility. At the same time, however, this is also the aspect that limits internal responsibility the most.[599] An asylum visa would therefore not create a 'perfect balance' between the principles of internal and external responsibility. Instead, the asylum visa has the normative potential to counter the current *imbalance* of responsibility principles manifested in the asylum paradox. The next section will delve into this issue and conclude this chapter.

11.8 Conclusion: the asylum visa as paradigm shift

This chapter has outlined, analysed and assessed the asylum visa, concluding that this pathway would overall have a strong normative effect on the asylum paradox. Chapter 10 identified an individual admission procedure with procedural safeguards and guarantees, no predominant focus on migration control and a change in the current allocation of international responsibility as key factors to counter the imbalance of responsibility principles reflected in the asylum paradox.[600] The asylum visa offers the possibility to individually apply for protection in the extraterritorial context, with corresponding procedural guarantees and, possibly, a Convention refugee status at the end of a national asylum procedure. Overall, this pathway has a significant impact on the principle of external responsibility. With a view to the inter-State responsibility, an asylum visa scheme would change the current allocation of responsibility based on geographical proximity. However, the asylum visa is limited in its scope, as it does not address the situation of protection seekers who might not be in imminent danger but require long-term protection. This, again, diminishes the effect of the asylum visa on the principles of external and inter-State responsibility. These limits of the asylum visa scheme make a *complementarity* of the asylum visa with other safe pathways necessary with a view to the principles of external and inter-State responsibility.

In order to distinguish the asylum visa from other pathways, particularly from 'humanitarian visas', the term 'asylum visa' has been narrowed down

599 See the legal arguments brought forward by the ECtHR in the case *M.N.*, above Part 3 Chapter 11.4.2.

600 See Part 2 Chapter 10.2.3.

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to the specific purpose of granting a visa to access a national asylum procedure upon a preliminary screening of a protection claim. There is currently no permanent asylum visa scheme for protection seekers at EU level. Existing national examples of granting 'humanitarian visas' are discretionary and vary significantly in size and scope. After the CJEU ruled in the X and X case that there is no legal basis for a visa at EU level allowing access to asylum, the European Parliament called for the introduction of a humanitarian visa scheme at EU level. The concept of an asylum visa scheme at EU level challenges established laws, policies and procedures, and opens a vast field of legal and practical questions regarding potential beneficiaries, actors involved in the procedure and the content of protection upon arrival. Key issues include how protection seekers could safely access these visa procedures and how to ensure safety during the procedures, both *de facto* and legally.

As outlined in Part 1 and reflected in the rulings of the CJEU and the ECtHR in 'asylum visa' cases, the question whether protection seekers have a right to legally access any State – and thus a right to an asylum visa procedure – is highly contested.[601] Yet, if an asylum visa scheme were to be introduced at EU level, respective obligations deriving from human rights norms would apply in favour of those seeking protection. Procedural guarantees are a prerequisite for doing justice to the protection claim and therewith the principle of external responsibly. The inclusion of these guarantees in an asylum visa scheme requires that applicants are adequately informed, that a personal interview is conducted, that adequate training is provided for the staff involved, that time limits are set for the processing of applications and that access to an effective remedy is guaranteed. In the absence of an existing EU asylum visa scheme, these requirements challenge the EU and its Member States and thus the principle of internal responsibility.

At the same time, however, there are several aspects in favour of the principle of internal responsibility. Firstly, any form of access regulation through a visa scheme is a form of migration control, giving States the possibility of undertaking security screenings and preparing administrative structures. Secondly, the national asylum procedure can be shorter: security checks have been carried out, the travel route is clear and the allocation of responsibility has been determined. Eventually, a harmonised scheme at EU level could help to overcome some of the deficiencies of the current Dublin

601 See Part 1 Chapter 1 and Chapter 5.1, see also Part 3 Chapter 11.4.

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system and enhance the stability of the CEAS to the benefit of all Member States.

The 'fear of numbers' is the main (political) argument raised against the implementation of an asylum visa scheme. This book follows the argument of AG Mengozzi in his opinion to the *X and X*[602] case, pointing out that this is not a legal argument, but an issue to address in the implementation of safe pathways.[603] However, drawing on the responsibility framework, this book still considers this argument to be *normative*: with a view to the internal responsibility, it can make a difference if a pathway 'allows anyone to come from anywhere'. However, the 'fear of numbers' argument can be countered in two ways. First, the asylum visa is not a pathway allowing for 'mass entry'; visa procedures entail various legal and practical hurdles and most protection seekers do not meet the high threshold of the principle of non-refoulement. Second, the 'fear of numbers' can be countered by addressing the central issue of the international protection system, which is the lack of collective action. The 'fear of numbers' is all the less justified the stronger the international commitment to the principle of external and inter-State responsibility.

12 Resettlement

This chapter examines resettlement as a quota-based pathway to protection. A clarification of the term 'resettlement' (12.1) will be followed by a brief outline of the background and legal context of this pathway (12.2). Subsequently, the key features of access to protection through resettlement will be outlined (12.3). Following this, resettlement will be analysed in the light of the responsibility framework to assess the effects of this pathway on the triad of responsibility principles (12.4). This will help identify tensions and trade-offs (12.5) and, ultimately, provide conclusions regarding the potential effects of resettlement on the asylum paradox (12.6). As will be shown, the assessment strongly depends on whether one takes 'traditional' UNHCR-led resettlement as a point of reference, or resettlement as defined in the proposal of the European Commission of 2016, 'establishing a Union Resettlement Framework' (Resettlement Framework Proposal) as well as the consolidated draft for a regulation on a 'Union Resettlement

602 *X and X* – Opinion of Advocate General Mengozzi, *supra* note 493.
603 See Part 3 Chapter 11.4 for a discussion of this case.

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and Humanitarian Admission Framework' of 2024.[604] While the reform process of the CEAS has led to an agreement on an amended regulation on resettlement and humanitarian admission to the EU, specific aspects of the 2016 Resettlement Framework Proposal of the Commission are still worth assessing as they are paradigmatic for an approach to resettlement focussing on migration control rather than on protection.

12.1 Defining resettlement

The term 'resettlement' has different meanings and therefore needs clarification. There can be substantial differences regarding the procedure and the rights granted to beneficiaries after arrival that may impact the assessments' outcome. On the one hand, 'resettlement' serves as umbrella term to describe humanitarian admission based on quotas. On the other hand, the term 'resettlement' refers to a specific form of permanent quota-based admission schemes in cooperation with and defined by UNHCR as one of the 'three durable solutions' (along with local integration and voluntary repatriation).[605] UNHCR defines resettlement as

> 'the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status'.[606]

An additional defining factor is the requirement of a particular vulnerability of beneficiaries in the selection process. According to the UNHCR definition, resettlement does not function 'as a rapid response to an acute crisis but, rather, as a durable solution implying a long-term concern for partic-

604 See European Commission, Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM (2016) 468 final, 13 July 2016 ('Resettlement Framework Proposal'); on the amended version agreed on during the negotiations of the CEAS reform see Council of the European Union, *Regulation(EU)2024/… of the European Parliament and of the Council of… establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147*, Annex to the Letter to the Chair of the LIBE Committee of the European Parliament, 6368/24, 2016/0225(COD), 9 February 2024.

605 See further https://www.unhcr.org/solutions.html.

606 UNHCR, *Resettlement Handbook*, *supra* note 52, at 3.

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ularly vulnerable individuals.[607] The focus lies on addressing protracted situations, by *'re'-settling* individuals, who have no integration prospects in a first State of refuge. In terms of distinguishing resettlement from other admission schemes, UNHCR states in its Resettlement Handbook that 'ad hoc admission exists and is often also referred to as resettlement, however, it does not fall under the above-mentioned definition'.[608]

The 2021 regulation establishing the Asylum, Migration and Integration Fund (AMIF Regulation)[609] at EU level refers to UNHCR's understanding of resettlement, setting out that '"resettlement" means the admission following a referral from the UNHCR of third-country nationals or stateless persons from a third country to which they have been displaced, to the territory of the Member States, and who are granted international protection and have access to a durable solution in accordance with Union and national law' (see Art. 2(8) AMIF Regulation). The Resettlement Framework Proposal of 2016, as the first step of harmonising resettlement with a regulation at EU level, defined resettlement in its draft Art. 2 as follows:

> 'For the purposes of this Regulation "resettlement" means the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection.'

The consolidated version at the end of the CEAS reform process in 2024 defines resettlement as follows:

> 'resettlement means the admission, following a referral from the United Nations High Commissioner for Refugees (UNHCR), of a third country national or stateless person, from a third country to which that person has been displaced to the territory of a Member State, who (a) is eligible for admission pursuant to Article 5(1); (b) does not fall under the grounds for refusal set out in Article 6; and (c) is granted international protection in accordance with Union and national law and has access to a durable solution.'[610]

607 Garnier, Jubilut and Sandvik (eds), *supra* note 155, at 5.
608 UNHCR, *Resettlement Handbook*, *supra* note 52, at 5.
609 Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, OJ 2021 L 251/1.
610 European Council, 'Union Resettlement and Humanitarian Admission Framework', *supra* note 604, Draft Art. 2(1).

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There are two main differences between these definitions of resettlement. On the one hand, the Resettlement Framework Proposal of 2016 refers not only to an admission from a first State of refuge, but also to admissions from home States, thereby addressing the situation of internally displaced persons (IDPs). On the other hand, the granting of a permanent residence status upon arrival is not an imperative requirement of the EU proposals. Instead, individuals are to be granted 'international protection status' according to Union and national law (that is, Convention refugee *or* subsidiary protection status),[611] and *have access to* a durable solution.

Further differences regarding the admission criteria and procedure will be discussed below.[612] As will be shown, these differences impact on the effects resettlement may have on the triad of responsibility principles. Before elaborating further on this issue, the next section will set the historical and legal context for the assessment by outlining the background of resettlement as safe pathway at international and EU level.

12.2 Background

This section briefly outlines the background of resettlement at international level (12.2.1) as well as the role of this pathway in the EU (12.2.2).

12.2.1 Resettlement at international level

Resettlement has a long tradition at international level. The resettlement of 'European refugees' to Western European States, Canada, the United States, Australia and Latin America was one of the first tasks of the International Refugee Organisation after the Second World War. Further large-scale resettlement schemes were established after the Soviet intervention in Hungary in 1956 and the military coup in Chile in 1973, as well as for individuals fleeing from former Yugoslavia between 1992 and 1994.[613] Resettlement played an important role in the CPA tackling the situation of 'Indochinese

611 See above Part 1 Chapter 3.1.1.

612 See below Part 3 Chapter 12.4.

613 See Hurwitz, *supra* note 119, at 151 ff; see also UN High Commissioner for Refugees (UNHCR), *The History of Resettlement: Celebrating 25 Years of the ATCR* (2019), available at https://www.unhcr.org/sites/default/files/legacy-pdf/5d1633657.pdf.

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refugees' from 1975 to 1995.[614] In all of these examples, State interests and political dynamics were decisive for admissions.[615] During the Cold War era, for instance, resettlement was instrumentalised for ideological political battles.[616] As Kneebone and Macklin conclude, '[t]he history of resettlement shows its genesis in State power and supporting institutions.'[617] While resettlement became less relevant during the late 1990s, the increased securitisation of the political landscape after the terrorist attacks of 2001 led to a revival of this pathway.[618] The NYD of 2016 and the following GCR of 2018 reasserted the political commitment of the international community to resettlement and other (complementary) pathways.[619]

Today, the UNHCR Resettlement Handbook outlines three main functions of resettlement: first, providing international protection and meeting specific individual needs; second, acting as a 'durable solution for larger numbers or groups of refugees'; and third, acting as an 'expression of international solidarity and a responsibility-sharing mechanism'.[620] The roles and responsibilities of resettlement countries and actors involved were set out in a Multilateral Framework of Understandings on Resettlement,[621] a non-binding instrument and result of the UNHCR's 'Convention Plus' process.[622] From 2008 to 2021 'top resettlement countries' were Australia, Canada, Finland, France, Germany, the Netherlands, Norway, New Zealand, Sweden, the United Kingdom, and the United States.[623] Resettlement relies on a great number of stakeholders at international, national and local level, from UNHCR and other international organisations to governments and NGOs.

614 On the CPA as responsibility- and burden-sharing arrangement, see Part 2 Chapter 9.3.2.

615 See O'Sullivan, *supra* note 380, at 254.

616 See Susan Kneebone and Audrey Macklin, 'Resettlement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 1080, at 1087.

617 *Ibid*., at 1098.

618 Labman, *Crossing Law's Borders*, *supra* note 157, at 27.

619 See Part 2 Chapter 9.3.3 on the NYD and the GCR.

620 UNHCR, *Resettlement Handbook*, *supra* note 52, at 3.

621 UNHCR, High Commissioner's Forum, 'Multilateral Framework of Understandings on Resettlement', FORUM/2004/6, 16 September 2004.

622 See further Hurwitz, *supra* note 119, at 151.

623 See the statistic provided by UNHCR, *Resettlement Data Finder*, available at https://rsq.unhcr.org/en/#9Hgc.

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Joint strategies and collaboration efforts are brought forward by the Working Group on Resettlement and the yearly resettlement conference hosted by UNCHR in Geneva, the Annual Tripartite Consultations on Resettlement (ATCR).[624] The annual *Projected Global Resettlement Needs* report, presented at the ATCR, sets out not only numbers of global resettlement needs but also the scope of resettlement operations around the world. A constant concern is that the available resettlement places are nowhere near enough to meet global resettlement needs. For 2024, UNHCR identified a grand total of 2.4 million persons in need of resettlement.[625]

12.2.2 Resettlement in the EU

In contrast to the relevance of resettlement at international level, this pathway has a short history at EU level.[626] In 2012, the EU adopted the 'Joint EU Resettlement Programme', which had been proposed by the European Commission in 2009.[627] Thus, the developments at EU level started to pick up pace.[628] As response to the high number of deaths in the Mediterranean, human smuggling and the increased number of asylum seekers reaching the EU irregularly in 2015, the European Commission stressed the importance of resettlement as 'safe and legal way' to reach protection in the EU in its 'European Agenda on Migration'.[629] Reflecting the approach to the principle of inter-State responsibility put forward in Chapter 9 of this book, the Commission stated that 'the EU has a duty to contribute its share in

624 UNHCR, *The History of Resettlement*, *supra* note 613.

625 See UNHCR, *Projected Global Resettlement Needs 2024* (2023), available at https://reporting.unhcr.org/unhcr-projected-global-resettlement-needs-2024.

626 For a comprehensive assessment of the legal framework for refugee resettlement to the EU, see Prantl, *supra* note 162.

627 See Statement by EU Commissioner Malmström on the Council adoption of a common position on the Joint EU resettlement programme, MEMO12/168, Brussels, 8 March 2012, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_168.

628 For an overview see de Boer and Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU', 32(1) *International Journal of Refugee Law* (2020) 54; see also Mario Savino, 'Chapter 3: Refashioning Resettlement: From Border Externalization to Legal Pathways for Asylum' in Sergio Carrera *et al.* (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (2019) 81.

629 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels 13.5.2015, COM(2015) 240 final, at 4.

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helping displaced persons in clear need of international protection. This is a joint responsibility of the international community'.[630] The subsequent Commission's Recommendation on a European Resettlement Scheme[631] led to the adoption of conclusions by the Council for resettlement of 20,000 'persons in clear need of international protection' based on multilateral and national schemes.[632] This was followed by a Council Decision reassigning 18,000 (intra-EU) relocation[633] places for the resettlement of Syrians from Turkey.[634]

The so called 'EU–Turkey Statement'[635] of March 2016 marked a turning point for resettlement and humanitarian admission policies in the EU. The legal nature of this 'statement' or 'deal', which was published as a 'press release', has been subject to debate.[636] In cases concerning applications for annulment by three asylum seekers against this 'deal', the General Court of the European Union declared that it lacks jurisdiction as the EU–Turkey Statement could not be attributed to the EU but only to the Heads of EU Member States.[637] However, the legal uncertainties regarding this 'deal' or 'statement' did not prevent it from serving as basis for two humanitarian admission schemes: the so called 'one-to-one scheme', overall foreseeing the admission of 50,000 persons in need for international protection from

630 *Ibid*.

631 European Commission, Recommendation (EU) 2015/914 of 8 June on a European resettlement scheme, 13.6.2015, L 148/32.

632 Council of the European Union, Note from the General Secretariat of the Council to Delegations, Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Brussels, 22 July 2015 (OR.en) 11130/15, ASIM 62, RELEX 633.

633 On relocation see above, Part 1 Chapter 3.1.2.

634 See Council Decision 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

635 European Council, 'EU-Turkey Statement, 18 March 2016', Press Release, 18 March 2016, available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

636 See further Mauro Gatti and Andrea Ott, 'Chapter 10: The EU-Turkey-Statement: Legal Nature and Compatibility with EU Institutional Law' in Sergio Carrera, Juan S. Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of the EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (2019) 175.

637 See Case T-192/16, *NF, NG and NM v European Council*, 28 February 2017; *NF v European Council* (EU:T:2017:128); Case T-193/16, *NG v European Council* (EU:T:2017:129); Case T-257/16, *NM v European Council* (EU:T:2017:130).

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Turkey, and the so called Voluntary Humanitarian Admission Scheme (VHAS).[638] The 'one-to-one' scheme foresees that for each Syrian returned from Greece to Turkey after an irregular arrival in the EU, one Syrian will be 'resettled' from Turkey to the EU.[639] This scheme qualifies as *ad hoc* humanitarian admission scheme and will therefore be in the focus of the following chapter. For the purposes of this chapter, it suffices to acknowledge that the 'migration deal' with Turkey served as a blueprint for the Resettlement Framework Proposal.

A focus on securitisation and migration control influenced the ongoing harmonisation of resettlement at EU level with the Resettlement Framework Proposal of 2016 at its core. The adoption of a 'Resettlement Regulation' at EU level, as foreseen by the proposal, would lift resettlement from policy to legal level in the EU.[640] To support Member States in the implementation, financial support shall be implemented in accordance with the AMIF Regulation.[641] The implementation is to be monitored by the European Commission and the European Asylum Support Office (EASO). Thus, the Resettlement Framework Proposal of 2016 points the way, stating in its Article 3: 'A Union Resettlement Framework is hereby established. It lays down rules on the resettlement of third-country nationals and stateless persons to the territory of the Member States.'[642]

As will be analysed in the following discussion, the original suggestions put forward by the Resettlement Framework Proposal of 2016 distorted the traditional UNHCR approach to resettlement in many ways. In the ongoing negotiations, some of the proposals were mitigated based on several amendments suggested by the European Parliament, arguing that resettlement should be conducted 'in conformity with the existing international

638 See European Commission Recommendation of 11 January 2016 for a voluntary humanitarian admission scheme with Turkey, Brussels, 11.1.2016, C(2015)9490 Final (hereafter 'VHAS Recommendation').

639 The 'one-to-one' scheme is not reflected in the actual numbers of individuals admitted and returned under this scheme; see further Part 3 Chapter 13.4.1.1.

640 With a view to these developments Ziebritzki speaks of an 'emerging EU resettlement law', see Catharina Ziebritzki, 'Chapter 9: The Objective of Resettlement in an EU Constitutional Perspective' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 285, at 298 ff.

641 See Draft Art. 13 of the regulation on a 'Union Resettlement and Humanitarian Admission Framework', *supra* note 604.

642 European Commission, 'Resettlement Framework Proposal', *supra* note 604.

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resettlement architecture'.[643] The suggested amendments pick up on some of the proposal's most critical points, particularly the grounds for exclusion foreseen in Art. 6(d) and (f) of the Resettlement Framework Proposal. In contrast to the last draft of a 'Union Resettlement and Humanitarian Admission Framework' of February 2024, the Commission proposal of 2016 was paradigmatic for a security-oriented approach to resettlement in the EU. Against the backdrop of the political negotiations at EU level, the following assessment will therefore address the original proposals of 2016 as conceptual counterpart to traditional UNHCR resettlement.

12.3 Access through resettlement

This section outlines the regulation of access through resettlement with a view to potential beneficiaries ('who', 12.3.1), the procedure ('how', 12.3.2) and the content of protection – that is, the status granted upon arrival ('what', 12.3.3). The section will draw on both the 'traditional' definition of resettlement set out by UNHCR and contrast this concept of resettlement with the concept provided by the 2016 Resettlement Framework Proposal at EU level. The findings will serve as basis for the subsequent analysis and assessment of resettlement in the light of the responsibility framework (12.4).

12.3.1 'Who': 'resettled refugees'

UNHCR addresses beneficiaries of resettlement as 'resettled refugees'.[644] To be resettled under a UNHCR procedure, individuals must not only be Convention or so called 'mandate refugees',[645] but also meet further eligibility criteria, mainly drawing on 'vulnerability' (including persons with medical, legal or physical protection needs, children and adolescents, elderly people, women-at risk, survivors of violence). There also has to be a lack of local

643 See Draft European Parliament Legislative Resolution on the proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council (Com(2016)0468 – C8–0325/2016 – 2016/0225(COD)), Amendment 12.

644 UNHCR, *Resettlement Handbook*, *supra* note 52, at 4.

645 On the definition see UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011), HCR/1P/4/enG/Rev. 3, 7, para. 16.

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integration prospects or options of family reunification to a specific State. In view of the voluntary nature of resettlement, these requirements are not mandatory. In addition to or instead of the eligibility criteria set out by UNHCR, States can therefore apply their own admission criteria.

In its Article 5 the EU Resettlement Framework Proposal of 2016 sets out the following eligibility criteria for resettlement of third-country nationals or stateless persons:

- who are eligible for international protection (that is refugee or subsidiary protection), see Art. 5(a)(i) and (ii);
- who are vulnerable, see Art. 5(b)(i): women and girls at risk; children and adolescents at risk, including unaccompanied children; survivors of violence and/or torture, including on the basis of gender; persons with legal and/or physical protection needs; persons with medical needs or disabilities; or persons with socio-economic vulnerability;
- who are family members of third-country nationals or stateless persons or Union citizens legally residing in a Member State, see Art. 5(b)(ii);
- who do not fall within the scope of Article 1D of the 1951 Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the UNHCR, see Art. 5(c);
- who have not been recognised by the competent authorities of the country in which they are present or have taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those: see Art. 5(d).

Furthermore, the 'ordinary procedure' set out in Art. 10 of the Resettlement Framework Proposal of 2016 foresees that Member States may *inter alia* prioritise third-country nationals or stateless persons with:

- 'family links' to a Member State;
- 'social or cultural links', or any link which can 'facilitate integration', however, 'provided that this is without discrimination based on any ground';
- 'particular protection needs or vulnerabilities'.

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The Explanatory Memorandum to the 2016 proposal stressed that this proposal expands the scope of traditional resettlement to IDPs as well as 'persons with socio-economic vulnerability and those with family links'.[646]

Several of these aspects are equally considered by UNHCR, albeit not when identifying the individual eligible for resettlement but, instead, when *determining a country* to match an individual already qualifying for resettlement (so called 'resettlement country criteria'). Thus, there are country criteria related to the individual and country criteria related to the country. Country criteria related to the specific individual include family ties, language or cultural aspects, medical or other specific needs, the educational or professional background, as well as personal preferences.

Country criteria solely related to the country include resettlement capacities, also with a view to the timeline and travel, national priorities, the presence of a supportive community and the availability of services for specific needs. Political interests can play a role in the admission decision when it comes to the question of where resettlement takes place from.

The latter aspect played an important role in the Commission's 2016 proposal, as it focused on resettlement from countries that cooperate effectively on migration control, *inter alia* by 'reducing the number of third-country nationals and stateless persons irregular crossing the border into the territory of the Member States coming from that country' (see Article 4(d)(i) of the 2016 Resettlement Framework Proposal). The Explanatory Memorandum added to that by stating, *inter alia*: 'Third countries' effective cooperation with the Union in the area of migration and asylum will be an important element on which the Commission will base its decision.'[647]

Finally, there is the question of exclusion criteria. Apart from exclusion criteria based on security risks, the Resettlement Framework Proposal of 2016 suggested *inter alia* excluding 'persons who have irregularly stayed, irregularly entered, or attempted to irregularly enter the territory of the Member States during the five years prior to resettlement' (Art. 6(d)), as well as 'persons whom Member States have during the last five years prior to resettlement refused to resettle' (Art. 6(f)). These grounds for exclusion were amended in the course of the ongoing reform process and are no longer included in the 2024 proposal for a Union Resettlement and Humanitarian Admission Framework.

646 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 10.
647 *Ibid.*

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Lastly, an important precondition for an admission through resettlement is the consent of the potential beneficiary (see Art. 9 Resettlement Framework Proposal).

12.3.2 'How': resettlement procedures

In its traditional conduct by UNHCR, individuals are selected by States from so called UNHCR resettlement 'dossiers'. As pointed out by van Selm, the specific resettlement procedure varies from country to country, with common factors being: 'identifying resettlement candidates (often carried out by UNHCR); preparing cases for status determination and resettlement eligibility processing (often UNHCR or NGOs); selection missions (immigration services); preparing refugees for movement and settlement (often the International Organization for Migration, IOM); transportation (usually the IOM) and assistance with settlement and integration after arrival (often NGOs and some government departments and services)'.[648] Given the limited number of resettlement places available, UNHCR 'triages cases'[649] depending on how urgent they are.

The Resettlement Framework Proposal of 2016 set out similar procedural steps, with the particularity that there can be an 'ordinary procedure' (Art. 10) and an 'expedited procedure' (Art. 11). The procedure consists of:

- Identification of candidates, either through referral or by States themselves;
- Registration and assessment of eligibility criteria and exclusion grounds;
- Granting refugee or subsidiary protection status in case of a positive decision;
- Providing for travel arrangements and pre-departure as well as post-arrival assistance.

The expedited procedure applies in cases of 'specific humanitarian grounds or urgent legal or physical protection needs',[650] 'with the same level of security checks as in the ordinary procedure'.[651] The 2024 draft of a regulation on a Union Resettlement and Humanitarian Admission Framework does

648 Joanne van Selm, 'Refugee Resettlement', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 512.
649 Kneebone and Macklin, *supra* note 616, at 1094.
650 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 13.
651 *Ibid*., at 19 para. 15.

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no longer foresee an expedited resettlement procedure. Instead, it foresees the option of 'emergency admissions' (Draft Art. 2(3)).

Regarding the timeframe of resettlement procedures, the Resettlement Framework Proposal sets out that the 'procedure should be concluded as soon as possible'; however, 'it should ensure that Member States have sufficient time for a full and adequate examination of each case'.[652]

12.3.3 'What': the protection status of 'resettled refugees'

The aim of resettlement in its traditional outline by UNHCR is to offer a durable and thus permanent 'solution' to protection seekers in protracted situations. This implies a permanent status upon arrival. The UNHCR Resettlement Handbook states:

> 'The status provided ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.'[653]

In the legal context of the EU, the status granted to resettled refugees is not always a Convention refugee status and varies between Member States. The Framework Proposal seeks to harmonise resettlement and therefore takes a uniform approach by foreseeing the granting of an international protection status.

These differences apart, both approaches to resettlement imply that beneficiaries do not have to undertake an asylum procedure upon arrival and have immediate access to work, education, and housing. Furthermore, beneficiaries may generally receive pre-departure and post-arrival orientation, including a broad support structure of different stakeholders.[654]

652 *Ibid*., at 19, para. 16. The Union Resettlement and Humanitarian Admission Framework foresees a maximum time frame of 12 months, see Draft Art. 9(14f).

653 UNHCR, *Resettlement Handbook*, *supra* note 52, at 7.

654 van Selm, 'Resettlement', *supra* note 648, at 12; UNHCR, *Resettlement Handbook*, *supra* note 52, at 7.

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12.4 Analysis and assessment of resettlement in the light of the responsibility framework

While the traditional concept of UNHCR-led resettlement has a strong focus on international solidarity, the Resettlement Framework Proposal of 2016 risked significantly limiting the impact of resettlement on the principle of external responsibility as well as on the principle of inter-State responsibility. Against this backdrop, this section analyses the three elements of resettlement ('who', 'how' and 'what') with a view to the principles of external (12.4.1), internal (12.4.2), and inter-State responsibility (12.4.3).

12.4.1 External responsibility

This section will analyse the extent to which the overall concept of resettlement strengthens the principle of external responsibility. While this section is not intended to deny that resettlement can be lifesaving for every resettled refugee,[655] it will point to several aspects that may diminish its impact as a human rights instrument. To this end, this section will start by analysing and assessing the choice of beneficiaries of resettlement (12.4.1.1), to then discuss resettlement procedures (12.4.1.2), and eventually the protection status offered through this pathway (12.4.1.3).

12.4.1.1 Beneficiaries of resettlement: from vulnerability to IDPs

There are three key aspects setting the course with a view to the beneficiaries of resettlement: first, the 'profile' of resettled refugees (that is, which eligibility and exclusion criteria apply); second, the question of *where* to resettle from; and, third, the scope of admission quotas. Overall, States have a wide margin of discretion with a view to all these issues.

Thereby, the Resettlement Framework Proposal of 2016 entailed a few particularities worth addressing in this analysis. To start with the first issue: resettlement traditionally addresses the situation of Convention or

655 See also Adele Garnier and Astri Suhrke, 'Conclusion. The Moral Economy of the Resettlement Regime' in Adele Garnier, Liliana L. Jubilut and Kristin B. Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (2018) 244, at 250: 'Resettlement protects at-risk refugees and reduces incentives for individuals to "jump the gate" and expose themselves to danger (as by crossing the Mediterranean).'

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'mandate refugees' who are in protracted situations in a first State of refuge. Resettlement thus reflects a protection-orientated approach with a view to the choice of beneficiaries. Additionally, States apply selection criteria reflecting State interests. The UNHCR approach of considering State interests and potential ties to a particular State as 'country criteria' is more protection-oriented than considering these requirements as eligibility criteria. For instance, while family unity of protection seekers should be considered in an admission, requiring family ties to Union citizens (Art. 5(b) (i) Resettlement Framework Proposal of 2016) risks undermining the complementarity of resettlement to other pathways, such as family reunification. This is acknowledged by the draft of a 'Union Resettlement and Humanitarian Admission Framework' of 2024, stating that the admission of family members should focus on those who do not qualify for family reunification under Union law or who could not be reunited otherwise (para. 15).

While the additional criteria of 'vulnerability' set out by UNHCR narrows the circle of beneficiaries, it considers the specific effects of the current system on individuals who might face more difficulties to physically reach a State to seek protection than others. Still, differentiating between different types of protection seekers on the basis of static criteria is a sensitive issue. In their assessment of the resettlement-scheme under the EU-Turkey Statement, Welfens and Bekyol found that the operational use of the vulnerability criterion remains undefined and difficult to scrutinize; they also point to the risk of exacerbating existing vulnerabilities or even creating new ones through additional security or integration-related criteria in resettlement schemes.[656] Turner argues that '[w]hile determinations of vulnerability are typically presented as objective and neutral, they are in fact deeply subjective and political. Single Syrian men's chances for resettlement are determined, in part, by the prevailing perceptions of vulnerability in the humanitarian sector.'[657] In a study undertaken in Jordan, Turner 'encountered a near consensus that refugee women and children are "the most vulnerable"'.[658] The issue Turner sees with such a general categorisation is that it 'tends to attach vulnerability to the person (the woman or child) rather than describing threats, challenges or situations as

656 See Welfens and Bekyol, *supra* note 537.

657 Lewis Turner, 'Who will resettle single Syrian men?' (2017), at 30.

658 Turner, 'Are Syrian Men Vulnerable Too? Gendering The Syria Refugee Response', *supra* note 537.

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the creators of vulnerabilities that a person faces'.[659] Against this backdrop, van Selm describes resettled refugees as 'the chosen few, an almost perverse type of elite whether in terms of the exclusivity of their situation, or their vulnerabilities, or whatever the resettlement criteria applied'.[660]

Given the discretionary nature of this pathway, States can choose to apply further ('utilitarian') admission criteria. However, they are bound by the principle of non-discrimination, which is explicitly considered in the EU Framework Proposals.[661] At the same time, the Commission proposal of 2016 entailed problematic provisions with a view to the principle of external responsibility, such as Art. 6(1)(d), foreseeing an exclusion of 'persons who have irregularly stayed, entered or attempted to irregularly enter the territory of the Member States during the five years prior to resettlement'. The fact that an individual might have irregularly entered a Member State without qualifying for protection in the last five years, does not allow for any conclusion regarding his or her *current* need for protection. There is no provision of international human rights and refugee law entailing a similar ground for exclusion.

This issue concerns the link between an admission through resettlement and the prevention of irregular migration. A resettlement scheme that aims at replacing or preventing access to individual asylum is neither compatible with the individual right to seek asylum as enshrined in Art. 18 CFR and Art. 14 UDHR, nor with the principle of non-refoulement.[662] This is *in theory* respected by the EU proposal, stating that the proposal 'is without prejudice to the right to asylum and the protection from refoulement'.[663] At the same time, however, the Commission proposal of 2016 entailed several additional provisions explicitly linking resettlement to migration control, mainly outlined as eligibility or exclusion criteria. Cooperation with third-countries aiming at combatting irregular migration to the EU may lead to a violation of the right to leave any country as enshrined in Art. 12 ICCPR and Art. 13(2) UDHR, as well as effectively restrict the right

659 *Ibid.*

660 Joanne van Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection?' (2004) 22(2) Refuge: Canada's Journal on Refugees 39, at 41.

661 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 9; see also the amended proposal for a 'Union Resettlement and Humanitarian Admission Framework', *supra* note 604, at Draft Art. 6(3).

662 See further on resettlement and territorial asylum Part 3 Chapter 12.5.2.

663 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 8.

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to seek asylum.[664] Although the EU–Turkey Statement is problematic in this respect,[665] it served as a blueprint for the Resettlement Framework Proposal of 2016.[666] Overall, the link between resettlement and measures of migration control aiming at preventing protection seekers from reaching the EU significantly weakens the effect of resettlement on the principle of external responsibility.

However, the Resettlement Framework Proposal of 2016 also entailed examples of how additional criteria may broaden the circle of beneficiaries (to IDPs and to individuals with socio-economic needs). The suggestion of conducting resettlement directly from countries of origin widened the scope of beneficiaries to the largest group of protection seekers worldwide.[667]

Eventually, this proposal touches upon the cross-cutting issue between beneficiaries and procedures: the question *from where* to resettle. An admission of individuals directly from their country of origin might require cooperation with States which may be violating human rights or even add to the forced displacement of minorities.[668] With respect to the principle of external responsibility, considering the specifics of the individual case and the political context would be necessary when broadening the scope of admissions to IDPs.

12.4.1.2 Resettlement procedures: from one 'gatekeeper' to another

In contrast to the asylum visa assessed in the previous chapter, resettlement is not a pathway providing for an option to directly and individually apply for protection at an embassy. Resettlement procedures generally involve a great number of actors and stakeholders. States 'select' beneficiaries from prepared UNHCR 'dossiers', which makes the selection process less transparent for the individuals involved. A decision to transfer a specific dossier to a State is automatically a decision against another dossier, and thus

664 See further Part 1 Chapter 5.2.

665 For a critical discussion see de Boer and Zieck, *supra* note 628.

666 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 7.

667 At the end of 2022, UNHCR counted 62.5 million internally displaced of a total 108.4 million forcibly displaced worldwide; see https://www.unhcr.org/figures-at-a-glance.html.

668 See further Labman, *Crossing Law's Borders*, *supra* note 157, at 24 ff, discussing the 'exilic bias' of both the Refugee Convention and the UNHCR Statute; see also *ibid*., at 29 with further references.

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an indirect rejection of another person's claim for protection. The same applies to a state's decision to give preference to proposed applicants over others who are eligible for admission.

There are hardly any procedural rights set out in resettlement schemes. The few safeguards foreseen by UNHCR in its Resettlement Handbook[669] do not affect the actual admission decision and cannot be enforced vis-à-vis any State. Moreover, there is generally no option of judicial review in case of a non-admission. Similarly, the Resettlement Framework Proposal of 2016, as well as the amended draft of 2024, explicitly state that there is no right to be admitted to the territory of the Member State.[670] The complex questions of jurisdiction or applicability of EU law discussed with a view to asylum visa claims[671] are at first sight not relevant in resettlement procedures. One reason is the voluntary nature of resettlement – from the perspective of the State and the individual. Protection seekers are generally part of a voluntary process, requiring their consent for an admission; and States engage in a voluntary process of admission. To argue that such a voluntary scheme, initiated by the States themselves, may trigger a wide range of human rights obligations, would counteract the whole concept of this admission scheme – to the detriment of protection seekers in need of resettlement.

There are very few cases of protection seekers having recourse to national appeal procedures.[672] Paradigmatic is the case *Turani*,[673] concerning Palestinian refugees from Syria claiming 'indirect race discrimination' in a UK resettlement procedure. Since UNHCR has no mandate for Palestinian refugees, cases of Palestinians were not considered for resettlement. The High Court dismissed the claims, stating that it fell outside the territorial scope of the Equality Act 2010.[674] Thus, the Hight Court took the same exit as the CJEU and the ECtHR in asylum visa cases and avoided addressing the merits of the case.[675]

669 UNHCR, *Resettlement Handbook*, *supra* note 52; see at 302 ff on 'safeguards in the processing of resettlement submissions'.

670 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 10; European Council 'Union Resettlement and Humanitarian Admission Framework', *supra* note 604, at para. 25.

671 See above, Part 3 Chapter 11.4.

672 Labman, *Crossing Law's Borders*, *supra* note 157, at 66 ff on examples from Canada.

673 See *Turani v Secretary of State for the Home Department* (2019) EWHC 1586 (Admin).

674 *Ibid*., para. 116.

675 For a discussion of the CJEU case *X and X* and the ECtHR case *M.N.* see above Part 3 Chapter 11.4.

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While this case dealt with issues of discrimination, one could also think of a risk of refoulement, which could hardly be contested in resettlement procedures. In the absence of a harmonised resettlement scheme at EU level, Member States do not 'implement' Union law when engaging in a resettlement procedure. The CFR would thus not be applicable (see Art. 51(1) CFR). Given the recent ruling of the ECtHR in the *M.N.* 'asylum visa' case,[676] it is difficult to argue for extraterritorial jurisdiction in resettlement cases, with even less contact between the protection seeker and the State.[677] Either way, a non-admission for resettlement would generally not qualify as act of refoulement, since most of the protection seekers concerned are – according to the traditional UNHCR outline of resettlement – in a State in which they found at least preliminary refuge.

However, an admission of IDPs could concern potential 'refoulement' cases. When including IDPs in the scope of admissions, the question would be whether the application of the CFR would be triggered by the respective regulation – that is, whether Member States would be 'implementing Union law' according to Art. 51(1) CFR when engaging in resettlement procedures based on an EU regulation. In its landmark decision in the case *Fransson*,[678] the CJEU stated that its 'settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European law, but not outside such situations'.[679] AG Mengozzi did not see an issue with an (extraterritorial) applicability of the CFR in his opinion in the *X and X* case.[680] Given the numerous decisions on the issue of 'implementing Union law' that followed *Fransson*,[681] its applicability in case of a rejection (or non-admission) of a case would depend on the specifics of a future resettlement regulation at EU level. Zieck and de Boer argue against an applicability of the CFR 'as long as resettlement is not an established right within EU law or as long as EU law imposes no procedural duties on Member States'.[682] A counter argument would be that conducting a resettlement procedure on the basis of EU law recognises the right to seek asylum and the principle

676 *M.N. and Others v. Belgium*, *supra* note 17. For a discussion see Part 3 Chapter 11.4.
677 On jurisdiction under the ECHR see above Part 3 Chapter 11.4.1.
678 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (EU:C:2013:280).
679 *Ibid*., para. 19.
680 *X and X – Opinion of Advocate General Mengozzi*, *supra* note 493.
681 For a discussion see Law, *supra* note 491, at 100 ff.
682 de Boer and Zieck, *supra* note 628, at 80.

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of non-refoulement.[683] But, the explicit wording of the EU proposals will most likely be the legal 'gatekeeper' in this matter, stating that the respective provisions do not create an individual right to be admitted to a Member State.[684]

Even if one were to overcome the hurdle of applicability of the CFR, thus the strongest legal gatekeeper, *de facto* gatekeepers would remain: third parties, such as UNHCR, act as 'gatekeepers' by initiating a resettlement process through a case referral or *not*. Therefore, there is no official decision that can be challenged. Thus, the lack of official decisions and transparency in resettlement procedures may inhibit the enforcement of fundamental and human rights.

12.4.1.3 Content of protection: no uniform resettlement status

While the UNHCR definition foresees a permanent status, the legal position of resettlement refugees varies extensively among Member States. The suggestion to provide beneficiaries with an international protection status promotes a uniform application of resettlement within the EU – as well as equal treatment with asylum seekers. However, the right to family reunification and the possibilities for permanent settlement may vary depending on the status. This can create inequalities and incentives for secondary movements. This proposal could also undermine the achievements of national resettlement schemes, which already provide for resettlement status with a broader range of rights than subsidiary protection status.[685]

A final note on the support provided to resettlement refugees upon arrival: States have a wide discretion regarding their 'obligation to fulfil' protective duties arising from international human rights law. Acts towards beneficiaries of resettlement such as post-arrival (or pre-departure) orientation are not mandatory. However, making use of a wide margin of discretion in this regard, fostering respective post-arrival initiatives, enhances

683 On the notion of a 'gradual recognition of a positive right to resettlement' see Savino, *supra* note 628.

684 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 10; European Council 'Union Resettlement and Humanitarian Admission Framework', *supra* note 604, at para. 25.

685 A relevant example is Germany; see Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470.

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the principle of external responsibility.[686] Post-arrival support structures in resettlement schemes make a difference between resettlement and the asylum visa.[687]

12.4.2 Internal responsibility

This section analyses and assesses resettlement with a view to the principle of internal responsibility, addressing the beneficiaries (12.4.2.1), as well as issues concerning the procedures and the status granted upon arrival (12.4.2.2). As will be shown, resettlement has a strong focus on the principle of internal responsibility. Kneebone and Macklin therefore conclude that 'Resettlement portrays sovereignty in its most flattering light.'[688]

12.4.2.1 Utilitarian admission criteria and links to migration control

Regulating access to protection through resettlement generally meets the objective of migration control by making the granting of protection controllable and predictable. At the same time, an orderly admission, as well as an admission of individuals most clearly in need of protection, may strengthen the social acceptance of protection seekers, enhancing the principle of internal responsibility.[689]

States engaging in resettlement have discretion when it comes to who they want to 'select' for admission and where they want to admit from. The additional application of 'utilitarian' admission criteria reflects the attempt to (further) reconcile admissions with the principle of internal responsibility. Additional criteria applied by States include, for instance, links to the resettlement State, such as family ties or language skills, or a specific educational or religious background.[690]

686 See further on the relevance of post-arrival support Part 3 Chapter 14.4.1.3 and Chapter 14.4.2.3 with reference to sponsorship schemes.

687 For an analysis and assessment of the asylum visa see above Part 3 Chapter 11.

688 Kneebone and Macklin, *supra* note 616, at 1098.

689 See van Selm, 'Resettlement', *supra* note 648, at 517, pointing out that the 'flip side is the potential for allegations of "queue jumping" – that those seeking asylum "should" have waited their turn to be resettled'. See further on this issue Part 3 Chapter 12.5.2 and Chapter 13.5.1.

690 See de Boer and Zieck, *supra* note 628, at 72, with examples of additional admission criteria reflecting State interests in resettlement procedures of EU Member States.

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In contrast to territorial asylum procedures, security screenings do not take place at the border or within a State's territory, but in third countries. Thus, security concerns are a precondition of the admission.[691] The eligibility and exclusion criteria provided for in the Resettlement Framework Proposal of 2016 took the discretion a step further, instrumentalising resettlement for the purpose of preventing irregular migration.[692]

12.4.2.2 Flexible procedures and discretionary status

Resettlement procedures not only offer a large margin of discretion, but also a 'procedural infrastructure' and a wide range of support from third parties such as UNHCR or IOM. Resettlement targets primarily individuals who have found preliminary refuge in a third State. In contrast to asylum visa schemes, issues of reception in the region are therefore not as relevant in the context of resettlement procedures.[693] While the proposal at EU level aims to harmonize the procedures and status of resettled refugees, it still leaves a wide margin of discretion for states to implement a resettlement procedure under the respective regulation.

12.4.3 Inter-State responsibility

Chapter 9 discussed the relevance of responsibility-sharing and solidarity with respect to the principle of inter-State responsibility. Both are constantly pointed out as driving factors of resettlement. One of the three functions of resettlement as outlined by UNHCR in its Resettlement Handbook consists in 'allowing States to help share responsibility for refugee protection, and reduce problems impacting the country of asylum'.[694] In the same

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For a discussion of the 'close-tie' requirement, see Part 3 Chapter 13.5.2 with a view to *ad hoc* schemes. On the related issue of complementarity see Part 3 Chapters 14.5.2 and 15.2.6.

691 The exclusion criteria assessed in national procedures leads to a denial of status, but not necessarily to expulsion. There can be various legal or factual barriers, such as a risk of refoulement in case of expulsion or missing documents inhibiting a deportation.

692 See above at Part 3 Chapter 12.4.1.1, for a discussion of this issue with a view to the principle of external responsibility.

693 See above Part 3 Chapter 11.6.1.2. and 11.7.1.

694 UNHCR, *Resettlement Handbook*, *supra* note 52, at 3.

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sense, Goodwin-Gil and McAdam argue that one of the goals of resettlement is to 'relieve the strain on receiving countries'.[695] According to the Resettlement Framework Proposal of 2016, resettlement serves to 'enable the sharing of the protection responsibility with countries to which or within which a large number of persons in need of international protection has been displaced and help alleviate the pressure on those countries'.[696] Against this backdrop, this last section assesses resettlement in the light of the principle of inter-State responsibility, with a view to the choice of beneficiaries and the outline of the procedure (12.4.3.1), and the protection status after arrival (12.4.3.2).

12.4.3.1 Beneficiaries and procedures: from 'cherry picking' to limited quotas and political leverage

Given the different approaches of acting upon the principle of inter-State responsibility discussed in Chapter 9, resettlement can be seen as a form of 'stepping in' by resettling protection seekers from host States to receiving States. The choices States make regarding the beneficiaries reflect their approach to responsibility-sharing. A choice of beneficiaries in line with a 'common but differentiated approach' would imply taking the specific capacities of the current host State into account. However, the eligibility criteria of UNHCR and the proposals at EU level put the focus on considerations regarding the (future) receiving State. Thus, individual admission criteria can indirectly affect the principle of inter-State responsibility: for instance, vulnerable individuals do generally have specific needs. An adequate reception can therefore be challenging for host States. Resettling these individuals to States with stronger infrastructures to provide for these special needs can be relevant with a view to the principle of inter-State responsibility. At the same time, 'cherry picking'[697] by States can have detrimental effects if States only focus on the admission of individuals with, for instance, good educational backgrounds ('brain-drain'). This assumption can be countered by the fact that the admission quotas are so low that additional admission criteria hardly have any effect on the entire 'refugee population' of a host country. Still, utilitarian 'cherry-picking' does

695 Goodwin-Gill and McAdam, *supra* note 13, at 554.
696 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 3.
697 On the use of this term see de Boer and Zieck, *supra* note 628.

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not promote the principle of inter-State responsibility. Similarly, Schneider concludes in her assessment of resettlement with a view to political interdependencies and power relations, that an emphasis on national selection criteria contrasts the idea of resettlement as an instrument of multi-level governance.[698]

Using resettlement as leverage in political negotiations is neither an act of solidarity nor responsibility-sharing. As discussed in Part 2, responsibility-sharing implies that there is a responsibility to be shared in the first place. Policies promoting a 'conditional approach' to responsibility-sharing, making resettlement dependent on 'migration deals', which aim at reducing irregular border crossings (such as foreseen, for instance, by Art. 4 of the Resettlement Framework Proposal of 2016), are not in line with the principle of inter-State responsibility.

Instead, a 'common but differentiated approach' would have to consider the quantity of admissions, that is the actual scope of the admission quotas. An admission through resettlement can support States in the regions of conflict, hosting most protection seekers worldwide.[699] The larger the admission quotas, the greater the effect on the principle of inter-State responsibility. However, resettlement lacks actual impact in this regard due to low admission quotas compared to global resettlement needs.[700]

The last issue this section points to is the choice of countries *where to resettle from*. Resettlement from countries of origin is a form of 'in-country processing', raising numerous legal and practical concerns. In the event that the home country where IDPs are located is not able to provide for its population, the principle of inter-State responsibility would require international assistance in the region. If the respective country is violating human rights (e.g., causing the displacement of minorities), then resettlement could indirectly facilitate a forced exodus.[701] The principle of inter-State responsibility could also be relevant with regard to other (third) States in the region, assuming that protection seekers might move on to neighbouring countries if they are not resettled.

698 Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations', 3 Frontiers in Political Science (2021) article 629675.

699 See Part 1 Chapter 1 on the 'asylum paradox'.

700 See above Part 3 Chapter 12.2.1 on resettlement at international level.

701 See above Part 3 Chapter 12.4.1.1 for a discussion of this issue with a view to the principle of external responsibility.

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12.4.3.2 Content of protection: predictability

A key factor that reinforces the principle of intergovernmental responsibility is the predictability that results from a regular commitment to resettlement. This is a significant difference to the asylum visa or any *ad hoc* admission scheme without a fixed annual quota.[702] A long-term protection commitment of receiving States implies a secure – ideally permanent – status, including options of family reunification.[703]

12.5 Tensions and trade-offs raised by resettlement

Against the backdrop of the foregoing analysis, this section addresses two key issues of resettlement raising tensions and trade-offs with a view to the triad of responsibility principles: the voluntary nature of resettlement (12.5.1) and the relation of resettlement to territorial asylum (12.5.2).

12.5.1 The discretionary nature of resettlement: from 'filters' to 'gatekeepers'

The key characteristic of resettlement is that it is a pathway at the discretion of States. In legal scholarship resettlement is therefore referred to as 'instrument of humanitarian governance' and 'act of benevolence aiming to help suffering people in need'.[704] In contrast to territorial asylum or the asylum visa, resettlement is framed as 'moral appeal to humanitarian discretion'.[705] Being more 'policy rather than law' and more about 'inviting individuals […] rather than entitling them to access protection',[706] makes resettlement a pathway particularly reflecting the sovereign right of States to grant protection.[707] There are hardly any individual claims or procedural guarantees. Furthermore, the availability of resettlement can influence how asylum seekers who arrive irregularly are perceived. As Kneebone and Macklin point out, 'the mere possibility of resettlement produces a hypothetical

702 See further on *ad hoc* humanitarian admission, Part 3 Chapter 13.
703 See above, Part 3 Chapter 12.4.1.3, for a discussion of this issue with a view to the principle of external responsibility.
704 Garnier, Jubilut and Sandvik (eds), *supra* note 155, at 5.
705 Kneebone and Macklin, *supra* note 616, at 1081.
706 Noll, 'From "Protective Passports" to Protected Entry Procedures?', *supra* note 435, at 2.
707 See Part 2 Chapter 7.1.2 on sovereignty and the concept of asylum.

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queue, which real asylum seekers are accused of jumping'.[708] The State 'chooses' or 'selects' protection seekers, who must wait for an admission.[709]

States apply a range of additional ('utilitarian') admission criteria to 'filter' cases for an admission.[710] The UNHCR Resettlement Handbook points out that discrimination can be an issue in this regard, as the 'selection criteria adopted by some resettlement States can limit the access to resettlement for refugees most at risk, and have a negative impact overall on the global resettlement programme'.[711] This shows how a focus on the principle of internal responsibility can directly diminish the impact of resettlement on the principle of external responsibility.

A study evaluating the German resettlement scheme discusses 'whether the resettlement programme is based on an interest in the selection of "desired refugees" or whether the humanitarian concern for protection is foremost'.[712] The authors conclude that despite the 'utilitarian' admission criteria, Germany still complies with the admission criteria as established by UNHCR.[713] This reasoning reflects how the evaluation of additional admission criteria depends on the relation to protection criteria – and thus the principle of external responsibility.[714]

In her analysis of resettlement schemes, van Selm argues that setting additional criteria is necessary 'to make the programmes manageable' given the limited number of available places.[715] Justifying the prioritisation of certain protection seekers with the low number of resettlement places offered by States is logical. However, it is also a circular reasoning since the admission quotas are determined by the States themselves.

Overall, the discretionary nature and the procedural outline of resettlement creates various legal and *de facto* 'gatekeepers' inhibiting the applica-

708 Kneebone and Macklin, *supra* note 616, at 1091.

709 This issue is further discussed regarding the relation of resettlement and territorial asylum, below at Part 3 Chapter 12.5.2, as well as with respect to the notions of 'good' refugee and 'bad' asylum seeker below at Part 3 Chapter 13.5.1.

710 Noll, *Negotiating Asylum*, *supra* note 115, at 14, uses the term 'filters' for 'all legal devices explicitly or implicitly connected with the regulation of the personal and material scope of extraterritorial protection'.

711 UNHCR, *Resettlement Handbook*, *supra* note 52, at 70.

712 Tatjana Baraulina and Maria Bitterwolf, 'Resettlement in Germany: What Is the Programme for Particularly Vulnerable Refugees Accomplishing?' (BAMF Brief Analysis, 2018), at 3.

713 *Ibid*., at 10 ff.

714 See further on additional admission criteria Part 3 Chapter 13.4.1.

715 van Selm, 'Refugee Resettlement', *supra* note 648, at 514.

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tion or enforcement of human rights.[716] This leads to the last issue of this chapter, the relation of resettlement and territorial asylum.

12.5.2 Resettlement and territorial asylum

The scope of admission quotas is relevant for the actual impact of resettlement on the asylum paradox. It could be argued that the number of people applying for territorial asylum would decrease due to resettlement. However, as van Selm points out, resettlement targets a specific group of protection seekers, who might not turn to irregular routes if resettlement was not an option.[717] Nonetheless, the admission quota influences the actual impact of resettlement on the principle of external responsibility and the principle of inter-State responsibility. Given the low numbers of resettlement places vis-à-vis actual resettlement needs, Labman considers this pathway to be 'the smallest piece of the puzzle'.[718]

At the same time, the early CEAS reform proposals at EU level reflected a tendency to further instrumentalise resettlement for the purpose of migration control, making admissions subject to political leverage and instruments of deterrence. An example is the 2016 proposal of an exclusion criteria linked to irregular entry or rejection in a resettlement scheme, as well as the proposal of only admitting beneficiaries from countries cooperating in migration control.[719] This means that resettlement would not only carry the risk of having a limited impact on the principle of inter-state responsibility, but also the risk of indirectly affecting individual rights, such as the right to seek asylum (Art. 18 CFR, Art. 14 UDHR) as well as the right to leave any country as enshrined in Art. 12(2) ICCPR, Art. 13(2) UDHR and Art. 2(2) of Protocol No. 4 of the ECHR.[720] The 'right to leave' may be restricted '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' (see Art. 2(3) Protocol No 4 of the ECHR. However, States choose

716 See above Part 3 Chapter 12.4.1.2.
717 See further on this argument van Selm, 'The Strategic Use of Resettlement', *supra* note 660, at 41–45.
718 Labman, *Crossing Law's Borders*, *supra* note 157, at 29.
719 See above at Part 3 Chapter 12.3.1.
720 See with a similar argument on this issue Garnier and Suhrke, *supra* note 655, at 250.

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whether and how they engage in resettlement, determining exactly who they admit into their territories. Trying to enforce an additional effect of migration control on resettlement undermines the protective scope of this pathway and 'further corrodes responsibility-sharing and solidarity'[721].

The immanent risk of States making use of resettlement 'as a "humanitarian alibi" for restrictive asylum policies' is not new, as discussed by van Selm in her earlier analysis of the 'Strategic Use of Resettlement (SUR)' in 2004.[722] From an EU constitutional perspective, Ziebritzki argues that human rights concerns raised against such an instrumentalisation of resettlement are 'undergirded by constitutional arguments'.[723] As the 'emerging EU resettlement law' is governed by the constitutional framework of the CEAS, 'the objective is to provide international protection'.[724] This objective, however, has been effectively neglected in the Resettlement Framework Proposal of 2016.[725]

Instead, the Commission proposal of 2016 pointed to an overall trend of instrumentalising resettlement for the purpose of migration control. At this point it is worth noting Hashimoto's discussion of the 'four traditional perspectives on States' motives for resettlement, based on well-established theories of International Relations, namely egoistic self-interest, altruistic humanitarianism, reciprocity, and international reputation'.[726] As Hashimoto considers these motives to be insufficient to explain a rising State interest in resettlement, she adds another hypothesis to the picture, claiming 'that States perceive resettlement as an alternative to asylum in terms of migration management, given the recent empirical and discursive trend'.[727] By establishing a new category of State motivation instead of fitting this aspect into the more general motive of 'egoistic self-interest', Hashimoto's categorisation reveals a common objective of States in this regard.

States have already adopted a wide range of migration control mechanisms, effectively preventing access to protection in the EU.[728] Adding reset-

721 Kneebone and Macklin, *supra* note 616, at 1098.
722 van Selm, 'The Strategic Use of Resettlement', *supra* note 660, at 40.
723 Ziebritzki, *supra* note 640, at 319.
724 *Ibid*., at 291.
725 Similarly, Savino, *supra* note 628, at 95.
726 Hashimoto, *supra* note 154, at 162.
727 *Ibid*., at 162.
728 See Part 1 Chapter 1.

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tlement to the repertoire would counteract its scope, to the detriment of the principles of external and inter-State responsibility.

12.6 Conclusion: resettlement between solidarity and political leverage in migration control

Resettlement is on the rise as safe pathway to protection in the EU. In its design as a quota-based admission scheme, resettlement is a State-centred approach to protection. Resettlement is grounded in an understanding of the granting of protection as a right of States, in line with the territorial concept of asylum.[729] A particular characteristic distinguishing resettlement from the asylum visa and *ad hoc* schemes is its regularity: resettlement schemes are generally based on regular commitments to quota admissions. This predictability is important for receiving States and current host States alike, thus enhancing the principles of internal and inter-State responsibility.

According to the criteria set out by UNHCR, resettled refugees are Convention or 'mandate refugees', who generally fulfil an additional criterion of particular vulnerability. However, States are free to apply their own admission criteria, which can broaden or narrow the circle of beneficiaries. The decision of States to commit to resettlement is a discretionary act. There is no individual right to apply for an admission or appeal against a non-admission decision. As has been discussed, there are various (legal and *de facto*) 'gatekeepers' in resettlement procedures, leading to a near absence of individual rights and guarantees. Here, again, resettlement differs from the concept of a permanent asylum visa scheme.

Overall, the effect of resettlement on the responsibility principles varies depending on whether States implement resettlement according to its traditional outline by UNHCR, or whether they apply their own admission criteria. The EU Resettlement Framework Proposal of 2016 included numerous suggestions that would have changed the scope of this pathway if implemented in law and practice. While several restrictive proposals have been mitigated along the negotiation process of the CEAS reform, the proposal of 2016 is paradigmatic for an approach to resettlement with a strong focus on migration control, rather than on protection. UNHCR proclaims

729 See Part 2 Chapter 7.1.2.

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that resettlement serves the protection of individuals at risk, providing durable solutions to the refugee situation and international solidarity.[730] The main aim therefore lies in enhancing the external responsibility (protection) and the inter-State responsibility (international solidarity).

The EU proposal takes all three areas of responsibility into account: it aims at offering safe and legal access to protection in the EU (external responsibility), as well as helping to 'reduce the pressure of spontaneous arrivals on the Member States' asylum systems' (internal responsibility), and lastly, to 'enable the sharing of the protection responsibility with countries to which or within which a large number of persons in need of international protection has been displaced and help alleviate the pressure on those countries'[731] (inter-State responsibility). Judging by this scope, the proposal aims at striking a balance between the three principles of responsibility. As shown, the details of the 2016 EU proposal reveal a more complex picture.

Linking resettlement to deterrence not only fails to create a balance between the triad of responsibilities but also risks aggravating the existing imbalance of responsibility principles manifested in the asylum paradox. Examples are proposals such as the primary admission of individuals from countries that cooperate in migration control, or excluding individuals who entered the EU irregularly within the last five years. Regarding the principle of inter-State responsibility, an example is favouring countries willing to cooperate in migration control over others, instead of focusing on the actual need for assistance. Linking protection with access control can be a tool to balance the principle of internal responsibility with the principle of inter-State responsibility as well as providing protection, promoting the principle of external responsibility. However, if safe pathways serve as 'deterrence in disguise', they exacerbate the asylum paradox.

13 Ad hoc *humanitarian admission*

After addressing the asylum visa as individual pathway,[732] and resettlement as a *permanent* quota-based pathway,[733] this section focuses on *ad hoc* humanitarian admission schemes. As there is a great variety of respective schemes and no uniform definition at EU level, the first part of this chapter

730 UNHCR, *Resettlement Handbook*, *supra* note 52, at 36 ff.
731 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 3.
732 See Part 3 Chapter 11.
733 See Part 3 Chapter 12.

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is dedicated to defining this pathway for the purpose of the following analysis and assessment (13.1). The chapter then outlines the background of *ad hoc* admission schemes in the EU (13.2), as well as the key features of access to protection through this pathway (13.3). Finally, *ad hoc* humanitarian admission schemes are analysed and assessed in the light of the responsibility framework (13.4), to outline tensions and trade-offs (13.5) and draw conclusions on the effects of this pathway on the asylum paradox (13.6).

13.1 Defining *ad hoc* humanitarian admission

For the purpose of the following analysis and assessment this book defines *ad hoc* humanitarian admission schemes as:

> temporary governmental admission schemes, committing to an *ad hoc* and expedite admission of individuals or families in need of imminent protection due to a specific situation of crisis, independent of their geographical location, generally based on fixed quotas, not necessarily depending on private funding.

While some *ad hoc* humanitarian admission schemes foresee a national asylum procedure upon arrival, others grant direct access to a protection status. The main difference to the asylum visa is that individuals do not have access to an individual admission procedure with respective rights and guarantees.[734] Besides, these schemes are of an *ad hoc* and thus temporary nature, generally based on quota admissions. The *ad hoc* and temporary nature is the main difference to quota-based permanent resettlement schemes.

There is no uniform definition of (*ad hoc*) humanitarian admission in the EU. On the one side, 'humanitarian admission' is an umbrella term for any kind of admission with protective scope;[735] on the other side, it can delimit specific programs that have been implemented or operationalised by EU Member States.[736]

734 See Part 3 Chapter 11 on the asylum visa.

735 For an overview see Foblets and Leboeuf (eds), *supra* note 48.

736 European Resettlement Network (ERN), 'Humanitarian Admission Programmes in Europe: Expanding Complementary Pathways of Admission for Persons in Need of International Protection' (March 2018), at 9.

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In 2016, the European Migration Network (EMN) launched a report based on national contributions from 24 European countries,[737] describing humanitarian admission as 'schemes which are similar to resettlement, but for varying reasons do not fully adhere to the definition of resettlement'.[738] This stands in contrast with Draft Art. 2(2) of the 2024 proposal for a regulation on a 'Union Resettlement and Humanitarian Admission Framework', defining humanitarian admission in conformity with resettlement as

'the admission, following, where requested by a Member State, a referral from the UNHCR, the European Union Agency for Asylum (the 'Asylum Agency') or another relevant international body, of a third-country national or stateless person from a third country to which that person has been forcibly displaced to the territory of a Member State […]'.

While the main difference to resettlement lies in the option of a referral not only by UNHCR, but also by Member States and other stakeholders, Draft Art. 3 foresees the modality of an 'emergency admission', which 'means the admission by means of resettlement or humanitarian admission of persons with urgent legal or physical protection needs or with immediate medical needs.'

A more nuanced definition can be found in Art. 2(5) of the AMIF Regulation, providing that:

> '"humanitarian admission" means the admission following, where rewuested by a Member State, a referral from the European Asylum Support Office (EASO), the United Nations Hight Commissioner for Refugees ("UNHCR"), or another relevant international body, of third-country nationals or stateless persons from a third country to which they have been forcibly displaced to the territory of the Member States, and who are granted international protection or a humanitarian status under national law that provides for rights and obligations equivalent to those of Articles 20 to 34 of Directive 2011/95/EU for beneficiaries of subsidiary protection'.

737 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Slovakia, Spain, Sweden, United Kingdom.

738 European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – What Works' (2016), at 4.

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Finally, a very specific definition has been elaborated for the VHAS, which is based on the 'EU–Turkey Statement':[739]

> 'Humanitarian admission should mean an expedited process whereby the participating States, based on a recommendation of the UNHCR following a referral by Turkey, admit persons in need of international protection, displaced by the conflict in Syria, who have been registered by the Turkish authorities prior to 29 November 2015, in order to grant them subsidiary protection as defined in Directive 2011/95/EU or an equivalent temporary status, the validity of which should not be less than one year.'[740]

Considering this specific scheme, as well as the various past and current implementations of *ad hoc* humanitarian admission schemes at national level in the EU, the following modalities of *ad hoc* schemes can be identified:

a) humanitarian admission schemes as *ad hoc* and expedited responses to a situation of crisis in a specific country or region; or
b) humanitarian admission schemes as emergency tools in particularly pressing situations, also referred to as 'humanitarian evacuation', often, but not always, taking place directly from the country of origin or region of conflict, or addressing the situation of individuals in distress at sea;[741]
c) *ad hoc* humanitarian admission targeting protracted refugee situations in third countries, where admitted individuals have only found preliminary refuge;[742]

739 See above on the legal nature of the 'statement', Part 3 Chapter 12.2.2.
740 See European Commission, 'VHAS Recommendation', *supra* note 638, para. 2.
741 National examples are Germany's federal humanitarian admission programs (HAPs) for protection seekers fleeing Syria from 2013 onwards; see further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470; as well as the admission schemes set up by various Member States in 2021 to evacuate individuals from Afghanistan after the takeover of the Taliban, for an overview see the briefing of the European Parliament Research Service of November 2021, available at www.europarl.europa.eu/RegData/etudes/BRIE/2021/698776/EPRS_BRI(2021)698776_EN.pdf.
742 Such as Austria's and France's humanitarian admission programs (HAPs); see further Lisa Fischer and Petra Hueck, '10 % of Refugees from Syria: Europe's Resettlement and Other Admission Responses in a Global Perspective' (June 2015), at 41 ff.

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d) *ad hoc* humanitarian admission relying on financial contributions from civil society, mainly referred to as private or community 'sponsorship schemes' or 'humanitarian corridors';[743] including public-private or 'hybrid schemes'.[744]

This variety of *ad hoc* schemes calls for disentanglement. While humanitarian evacuations (b) can be seen as a variation of *ad hoc* schemes as a response to a specific crisis (a), the third category (c) can be described as 'resettlement in disguise'. States may at times engage in *ad hoc* admission to remain more flexible in comparison to an annual commitment to admissions within a permanent resettlement scheme based on UNHCR referrals. However, these admissions offer 'secondary' access to protection, as individuals have already found preliminary refuge in a third country. The definition of humanitarian admission proposed at EU level in the draft of a regulation for a 'Union Resettlement and Humanitarian Admission Framework' falls under this category. As resettlement is discussed in Chapter 12, it will not be considered in the following. Finally, admission schemes qualifying as 'private' or 'community sponsorship' (d) have a very distinct character. These schemes are not necessarily of an *ad hoc* or temporary nature and the inherent requirement of demonstrating a financial link to the receiving State is not merely a variation of implementation but, rather, the core of these schemes. Therefore, they merit separate attention.[745] This leaves this chapter with the first two modalities, (a) and (b), to analyse and assess.

13.2 Background

Several EU Member States have, or have had, *ad hoc* humanitarian admission schemes in place – sometimes, but not always, complementing permanent national resettlement schemes.[746] Partly as a result of the increased

743 Such as the Humanitarian Corridors to St. Egidio, Italy; see further Katia Bianchini, 'Chapter 4: Humanitarian Admission to Italy through Humanitarian Visas and Corridors' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 157.

744 Such as the German admission schemes at *Länder* level; see Part 3 Chapter 14.

745 See below Part 3 Chapter 14.

746 For an overview see Leboeuf and Foblets, *supra* note 111; see also ERN, *supra* note 747.

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number of irregular arrivals in the EU in 2014 and 2015, several *ad hoc* humanitarian admission schemes focused on protection seekers fleeing the conflict in Syria.[747] The *ad hoc* admission schemes for Syrians implemented at federal level in Germany from 2013 onwards were the largest schemes in the EU, and have been the subject of numerous case studies.[748] Other prominent examples were *ad hoc* admission schemes put in place by Austria, France and the UK.[749] While they were all of an *ad hoc* and expedited nature, some of the Austrian and French schemes showed similarities to resettlement – for instance, as regards the choice of beneficiaries and cooperation with UNHCR.

Prominent examples at EU level are the so called 'one-to-one' scheme and the VHAS, both based on the 'EU–Turkey Statement'.[750] In the following, national examples as well as the 'one-to-one' scheme and the Commission recommendations regarding the VHAS will be drawn to by way of example, serving as basis for outlining the key features of access through *ad hoc* humanitarian admission schemes in the EU.

13.3 Access through *ad hoc* humanitarian admission

The aim of this section is to outline the general common features of *ad hoc* humanitarian admission schemes in the EU, and to reveal particularities of these schemes in contrast to other pathways considered in this book. Drawing on findings from policy reports analysing *ad hoc* humanitarian admission schemes in several EU Member States, this section will address the beneficiaries of protection (13.3.1), common features of admission procedures leading to protection under these schemes (13.3.2) and the possibilities regarding the status to be achieved upon arrival (13.3.3). The findings will serve as basis for the subsequent assessment of *ad hoc* humanitarian admission schemes in the light of the responsibility framework.

747 For an overview see Fischer and Hueck, *supra* note 742.

748 See Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 478; Laura Scheinert, 'Collapsing Discourses in Refugee Protection Policies: Exploring the Case of Germany's Temporary Humanitarian Admission Programmes', 3(1) *Movements: Journal for Critical Migration and Border Regime Studies* (2017) 129; Tometten, *supra* note 406; Schwarz, *supra* note 405.

749 See Fischer and Hueck, *supra* note 742, at 8.

750 See above at Part 3 Chapter 12.2.2.

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13.3.1 'Who': beneficiaries *of ad hoc* humanitarian admission

As there is no uniform definition of *ad hoc* humanitarian admission, there is no specific profile of beneficiaries either. In contrast to 'traditional' resettlement,[751] *ad hoc* admission schemes do not necessarily require a refugee status determination (RSD) procedure by UNHCR prior to admission. Admission criteria with humanitarian scope can concern survivors of violence and torture, individuals in need of medical assistance, or individuals qualifying as Convention refugees.[752] Evaluations of Member State practices show a wide range of eligibility and exclusion criteria, revealing a common pattern of applying a range of priorities and admission criteria unrelated to protection needs: 'at least 13 [Member] States […] use additional criteria for prioritising certain candidate profiles'.[753] Thus, States tend to prioritise individuals of a certain gender or nationality, with specific professional, cultural or religious backgrounds as well as with certain links ('close-ties') to the receiving States, such as family members or language skills.[754] For instance, the German HAPs prioritised individuals with family ties to Germany as well as individuals who had the ability 'to contribute to the rehabilitation of Syria' after the conflict'.[755]

The following exclusion criteria were identified in external case studies of the EMN: individuals having a criminal record or who committed serious crimes, having a history of drug abuse, irregular entry or having provided false information, individuals with 'family composition issues' or 'complex profiles' such as 'high-ranking members of government/authorities, judges, prosecutors', as well as members of police, private security, military, paramilitary, militant groups or staff at prisons or detention centres or individuals with 'family members engaged as combatants'.[756]

751 This book draws on the term 'traditional' resettlement to distinguish between the UNHCR-led and defined resettlement program and the developments of resettlement at EU level, which blur the lines between resettlement and humanitarian admission, see further Chapter 12.

752 European Migration Network, *supra* note 738, at 23.

753 *Ibid*., at 24. The 13 States are Austria, Germany, Estonia, Spain, Finland, Croatia, Hungary, Ireland, Luxembourg, the Netherlands, Poland, Slovakia and Norway.

754 *Ibid*.

755 See further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470.

756 See European Migration Network, *supra* note 738, at 25 ff. for a detailed account of Member States applying these exclusion or deprioritisation criteria.

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Ad hoc admission schemes also show a wide range of options regarding the choice of countries *from where* admissions take place. In contrast to resettlement as well as the definition of humanitarian admission provided by the 2024 proposal for a regulation on a 'Union Resettlement and Humanitarian Admission Framework', *ad hoc* admission can and does often take place directly from countries of origin.[757] Another option is to make admissions dependent on international cooperation, such as, for instance, the political requirements laid out in the 'EU–Turkey Statement' aiming at a prevention of irregular border crossings from Turkey 'in exchange' for humanitarian admission.[758]

13.3.2 'How': *ad hoc* humanitarian admission procedures

As with resettlement, there is generally neither a possibility of submitting an individual application in *ad hoc* humanitarian admission procedures, nor a possibility of judicial review. This is an important difference to the asylum visa.[759] In contrast to resettlement, *ad hoc* admission schemes are more flexible regarding options for case referral, allowing States to grant protection to a relatively large group of individuals in a comparably short amount of time.[760] With regard to the VHAS, for instance, a maximum procedural timeframe of six month is recommended.[761]

EU Member States can set a 'quota' or 'pledge' to indicate their annual or multi-annual admission capacity with a view to a specific crisis. In contrast to resettlement, this is not a permanent quota but, rather, a temporary commitment targeting a specific crisis. While some Member States rely on UNHCR proposals – with or without a national re-assessment of the cases – others do not involve UNHCR in the selection process. This is a significant difference to resettlement, making the schemes much more

757 See above Part 3 Chapter 12.2.2 and 12.3.1 on resettlement, discussing the proposals for a 'Union Resettlement and Humanitarian Admission Framework'.

758 See Part 3 Chapter 12.5.2 for a discussion of this issue with a view to the Resettlement Framework Proposal at EU level, which entails proposals that are based on the suggestions of the EU–Turkey Statement.

759 See above at 3 Chapter 11.

760 See ERN, *supra* note 737, at 10; see also European Commission, 'VHAS Recommendation', *supra* note 638, stating with a view to the VHAS that the aim is to create 'a rapid, efficient and voluntary scheme' (para. 4) and that the 'scheme should be flexible' (para. 5).

761 European Commission, 'VHAS Recommendation', *supra* note 638, para. 10.

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flexible. Admissions can be based on referrals by diplomatic representations of the receiving State, NGOs, churches or faith-based organisations, family or other civil society members or even self-referrals at embassies in the region.[762] In view of the selection procedure of the VHAS, the European Commission recommended 'a collaborative effort of the participating States, Turkey, UNHCR and EASO'.[763]

To select the beneficiaries from the case referrals, several Member States send selection missions that conduct on-site interviews depending on the security situation in the individual countries.[764] Other Member States conduct video interviews or base their selection exclusively on the respective case referrals.[765]

Security checks and health examinations are an integral part of the visa process after selection. As with resettlement, orientation and travel assistance is usually offered before and after arrival, often in cooperation with external organizations such as the IOM. After arrival, the beneficiaries either receive a national residence permit or have to go through a national asylum procedure. With regard to the VHAS, the European Commission recommends the possibility of mutual representation of the Member States.[766]

Overall, *ad hoc* admission procedures in EU Member States[767] show a common pattern of:

- an official national admission decision regarding a certain number of protection seekers of a specific profile, from particular countries or regions, due to an imminent crisis;
- an individual selection of beneficiaries on the basis of case referrals by diplomatic representations and/or other stakeholders (e.g. UNHCR, NGOs, churches, faith-based organisations);
- a visa procedure, including security screenings and medical checks, and possibly pre-departure orientation as well as travel assistance;

762 See Fischer and Hueck, *supra* note 742, at 37.
763 European Commission, 'VHAS Recommendation', *supra* note 638, para. 8.
764 European Migration Network, *supra* note 738, at 26.
765 *Ibid.*
766 European Commission, 'VHAS Recommendation', *supra* note 638, para. 9.
767 See *ibid.* para. 7 for a detailed account of recommended procedural steps regarding the VHAS.

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– the reception of beneficiaries in the receiving State, mostly including post-arrival orientation and possibly a national asylum procedure;
– ultimately, the issuing of a residence permit on humanitarian grounds.

The status granted upon arrival determines the content of protection, which will be addressed in the following.

13.3.3 'What': the status granted through *ad hoc* humanitarian admission

The status granted upon arrival depends on whether the respective scheme foresees a national asylum procedure upon arrival or not. If there is no asylum procedure, the status further depends on *where* – and sometimes even *when* – a person arrives in the EU.[768] Member States either grant international protection (Convention refugee or subsidiary protection status) or a national temporary protection status, either in line with the national resettlement refugee status or a status specifically designed for persons admitted under *ad hoc* programs. Germany, for instance, grants a specific temporary protection status for beneficiaries of humanitarian admission, which is not only less favourable than the status granted to Convention refugees, but also weaker than the status granted to resettlement refugees.[769] The Commission recommendations for the VHAS foresee either subsidiary protection or an 'equivalent temporary status' with a minimum duration of one year.[770]

13.4 Analysis and assessment of *ad hoc* humanitarian admission in the light of the responsibility framework

In the following discussion, *ad hoc* humanitarian admission schemes are analysed and assessed in the light of the responsibility framework, thereby addressing the key elements identified in the previous section ('who', 'how', 'what'). To avoid redundancies in relation to the asylum visa[771] and

768 ERN, *supra* note 737, at 9.
769 See Section 23 of the German Residence Act providing for the different statuses, see further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470.
770 European Commission, 'VHAS Recommendation', *supra* note 638, para. 11.
771 See Part 3 Chapter 11.

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resettlement,[772] the assessment will focus on the specificities of *ad hoc* admission schemes when it comes to the principles of external (13.4.1), internal (13.4.2), and inter-State responsibility (13.4.3).

13.4.1 External responsibility

This section analyses and assesses the beneficiaries (13.4.1.1), the admission procedures (13.4.1.2) and the content of protection (13.4.1.3) of *ad hoc* humanitarian admission schemes in the light of the principle of external responsibility.

13.4.1.1 Beneficiaries: from the 'one-to-one' approach to 'close-tie' requirements

States make use of their full discretion when implementing *ad hoc* humanitarian admission schemes. Depending on the details of implementation, this can change the scope of international protection. A particular issue in this regard is the approach initiated by the EU–Turkey Statement, including the 'one-to-one' mechanism, reflecting the interdependency of humanitarian admissions and deterrence. The fact that the 'one-to-one' scheme does not materialise in the actual numbers of persons admitted from and returned to Turkey does not diminish the intended deterrent effect.[773] Making human beings objects of political bartering and admissions dependent on access prevention by third States narrows the effect of humanitarian admissions on the principle of external responsibility.[774] Overall, such an approach to humanitarian admission shifts the focus from protection to migration control – or, rather, 'migration management', which, as Tometten

772 See Part 3 Chapter 12.

773 In practice, there is no actual 'one-to-one' scheme, as the number of protection seekers admitted (25.560) exceeds the numbers of individuals returned from Turkey to Greece (2.001), see the data provided by UNHCR on returns from Greece to Turkey (under EU-Turkey Statement) as of 31 December 2019, available at https://data2.unhcr.org/en/documents/details/73295, as well as the data provided by statewatch, available at https://www.statewatch.org/news/2020/may/eu-turkey-369-syrians-deported-to-turkey-through-eu-fund-for-refugees/.

774 See further on this issue with a view to the Resettlement Framework Proposal of 2016 relying on the EU-Turkey Statement, Part 3 Chapter 12.5.2.

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puts it, 'raises serious doubts with regard to the future of a rights-based approach in refugee policy on both the national and the EU level'.[775]

Not as clear-cut is the prioritisation of individuals based on non-humanitarian admission criteria, such as the belonging to a specific group (e.g., a certain gender, nationality, family, religion), possessing specific skills (e.g., a particular professional background, language skills), or having cultural or personal connections to the receiving State.[776] Additional admission criteria can represent an issue with regards to the principle of external responsibility, if the focus of the admission shifts from protection to other priorities or in case of discrimination.

However, additional admission criteria can not only narrow but also broaden the scope of beneficiaries. *Ad hoc* admission schemes can, for instance, include beneficiaries with humanitarian needs not necessarily covered by the international protection status. Still, as with resettlement, a general prioritisation of 'vulnerability' can be an issue.[777] With a view to the principle of external responsibility, including any kind of prioritisation implies a comprehensive approach, primarily considering individual protection needs.[778]

Exclusion criteria serving the sole purpose of migration control – such as previous irregular entry into national or EU territory – narrow the impact of the respective admission on the principle of external responsibility. Moreover, such criteria can potentially discourage spontaneous arrivals, affecting the relation of humanitarian admission to territorial asylum.[779]

Eventually, human rights issues arise regarding the question *from where* admissions take place. *Ad hoc* humanitarian admission is an emergency tool, characteristically focusing on specific situations of crisis. An admission directly from countries of origin or regions of conflict is therefore not unusual. Still, as discussed in relation to the proposals for a resettlement

775 Tometten, *supra* note 406, at 203.

776 See European Migration Network, *supra* note 738, 24 ff. for a detailed overview of admission criteria applied by different Member States.

777 For a critical analysis of the vulnerability criterion in admissions under the EU-Turkey-Statement, see Welfens and Bekyol, *supra* note 656; see further Part 3 Chapter 12.4.1.1.

778 For a further discussion of this issue with a view to resettlement see above Part 3 Chapter 12.4.1.1.

779 For a discussion of this issue with a view to resettlement see above Part 3 Chapter 12.4.1.1 and Chapter 12.5.2.

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regulation at EU level, there are human rights risks to be considered when engaging into the humanitarian admission of IDPs.[780]

13.4.1.2 *Ad hoc* admission procedures: silence on procedural guarantees

The flexible and expedited nature of *ad hoc* humanitarian admission schemes facilitates the granting of protection to a large group of individuals in a relatively short amount of time. At the same time, however, expedited procedures necessarily reduce the depth of scrutiny of the application. In its recommendations on procedural safeguards in any kind of humanitarian admission procedure, ECRE points to the importance of access to independent information, qualified impartial interpreters, and legal remedies.[781] Providing applicants with independent information and an impartial interpreter, conducting a personal interview and foreseeing legal assistance are all adequate measures to effectively promote the right to seek asylum in the sense of offering access to a fair procedure. Meeting these standards would enhance the individual rights position and thus the principle of external responsibility. Given the voluntary nature of *ad hoc* admission schemes, States do not take these requirements as a benchmark in existing schemes. As with resettlement, the procedural framework of humanitarian admission schemes creates additional hurdles for challenging a decision of non-admission.[782]

Here again, there are very few cases of judicial appeal. A relevant – and in the first instance successful – case is the appeal of a former local staff member of the German development agency GIZ (*Gesellschaft für Internationale Zusammenarbeit*) in Afghanistan, against the denial of 'humanitarian visas' for him and his family members after the Taliban takeover in 2021.[783] The Administrative Court of Berlin (*Verwaltungsgericht Berlin*) ruled in an expedited procedure that the visas under Section 22 Residence Act[784] had to be granted to the applicant and his family, thereby denying any discretion of the embassy, due to the specific circumstances of the

780 See further Part 3 Chapter 12.4.1.1.
781 ECRE, *supra* note 588, at 16.
782 See Part 3 Chapter 12.4.1.2.
783 Verwaltungsgericht Berlin, Decision of 25 August 2021 – VG 10 L 285/21 V.
784 Section 22 (1) Residence Act allows for an 'admission from abroad' in exceptional cases on discretionary basis. This case relates to *ad hoc* evacuations based on this provision after the Taliban takeover in Afghanistan in 2021.

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case. The court based its decision on Art. 3(1) of the German Basic Law (*Grundgesetz*),[785] and argued that Germany had committed itself to the imminent evacuation of former local staff members (*Ortskräfte*) at risk after the takeover of the Taliban, by publicly announcing and actively engaging in (*ad hoc*) evacuations. In contrast to the Higher Administrative Court (*Oberlandesgericht Berlin-Brandenburg*) in second instance, the court held Germany must be judged by its numerous public statements and administrative practices and was thus bound by the 'principle of self-commitment of public administration' (*Grundsatz der Selbstbindung der Verwaltung*), which follows from Art. 3(1) of the German Basic Law.[786] While this case concerns German constitutional law and one specific *ad hoc* emergency evacuation scheme, the case points to the issue of how individual rights can be enforced in admission schemes, even when they are deemed to be at the sole discretion of a State. In contrast to the decision of the UK High Court with regards to the extraterritorial (in)applicability of the Equality Act 2010 in the case of *Turani*,[787] discussed previously,[788] the Administrative Court of Berlin did not question the applicability of German Basic Law in the extraterritorial context and neither did the Hight Court in second instance. This is in line with the Federal Constitutional Courts' recent case law.[789]

The issue of extraterritorial jurisdiction and applicability of the respective laws is the *conditio sine qua non* for the enforcement of any right within humanitarian admission procedures.[790] As discussed with respect to resettlement procedures, this legal 'gatekeeper' can be reinforced by a lack of direct contact with State representatives as well as a lack of transparency in admission procedures. As *ad hoc* admission schemes target cases of imminent crisis and potential individual danger, individuals are likely to depend on an admission to escape an imminent risk of a severe human rights violation. This is a crucial difference from most (potential) beneficiaries of

785 Art. 3(1) states: 'All persons shall be equal before the law'.

786 Verwaltungsgericht Berlin, Decision of 25 August 2021, *supra* note 783, para. 27; this decision was overturned by the Higher Administrative Court OVG Berlin-Brandenburg, Decision of 3 November 2021 – 6 S 28/21.

787 *Turani v Secretary of State for the Home Department* (2019) EWHC 1586 (Admin).

788 See Part 3 Chapter 12.4.1.2.

789 See Federal Constitutional Court, Judgment of the First Senate of 19 May 2020 (1 BvR 2835/17 – Federal Intelligence Service – foreign surveillance) paras. 87 ff. (DE:BVerfG:2020:rs20200519.1bvr283517); Order of the First Senate of 24 March 2021 (1 BvR 2656/18 and others – Climate Change) paras. 174 ff. (DE:BVerfG:2021:rs20210324.1bvr265618).

790 See Part 1 Chapter 5.1 and Part 3 Chapter 11.4.1.

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resettlement.[791] Leaving respective individuals with no right to challenge a non-admission might be justifiable based on the recent jurisprudence of the CJEU and the ECtHR in 'asylum visa' cases.[792] However, it neglects the principle of external responsibility.[793] As will be discussed in the following, the lack of procedural rights in the extraterritorial context is accompanied by a trade-off between access and status rights after arrival.

13.4.1.3 Content of protection: access vs. rights

The principle of external responsibility calls for adapting the content of protection to individual protection needs and not to the method or time of arrival. The contrary practice of granting beneficiaries of *ad hoc* admission schemes a weaker status than other protection seekers can lead to significant inequalities. For instance, in Germany protection seekers from Syria with similar backgrounds, sometimes even members of the same family, were granted different residence permits, and thus different rights, depending on how and when they reached the country.[794] Differences in status can lead to inequalities and impact, for instance, on options for family reunification. The principle of external responsibility implies adapting the protection status to protection needs and not the way a protection seeker entered a State.[795]

13.4.2 Internal responsibility: State discretion at peak

Compared to all other pathways assessed in this book, *ad hoc* humanitarian admission schemes offer Member States the widest margin of discretion and flexibility. This 'definitional power'[796] is the embodiment of sovereign authority over access to territory.[797] The Feasibility Study in 2002 concluded that '[t]he importance of the control advantage can hardly be

791 See Part 3 Chapter 12.
792 For a discussion of these decisions see Part 3 Chapter 11.4.
793 This book therefore argues for a dynamic application of human rights in the extraterritorial context, see Part 3 Chapter 11.4.4.
794 Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470.
795 See further below at Part 3 Chapter 13.5.3.
796 Scheinert, *supra* note 748, at 131.
797 On the same issue with a view to resettlement see Part 3 Chapter 12.4.2.1.

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overestimated. States are presently struggling to gain control over migratory movements of all kinds.'[798] In contrast to 'traditional' UNHCR-led resettlement,[799] which foresees a permanent commitment to an annual admission quota, *ad hoc* admission schemes give States even more flexibility. States are free to choose whether an *ad hoc* admission scheme is set in place, extended or terminated. *Ad hoc* admission schemes offer flexibility not only regarding the number and choice of beneficiaries, or the status granted upon arrival, but also in relation to the nature of the procedure and the involvement of different stakeholders. States can adapt administrative structures and adjust reception conditions according to the admissions. While this flexibility can be advantageous in many aspects, it also narrows the predictability of *ad hoc* admission schemes in comparison to a permanent scheme.

The pre- and post-arrival assistance provided to beneficiaries, and particularly the status granted upon arrival, strongly affect the principle of internal responsibility. As pointed out by the ERN, a 'homogeneous organization of travel arrangements and post-arrival integration support for all beneficiaries would probably guarantee more equal treatment and a better integration outcome'.[800] This, again, can benefit the internal order and thus the principle of internal responsibility.

13.4.3 Inter-State responsibility: *ad hoc* admissions as acts of 'emergency solidarity'

Some of the issues arising in humanitarian admission schemes that are relevant with a view to the inter-State responsibility have already been addressed in Chapter 12: the issue of 'cherry picking', concerns with regard to 'in-country' processing, as well as the policy of making admissions dependent of international cooperation in migration control, with the aim to reduce irregular border crossings. As discussed in Part 2, solidarity does not foresee a condition of reciprocity, and responsibility-sharing implies that there is a responsibility to be shared, without requiring any consideration in return.[801] As argued with a view to resettlement, using *ad hoc* admissions as leverage in political negotiations is neither an act of solidarity nor responsibility-sharing.

798 Noll, Fagerlund and Liebaut, *supra* note 49, at 80.
799 See above Part 3 Chapter 12.1.
800 ERN, *supra* note 737, at 15.
801 See Part 3 Chapter 9.2.

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This leaves this section to conclude on the nature of *ad hoc* humanitarian admission schemes as acts of 'emergency solidarity' in the case of a specific crisis, vis-à-vis a specific State of first refuge.[802] While 'emergency solidarity' might be necessary to mitigate the effects of an imminent crisis, such an approach to responsibility-sharing does not have a significant long-term effect on the principle of inter-State responsibility, since such schemes have no normative effect on the allocation of responsibility for refugee protection.[803]

13.5 Tensions and trade-offs arising through *ad hoc* humanitarian admission

Humanitarian admission shares many of the tensions and trade-offs pointed out in relation to resettlement. First, the voluntary nature of the scheme stands in contrast to enforceable individual rights as well as a reliable responsibility-sharing scheme at international level.[804] The *ad hoc* nature of the schemes reinforces these tensions. *Ad hoc* humanitarian admission schemes are acts of 'emergency solidarity'.[805] Second, they share the tensions and trade-offs discussed with regards to the relation of resettlement and territorial asylum.[806] To avoid redundant discussions, this section focuses on how humanitarian admission can (indirectly) reinforce the stereotypes inherent in the legal system governing access to territory and protection (13.5.1). The section then turns to the various effects of 'close-tie' requirements on the responsibility triad (13.5.2) and concludes with some further thoughts on the possible trade-off between access and status rights after arrival (13.5.3).

13.5.1 The 'good' refugee and the 'bad' asylum seeker

As discussed with a view to the relation of resettlement and territorial asylum, referring to the image of 'queue jumpers',[807] the selection of certain 'types' of protection seekers can impact on the image of (other) protection

802 See Part 2 Chapter 9.3.1 on this term.
803 See Part 2 Chapter 9.4 and Chapter 10.2.1.
804 With a view to resettlement see Part 3 Chapter 12.5.1.1.
805 On this term see Part 2 Chapter 9.31.
806 See Part 3 Chapter 12.5.1.2.
807 See Part 3 Chapter 12.5.2.

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seekers, who entered a State irregularly. Thus, humanitarian admission can enhance the dichotomy between the 'good' refugee, who waited for a 'legal' admission, and the 'bad' asylum seeker, who entered EU territory 'illegally'. Using a similar argument, Scheinert states that the German HAPs draw and overturn 'the economic/migrant-humanitarian/refugee distinction'.[808] She concludes that humanitarian admission 'can also be seen to be in the interest of (inter-)national security when analysed through the lens of "managing" and controlling the "security threat" the refugee is constructed to pose'.[809] A particularly cynical example of the manifestation of a 'good' refugee vs. 'bad' asylum seeker approach in a humanitarian admission scheme is the suggested 'one-to-one' mechanism under the EU–Turkey Statement, degrading irregular migrants to objects of political leverage. This approach has a detrimental effect on the principle of external responsibility.[810]

At the same time, this issue affects the principle of internal responsibility. The acceptance of protection seekers entering a State through humanitarian admission might benefit the internal order of a State. However, the preconceptions regarding asylum seekers who entered irregularly (the 'queue jumpers') could increase, to the detriment of the political climate. As argued above, such a 'conditional approach' to humanitarian admission is not in line with the principle of inter-State responsibility either.

13.5.2 The controversial nature of the 'close-tie' requirement

With a view to the voluntary nature of *ad hoc* admission schemes, States are free to apply whatever inclusion or exclusion criteria they deem appropriate. While the external responsibility of States calls for prioritising individuals with protection needs, applying non-humanitarian admission criteria can also enhance a State's willingness to commit to humanitarian admission, which again benefits each and every person admitted and thus the principle of external responsibility.

The interrelatedness of the effects additional admission criteria can have on all three responsibility principles is particularly evident with regard to the 'close tie' requirement, referring to the existence of links to the receiving

808 Scheinert, *supra* note 748, at 132.
809 *Ibid.*, 135.
810 See above Part 3 Chapter 13.4.1.1 on the lack of practical implementation of the scheme.

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State. The existence of 'ties', such as family ties or language skills, can facilitate integration and access to work or education, thereby facilitating the enjoyment of rights in the receiving State.[811] Thus, while seemingly attributable to the interests of States, and thereby the principle of internal responsibility, these requirements can also very well relate to the principle of external responsibility. Furthermore, the 'close ties' requirement can be grounded in a particular understanding of responsibility-sharing, thereby affecting the principle of inter-State responsibility.[812] With regard to the current (implicit) responsibility allocation due to geographical proximity Kritzman-Amir discusses how this might follow 'solidarity bonds' of neighbouring countries in the regions of conflict.[813] Similarly, the Feasibility Study of 2002 argued that imposing such requirements 'reflects an attempt to craft a rudimentary form of global responsibility allocation for persons in need of protection, hampered by the fact that close ties-requirements are unilaterally imposed and not coordinated among states'.[814] A relevant example is the longstanding admission of former Afghan local staff (*Ortskräfte*) by Germany, which was stepped up and complemented by a military emergency evacuation after the Taliban take-over in 2021.[815] The German Federal Foreign Office refers to 'people for whom Germany bears a special responsibility'.[816]

'Close ties' also play out in the complementarity of safe pathways. For instance, individuals might choose to apply for *ad hoc* admission due to higher administrative (or legal) burdens in family reunification procedures, or a State might select, out of the case referrals, a protection seeker with nuclear family ties, who would also have a chance to be admitted in a family reunification procedure. In all these cases the limited admission capacities of existent pathways are not fully explored. The principle of external responsibility implies a complementarity of pathways and there-

811 For this argument with a view to sponsorship schemes see below at Part 3 Chapter 14.

812 See Part 3 Chapter 9.2.

813 Kritzman-Amir, 'Not in My Backyard', *supra* note 196, at 373.

814 Noll, Fagerlund and Liebaut, *supra* note 49, at 74.

815 For an overview see the briefing of the European Parliament Research Service of November 2021, available at www.europarl.europa.eu/RegData/etudes/BRIE/2021/698776/EPRS_BRI(2021)698776_EN.pdf; see also the discussion of a case concerning an appeal against the non-admission of a local staff member and his family under this humanitarian evacuation scheme, above at Part 3 Chapter 13.4.1.2.

816 See German Federal Foreign Office, FAQ: Assistance leaving Afghanistan, available at https://www.auswaertiges-amt.de/en/visa-service/konsularisches/afg.

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fore considering possible effects of 'close tie' requirements in the selection process.[817]

13.5.3 Access vs. rights

The last issue of this section concerns the trade-off between access and status rights after arrival. The stronger the legal status of beneficiaries upon their arrival, the more comprehensive the corresponding obligations that the State has to fulfil and the closer the legal bond between the State and the protection seeker.[818] Apart from determining the duration of stay, the residence permit granted to beneficiaries sets the ground for access to other rights such as the right to work, the right to family reunification and, ultimately, prospects for naturalisation. Thus, crucial rights such as the right to family reunification and options for long-term residency or even naturalisation are all but unobtainable for beneficiaries of *ad hoc* admission schemes in some Member States. This can create incentives to apply for asylum once on EU territory. With regards to possible restrictions to family reunification, this has a direct impact on (other) safe pathways for family members, who might still be in the regions of conflict. This can be countered by a focus on family unity during humanitarian admissions. Still, family reunification can remain an issue upon arrival.

Overall, the trade-off between access and rights reflects the two stages of access offered through safe pathways. First, (all) safe pathways offer access to territory – and therewith primary physical safety and basic rights. Second, safe pathways offer access to (further) rights. With a view to this second stage, there are significant differences between the asylum visa, resettlement and *ad hoc* humanitarian admission schemes, depending on their implementation. While this primarily concerns the principle of external responsibility, it also impacts on the principle of internal responsibility, as 'counter moves' of protection seekers trying to achieve a better status by entering national asylum procedures can affect administrative structures within a State (as, for instance, in the case of Germany discussed in this chapter). In Part 2 of this book, the principle of internal responsibility was deduced from an understanding of State sovereignty as shield for

817 See further Part 3 Chapter 14.5.2 on complementarity.

818 See also Part 2 Chapter 8.3 on the intersection of the principles of external and internal responsibility in the territorial context.

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the protection of the 'internal community', following from a democratic self-understanding of liberal societies.[819] Drawing on Benhabib to put forward a similar understanding of State sovereignty 'as an expression of the political (and democratic) self-determination of a bounded community', Scheinert argues 'that this political legitimacy is called into question by current responses to asylum seeking, like the German admission programmes, as they effect the persisting political exclusion of (long-term) residents'.[820] This affects not only the principle of external responsibility but also the principle of internal responsibility.

13.6 Conclusion: *ad hoc* humanitarian admission as emergency solidarity and State discretion at peak

This chapter has analysed and assessed *ad hoc* humanitarian admission schemes in the light of the responsibility framework. *Ad hoc* humanitarian admission schemes have been implemented in several ways in different EU Member States from 2015 onwards, particularly as responses to the crisis in Syria. While there is no legal implementation of *ad hoc* humanitarian admission at EU level, the EU–Turkey Statement served as basis for two models of *ad hoc* schemes and may have served as a blueprint for legislative proposals on resettlement at EU level. There is no uniform definition of *ad hoc* humanitarian admission; however, there are certain common key features regarding access to protection, characteristically distinguishing this pathway from others: admissions take place in response to a specific situation of crisis, mostly addressing protection seekers belonging to specific groups. Consequently, there is a much broader scope of eligibility and exclusion criteria than, for instance, in traditional resettlement schemes. In Member State practice, the 'close tie' requirement plays a dominant role. Regarding the procedure, a distinction is the temporary and *ad hoc* nature of the schemes, as well as the possibility to conduct an expedite and more flexible procedure, for instance with a view to options for case referrals other than from UNHCR.

As *ad hoc* schemes share the voluntary nature of resettlement, several issues with a view to the responsibility principles discussed in Chapter 12 were equally of relevance in this chapter. In its assessment of the tensions

819 See Part 2 Chapter 7.

820 Scheinert, *supra* note 748, at 136. See Part 2 Chapter 7 on the principle of internal responsibility.

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and trade-offs raised by *ad hoc* humanitarian admission schemes, this chapter therefore focused on three specific issues: the risks humanitarian admission schemes bear in relation to the perception of different protection seekers in receiving States; the various effects of the 'close ties' requirement; and the possible trade-offs between access and rights.

This chapter discussed how the legal situation of protection seekers who arrive based on *ad hoc* humanitarian admission schemes varies significantly among Member States, in comparison to both protection seekers who arrive irregularly and resettled refugees. Considering that the group concerned might be the same (e.g. individuals who fled the war in Syria), such differences can raise issues affecting the principles of external and internal responsibility. While the trade-off between access and rights culminates in the choice of status upon arrival, it can be traced back to the extraterritorial context, where – as with resettlement – the applicability of individual rights during admission procedures is contested, or at least nearly impossible to enforce.

Overall, *ad hoc* schemes offer States the widest margin of discretion, thereby particularly reflecting the principle of internal responsibility. With a view to the inter-State responsibility, they express an overall approach of 'emergency solidarity'. While *ad hoc* humanitarian admission schemes can be crucial to mitigating the effects of an acute situation of crisis, their exceptional character means they have a limited normative effect on the asylum paradox. The EU–Turkey Statement added elements of 'conditionality' and deterrence to humanitarian admission, making admissions dependent on cooperation in migration control. As argued in relation to the proposals for a resettlement regulation at EU level, humanitarian admission focused on migration control and deterrence exacerbates the asylum paradox.

14 Sponsorship schemes

This chapter addresses 'sponsorship schemes' as safe pathways depending on civil society and community engagement in the form of private funding and integration support. After further delimiting the term 'sponsorship schemes' (14.1), this chapter will provide background information for the assessment, by drawing on country examples (14.2.), to then outline key features of sponsorship schemes as safe pathways (14.3). Eventually the chapter analyses and assesses sponsorship schemes in the light of the responsibility framework (14.4), to outline tensions and trade-offs (14.5)

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and draw conclusions on the effects of this pathway on the asylum paradox (14.6).

14.1 Defining sponsorship schemes

The categorical distinction of safe pathways to protection is not always clear-cut. Different schemes can overlap regarding beneficiaries, stakeholders or implementation requirements – as, for instance, the role of family ties in the admission. The specific characteristic of 'sponsorship schemes' lies in the active participation of civil society in the admission of protection seekers, by providing financial and (or) integration support.

Against this backdrop, this chapter defines sponsorship schemes as *ad hoc* or permanent humanitarian admission schemes that make the admission of protection seekers *dependent* on a (mostly) financial commitment of civil society members as 'sponsors' in the receiving States. Such sponsorship schemes can be set up as individual pathways or quota-based schemes.

In contrast to safe pathways assessed thus far, the existence of a responsibility link to a non-governmental sponsor, such as an individual, group of people or community organisation in the respective host State is the main requirement for the admission to occur in the first place. The 'responsibility transfer' is therefore the defining feature of this pathway.[821]

As stated in a 2015 study of private sponsorship in the EU, sponsorship schemes can take numerous forms and finding a common definition is

> 'complicated by the fact that individuals and civil-society groups already help resettled refugees, and do so in a myriad of ways that reflect their own motivations and capacities – and the degree to which the state provides public assistance'.[822]

Various schemes exist under different terms, ranging from 'private sponsorship programs' to 'community(-based) sponsorship' and 'humanitarian

821 See also European Commission, *Study on the Feasibility and Added Value of Sponsorship Schemes as a Possible Pathway to Safe Channels for Admission to the EU, including Resettlement – Final Report* (2018) ('*Sponsorship Feasibility Study*'); Ekaterina Y. Krivenko, 'Hospitality and Sovereignty: What Can We Learn from the Canadian Private Sponsorship of Refugees Program', 24(3) *International Journal of Refugee Law* (2012) 579, at 594.

822 Judith Kumin, *Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the European Union* (2015), at 3.

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corridors'.[823] Therefore, the umbrella term 'complementary' or 'alternative' pathways is often used to indicate how this pathway can complement other pathways, such as resettlement, as well as territorial asylum.[824] Complementarity can even be considered to be a second defining feature of sponsorship schemes, as they would otherwise merely be setting a further requirement in another (different) scheme, such as resettlement.[825] However, a feasibility study of sponsorship schemes undertaken on behalf of the European Commission in 2018 (hereafter the 'Sponsorship Feasibility Study'), found that complementarity has become 'less central to the definition of sponsorship'.[826]

In addition to the necessary responsibility transfer to private actors as key feature, and the complementarity of sponsorship schemes as additional feature, there is a third feature pointed out in definitions of sponsorship schemes: the option for sponsors to suggest, or 'name', protection seekers to be selected for an admission (so called 'naming').[827] However, the option of 'naming' is not part of every scheme but, rather, more of a modality of the responsibility transfer.[828]

The terms 'private' and 'community-based' serve to distinguish the incentive power of civil society from merely government-led admission schemes. Referring to 'community' or 'community-based' schemes indicates the responsibility of communities (and cities) in the admission, not merely through political pressure of municipal governments but also through active (mainly financial) contributions of the respective citizens (or organisations) in the admission process. This must be distinguished from so-called 'sanctuary cities', 'solidarity cities' or 'cities of refuge'. These terms refer to

823 For a recent overview see Tan, 'Community Sponsorship in Europe: Taking Stock, Policy Transfer and What the Future Might Hold', 3 Frontiers in Human Dynamics (2021) article 564084.

824 See Part 1 Chapter 3.1.2. for a detailed delimitation of the term 'complementary pathway'. For a discussion of the concepts of additionality and complementarity of safe pathways see Part 2 Chapter 10.2.1.2.

825 Susan Fratzke, 'Engaging Communities in Refugee Protection: The Potential of Private Sponsorship in Europe' (MPI Europe Policy Brief Issue 9, 2017), at 3, identifying 'three core elements' of sponsorship schemes (responsibility transfer, 'naming' and complementarity).

826 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 41.

827 Kumin, *supra* note 822, at 3; see also Fratzke, *supra* note 825, at 3.

828 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 74 ff, outlining different areas of responsibility of sponsors, including the identification of beneficiaries.

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cities and municipalities, mostly in the legal context of the USA, Canada or the UK, taking up an active role in migration and human rights policies with respect to irregular migrants.[829] Cities and communities have also taken up an important political role with a view to the inter-EU relocation of individuals in distress at sea or in precarious situations in Greek refugee camps.[830] While these examples also involve cities and communities playing a role in creating political pressure as well as a hospitable environment for the admission, they must be distinguished from sponsorship schemes as defined in this chapter.

Against the backdrop of this delimitation, the next section will briefly draw on the background of sponsorship schemes at international and EU level.

14.2 Background

This section sketches the background of sponsorship schemes at international and EU level to set the scene for the outline of key features of sponsorship schemes, as well as their subsequent analysis and assessment in the light of the responsibility framework. Political recommendations to integrate sponsorship schemes are increasing at international and EU level, accompanied by observations of a growing interest among civil society in taking up responsibility for the admission and integration of protection seekers.[831] The following outline of different sponsorship schemes puts a focus on the Canadian model as the most prominent sponsorship scheme worldwide (14.2.1), and then briefly outlines the implementation of sponsorship schemes in the legal context of the EU (14.2.2).

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829 For an overview see Harald Bauder, *Sanctuary Cities: Policies and Practices in International Perspective* (2016), available at https://solidarity-city.eu/app/uploads/2017/06/Bauder-2016-International_Migration-Early-View.pdf; Heuser, *supra* note 161; see also the research project of Helene Heuser, 'Cities of Refuge', information available at www.jura.uni-hamburg.de/en/lehrprojekte/law-clinics/refugee-law-clinic/forschungsprojekt-staedte-der-zuflucht.html.

830 For a delimitation of relocation and safe pathways to protection in the focus of this book see above Part 1 Chapter 3.1.2.

831 See for instance Kumin, *supra* note 822, at 8, referring to the 'Save me' campaign, which in four years 'achieved 51 City Council decisions in favour of refugee resettlement in Germany' as well as the International Cities of Refuge Network (ICORN) at global level, coordinating temporary refuge of artists and writers in need of protection.

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14.2.1 International perspective: the Canadian private sponsorship scheme as a role model

With its NYD of 2016, the UN called upon states to 'consider making available or expanding, including by encouraging private sector engagement and action as a supplementary measure, resettlement opportunities and complementary pathways for admission of refugees'.[832] The declaration paved the way for the GCR of November 2018, pointing out that

> [t]he three-year strategy on resettlement […] will also include complementary pathways for admission, with a view to increasing significantly their availability and predictability. Contributions will be sought from States, with the support of relevant stakeholders […] to establish private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes promoted through the Global Refugee Sponsorship Initiative'.[833]

The latter is an initiative led by, among others, the Government of Canada, as the most experienced country in private sponsorship worldwide, to encourage and inspire States to engage in sponsorship schemes as complementary pathways to protection.[834]

As the Canadian model serves as role model for sponsorship schemes, it deserves closer attention. It was introduced in 1978 following the passage of the 1976 Immigration Act[835] and is firmly integrated into Canadian immigration law via Section 13(2) Immigration and Refugee Protection Act, which reads as follows:

> 'A group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province, and an unincorporated organization or association under federal or provincial law, or any combination of them may, subject to the regulations, sponsor a Convention refugee or a person in similar circumstances.'

832 UN General Assembly, 'New York Declaration', *supra* note 341; see further on the NYD above Part 2 Chapter 9.3.3.
833 UN General Assembly, 'Global Compact on Refugees', *supra* note 74, para. 95.
834 Labman, *Crossing Law's Borders*, *supra* note 157, at 81.
835 Immigration Act, 1976–77, c 52, s l, (IA).

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Sponsorship schemes complement the national governmental resettlement scheme as safe pathway to protection in Canada.[836] Generally, beneficiaries must meet the criteria of the Refugee Convention or else be in a 'refugee-like situation', which is similar to the concept of subsidiary protection in the EU. While IDPs were included in the program until 2011, they have not been part of the group of beneficiaries since.[837]

There are various models of admission schemes. Sponsors can name specific individuals for an admission, who they then fully sponsor; there is the so-called 'Blended Visa Office Referred (BVOR) Program', as well as the 'Joint Assistance Sponsorship (JAS)' programs, whereby sponsors provide non-financial support.[838] Within the BVOR Program, sponsors can name beneficiaries from a database of those preselected by the government agency Immigration, Refugees, and Citizenship Canada (IRCC) and the UNHCR.[839] Beneficiaries of all schemes must undertake security and medical checks prior to their admission. Upon arrival, they are granted permanent residency in Canada.

In contrast to the Canadian example, the admission of protection seekers based on sponsorship schemes is a relatively recent phenomenon in the legal context of the EU, which will be addressed in the following.

14.2.2 Sponsorship schemes in the legal context of the EU

Since 2013, some EU Member States as well as Switzerland have developed and implemented different forms of sponsorship schemes at national level, mostly as a reaction to the Syrian and Iraqi refugee crises and, from 2015 onwards, as response to the increase in asylum applications on EU territory.[840]

At EU level, the European Commission takes an active part in promoting this pathway. While the European Agenda on Migration of 2015 encouraged Member States to make use of 'other legal avenues available to persons in

836 See further Shauna Labman and Geoffrey Cameron, 'Introduction: Refugee Sponsorship: An Evolving Framework for Refugee Resettlement' in Shauna Labman and Geoffrey Cameron (eds), *Strangers to Neighbours: Refugee Sponsorship in Context* (2020) 3.

837 Krivenko, *supra* note 821, at 592.

838 See further Labman, *Crossing Law's Borders*, *supra* note 157, at 85 ff.

839 *Ibid*., at 86.

840 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 32 ff. and at 42.

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need of protection, including private/non-governmental sponsorships',[841] the European Commission included calls to 'explore ways to establish private sponsorship schemes where the settlement and integration support for persons in need of protection, including its related costs, can be provided by private groups of civil society organisations', *inter alia* in its communication of 2017.[842] Still, there is neither a legal basis nor uniform practice of a sponsorship scheme at EU level. To overcome this regulatory gap, the Sponsorship Feasibility Study outlines 'a maximalist option' for the EU to take legislative action based on Art. 78(2)(d) TFEU. Such instrument would set out the

> 'role of the sponsor in referrals; The nature of sponsor's obligations; The maximum duration of the sponsors' obligations (e.g. 5 years) in an agreement signed by sponsors with national authorities or specified in national legislation; Monitoring and evaluation provisions of the schemes throughout their implementation by national authorities.'[843]

To explore this option EASO could coordinate a pilot project.[844]

Meanwhile, there are several Member States that have, or have had, sponsorship schemes in place. Prominent examples are the 'humanitarian corridors' in Italy,[845] the '*visa au titre de l'asile*' granted by France,[846] or the German *ad hoc* humanitarian admission schemes for protection seekers fleeing Syria (illustrating the potential overlap between different pathways).[847] Most of the existing national sponsorship schemes have been responses to calls from civil society. They first emerged as forms of extended family reunification schemes in Germany, Ireland and Switzerland.

841 European Commission, 'A European Agenda on Migration', COM(2015) 240 final, 13 May 2015, at 5.

842 See European Commission, 'Communication on the Delivery of the European Agenda on Migration', COM(2017)558, 27 September 2017, at 19.

843 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 9 ff.

844 *Ibid.*, at 33.

845 See Bianchini, *supra* note 743.

846 While the French government stresses that asylum can only be claimed in the territory or at the border of France, there are visas granted in exceptional cases, which generally require some sort of civil society support; see the information provided by the French government, available at www.ofpra.gouv.fr/fr/asile/la-procedure-de-demande-d-asile/demander-l-asile-de-l-etranger.

847 See Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470.

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According to the Sponsorship Feasibility Study, sponsorship schemes in Europe can be divided into four main categories:

- so called 'humanitarian corridors', put in place by Belgium, Italy and France, based on Memorandums of Understanding between faith-based civil society organisations and government authorities, facilitating access to the national asylum system upon arrival;
- schemes based on financial commitments to facilitate extended family reunification with a view to relatives in need of protection, implemented for instance by Germany and Ireland;
- so called 'community-based sponsorship', implemented by the UK and Portugal, foreseeing the matching of persons in need of international protection with local and community organisations, which support their integration after arrival; and, lastly,
- *ad hoc* schemes specifically aiming at an admission of Christians, implemented by the Czech Republic, Slovak Republic and Poland, based on partnerships with religious organisations.[848]

The German *ad hoc* sponsorship schemes at *Länder* level are the largest and most studied sponsorship schemes in the EU.[849] In contrast to other country examples, German sponsorship schemes are based on a specific legal framework at national level.[850] Initiated based on extensive engagement with civil society, including relatives of Syrians already living in Germany, regional sponsorship schemes were launched by 15 of the 16 federal *Länder* from 2013 onwards.[851] While the schemes facilitated access of more than 20,000 individuals fleeing the conflict in Syria, they raised controversies regarding the selection of beneficiaries, the status granted upon arrival and the scope of the financial commitment of sponsors.[852] In 2019, Germany launched a pilot program at federal level called 'NesT' (short for *Neustart*

848 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 45, for a figure indicating the type of private sponsorship scheme and number of individuals admitted in the EU by October 2018.

849 *Ibid*., at 43, with a comparison of the German sponsorship schemes with other country examples.

850 Admissions are based on Section 23(1) Residence Act and an according 'Admission Ordonnance' (*Aufnahmeanordnung*).

851 See further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 207 ff.

852 *Ibid*.

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im Team, 'new start in a team'),[853] a 'hybrid' scheme, comprising elements of private sponsorship and government-led resettlement.[854]

While the German and the Irish schemes emerged in 2013 and 2014, most of the other schemes were launched from 2015 onwards, a time in which the number of asylum applications on EU territory had reached a historical peak.[855]

Overall, the number of entry visas granted under private sponsorship from 2013 to 2018 in the EU and Switzerland sat at around 31,690 and can be counted in addition to admissions under government-led resettlement schemes.[856] These numbers show how sponsorship schemes have developed as a significant *complementary* pathway to protection in Europe since 2013. The next section will draw on these examples to outline common features of sponsorship schemes as basis for the analysis and assessment of this pathway in the light of the responsibility framework.

14.3 Access through sponsorship schemes

There are common features of sponsorship schemes which will be outlined in the following to set the basis for the subsequent assessment. Here again, the focus lies on beneficiaries ('who', 14.3.1), admission procedures ('how', 14.3.2), and the content of protection granted upon arrival ('what', 14.3.3).

14.3.1 'Who': beneficiaries of sponsorship schemes

The selection of beneficiaries varies among the existing sponsorship schemes. The Sponsorship Feasibility Study found that most of the schemes in the EU legal context had 'nationality from a certain third country' as main eligibility criterion. This is a consequence of the evolution of these

853 See the information provided by the Federal Office for Migration and Refugees, available at https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/ResettlementRelocation/Resettlement/resettlement-node.html.

854 See further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 214 ff.

855 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 42 ff., with a timeline of the implementation of sponsorship schemes (Figure 3).

856 *Ibid.*, at 45, pointing out that the number of actual arrivals is not known and that '[c]omparisons between sponsorship and resettlement numbers should, however, be drawn carefully because of discrepancies in how they are counted'.

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schemes as a response to the conflicts in Syria and Iraq. The second criterion was vulnerability, and only third was the need for protection.[857] The exclusion criteria applied in sponsorship schemes generally matches common security considerations applied within visa procedures.

The issue of beneficiaries is closely linked to the responsibilities of sponsors throughout the procedure. Some schemes are based on the above-mentioned 'naming system', whereby sponsors can identify specific individuals for an admission. Other schemes rely on the so-called 'matching system', whereby certain stakeholders, such as UNHCR or national NGOs, match sponsors with pre-selected beneficiaries, sometimes, but not always, in collaboration with State institutions.[858]

Eligibility criteria for being a sponsor vary widely among the existing schemes. Generally, individuals and groups of people can be sponsors, as well as NGOs, including faith-based organisations, churches, academic institutions and corporations.[859] In the EU, the duration of the sponsor's financial responsibilities 'generally varies from 90 days to a maximum of five years, with most requiring between one and two years'.[860]

14.3.2 'How': sponsorship procedures

In 2018, the Sponsorship Feasibility Study identified five common stages of sponsorship schemes in the EU, including a 'setting up phase' for the respective policy-framework; a pre-departure phase; a transfer and departure phase; a post-arrival and integration phase; and a monitoring and evaluation phase.[861]

The pre-departure phase of sponsorship schemes entails a *selection process* involving different actors and initiated by individuals or third parties, and then a *visa procedure* to issue travel documents to selected beneficiaries. Even though civil society plays a key role in sponsorship schemes, the State remains responsible for setting up a policy or even legal framework allowing for the respective schemes to be set up, thereby determining the eligibility of sponsors and beneficiaries.

States also determine the scope of the responsibility transfer. As mentioned above, there is a focus on the choice of beneficiaries, either

857 *Ibid*., at 56 ff.
858 See above, Part 3 Chapter 14.1.
859 Kumin, *supra* note 822, at 7.
860 European Commissio, *Sponsorship Feasibility Study*, *supra* note 821, at 8.
861 *Ibid*., at 48 (Figure 6).

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through identification via 'naming-systems' or through active participation in 'matching-systems' (as the sponsors must agree). Additionally, sponsors can be responsible for bearing the travel costs of selected beneficiaries. Despite this elementary transfer of responsibility for some parts of the procedure, the State plays the most active part throughout the admission process: selected individuals must enter the respective State with a visa and therefore undertake a visa procedure conducted by the respective State representation at their present location, mostly entailing identity and security screenings as well as medical checks.

An important procedural difference between existing sponsorship schemes lies in the assessment of the protection status: while some schemes foresee the granting of a national protection status upon arrival, most of the schemes in EU Member States assessed in 2018 grant access to a national asylum procedure upon arrival. Some Member States based the visas granted on Art. 25(1) Visa Code. As the CJEU ruled in 2017 that there is no provision in EU law foreseeing the granting of a visa to access a national asylum procedure,[862] the Sponsorship Feasibility Study pointed out that '[a]ccording to current EU law, visas issued to persons who intend to obtain international protection or another long-term protection status in the EU must only be based on national legislation'.[863]

The visa determines the status upon arrival and thus the legal situation of beneficiaries. While none of the analysed sponsorship schemes foresee specific rights or legal remedies during the pre-departure phase, the post-arrival phase, considered in the following, is framed by the legal provisions applicable to protection seekers in the EU.

14.3.3 'What': status upon arrival

To draw a picture of the post-arrival situation of beneficiaries, the following outline will focus on the status granted upon arrival as well as the scope of responsibility possibly transferred to the sponsors.

With a view to the status and a respective residence permit, the Canadian 'role model' generally foresees granting beneficiaries permanent residency upon arrival, leading to a strong legal position.[864] In the EU, the status

862 See *X and X v Belgium*, *supra* note 16. For a discussion of this decision see Part 3 Chapter 11.4.
863 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 70.
864 See above at Part 3 Chapter 14.2.

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varies from Member State to Member State and even from scheme to scheme.[865] Most of the schemes grant access to the national asylum procedure upon arrival, and some foresee directly granting a national protection status. In contrast to the Canadian model, none of the schemes foresees the granting of permanent residency. The only way to achieve a better status than the status (directly) granted through the scheme therefore lies in applying for asylum (if not already foreseen by the scheme), which occurred primarily in Ireland and Germany.[866] In Germany, another reason for beneficiaries to apply for asylum lay in the duration of financial guarantees provided by the sponsors. In the first months of implementing sponsorship schemes for protection seekers from Syria in 2013, financial guarantees of relatives in Germany were *unlimited* with a view to their scope (e.g., including costs for healthcare) and duration. As a result, numerous beneficiaries of sponsorship schemes applied for asylum upon arrival, hoping that a change in status would allow them to access social benefits without the State having recourse against their sponsors (typically their relatives). However, the Federal Administrative Court ruled that the sponsors remained financially responsible, even after a change of status.[867] Eventually, Germany adjusted the duration of the financial guarantees to a maximum of five years and released sponsors from having to cover healthcare.[868] In the subsequent hybrid public–private scheme 'NesT' of 2019 the financial commitment of sponsors was limited to provide the net cost of housing for a period of two years. Additionally, beneficiaries are granted the status of resettled refugees and thus a status almost as strong as Convention refugee status in Germany.[869]

If beneficiaries apply for asylum, either as intended by the scheme or based on a personal decision upon arrival, they are considered as asylum seekers under EU law. In this case, all relevant provisions from the CEAS apply.[870]

865 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 65.
866 *Ibid*.; see with a view to Germany Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 207 ff.
867 See Bundesverwaltungsgericht 1 C10.16, Judgement of 26 January 2017 (DE:BVerwG:2017:260117U1C10.16.0).
868 Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 208.
869 *Ibid*., at 214.
870 See Part 1 Chapter 3.2. on legal sources.

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While another important area of private responsibility lies in integration support – e.g., in facilitating access to social services, language courses and the job market – the State remains primarily responsible for covering these needs; the same applies in the event that sponsors fail to comply with their initial commitment.[871]

14.4 Analysis of sponsorship schemes in the light of the responsibility framework

This section assesses the key elements of sponsorship schemes ('who', 'how' and 'what') in the light of the responsibility framework. As Fratzke points out, '[p]roponents of sponsorship cite several benefits it may offer refugees, policymakers, and sponsoring communities',[872] from offering 'additional pathways to protection' and allowing for an '[i]mproved refugee labour market integration and self-sufficiency' to providing civil society with a 'sense of ownership of refugee protection efforts'.[873] The following assessment will help to structure and evaluate these assumptions according to the principles of external (14.4.1), internal (14.4.2) and inter-State responsibility (14.4.3). In order to avoid redundancies in the discussion, the assessment will focus on the special features of sponsorship schemes that differ from the other safe pathways evaluated so far.

14.4.1 External responsibility

The following section shows how different methods of implementation can enhance or narrow the effect of a scheme on the principle of external responsibility. After addressing the issue of beneficiaries (14.4.1.1), the assessment will turn to the admission procedures (14.4.1.2) and conclude with an assessment of the content of protection (14.4.1.3).

871 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 8.
872 Fratzke, *supra* note 825, at 4.
873 *Ibid.*, at 5.

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14.4.1.1 Beneficiaries: the 'close tie' requirement as a key consideration

While the principle of external responsibility calls for a prioritisation of protection needs,[874] most of the existing sponsorship schemes focus on other factors in the selection process, such as nationality, religious affiliation, or family ties to the receiving State. The inherent risk of discrimination when focusing on eligibility criteria that are not protection-related is pointed out in the Sponsorship Feasibility Study, which notes that '[r]ather than increasing admission places for persons needing protection broadly, sponsorship schemes in Eastern Europe aimed to provide admission for a specific group of people, namely Syrian or Iraqi Christians'.[875] Apart from a risk of discrimination, there is the issue of complementarity, which can be limited by the requirement of 'family ties' as an eligibility criterion.[876] Examples are the German sponsorship schemes at *Länder* level, which were put in place instead of rigorously applying or extending options of family reunification.[877]

Nonetheless, the option for sponsors to 'name' protection seekers for admission and thereby to actively participate in the implementation of safe pathways significantly enhances the principle of external responsibility. The 'naming' system shifts the 'definitional power'[878] States usually hold in government-led schemes to civil society. Thus, a potential 'gatekeeper' role of sponsors as third parties in access to the admission schemes depends on their relationship to the respective protection seekers. If sponsors are relatives, they can facilitate access to the schemes in the first place. However, focusing on beneficiaries who are, for instance, protection seekers belonging to a particular religion (such as Christians), sponsored by religious organisations, indirectly excludes other protection seekers. These schemes do not only raise issues of potential discrimination, as pointed out above, but sponsors also function as 'gatekeepers' regarding protection seekers who do not belong to the specific group.

The (direct) exclusion criteria applied within the existing sponsorship schemes match the exclusion criteria in visa procedures, primarily based

874 See further Part 2 Chapter 10.2.
875 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 35.
876 On the 'close-ties' requirement see also above at Part 3 Chapter 13.5.2. On complementarity in sponsorship schemes see below at Part 3 Chapter 14.5.2.
877 For a critical discussion see Tometten, *supra* note 406.
878 Scheinert, *supra* note 748, at 131.

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on security concerns. None of the existing schemes entail exclusion criteria unrelated to security issues, focusing solely on migration control, such as an exclusion based on a previous irregular entry or stay in the EU (as, for instance, suggested in the Resettlement Framework Proposal).[879] Nor do existing examples of sponsorship schemes foresee making admissions dependent on migration cooperation with third countries. This is a result of the special nature of the schemes based on a cooperation with civil society. With respect to the principle of external responsibility this is a crucial difference to *ad hoc* admissions following the 'EU–Turkey Statement' as well as to the Resettlement Framework Proposal of 2016.[880]

14.4.1.2 Admission procedures: enhancing agency

In all safe pathways assessed thus far, the State plays the leading role in the procedures. Although sponsorship schemes rely on a transfer of responsibility to civil society, the above outline has shown that the State retains the leading role here as well. This has implications for two aspects that are important for the principle of external responsibility: the non-existence of a uniform approach foreseeing procedural rights throughout the admission process, and options to directly apply for an admission under a sponsorship scheme. The latter, however, depends on the scheme and the level of involvement of civil society. Compared to resettlement and *ad hoc* admission programs, the involvement of civil society can facilitate access to independent information and legal assistance as well as, possibly, legal remedies. Overall, the participation of civil society in admission procedures has the potential to enhance the agency of protection seekers and thereby significantly improve their legal condition.

In her analysis of Canadian private sponsorship schemes, Krivenko criticises 'long processing delays and high refusal rates'.[881] The processing time can be more than three years, creating a risk of significantly affecting the situation of the sponsors and the protection seekers to be sponsored. Thus, 'there are complaints from both sides', the sponsors and the govern-

879 For an assessment of this proposal see above Part 3 Chapter 12.
880 See above Part 3 Chapter 13 for an assessment of this *ad hoc* humanitarian admission scheme and Chapter 12 for an assessment of the Resettlement Framework Proposal.
881 Krivenko, *supra* note 821, at 594.

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ments.[882] Similar issues are pointed out by Labman in her assessment of sponsorship schemes.[883] Besides issues arising due to the use of the schemes as means to facilitate access of extended family members, there were conflicts over the responsibility of sponsors for healthcare costs.[884] There were similar problems in sponsorship schemes in Germany, as will be discussed in the next section.

14.4.1.3 Content of protection: issues of status and responsibility transfer

The legal situation of beneficiaries differs widely, depending *inter alia* on whether beneficiaries are immediately granted a residence permit or whether they must apply for asylum upon arrival. Comparing the practice of EU Member States shows that, on the one hand, the direct granting of a status – as, for instance, foreseen by the German sponsorship schemes – is favourable regarding immediate access to the job market and social inclusion. However, the national status granted to beneficiaries of German sponsorship schemes is overall weaker than the international protection status potentially granted through a national asylum procedure, and less favourable than the status granted to resettled refugees. Here again, there is a 'trade-off' between access and rights, as discussed in the previous chapter.[885] The new 'NesT' programme seems to pick up on important issues in the sense of 'lessons learned', granting beneficiaries a stronger status and focusing on the sponsor's responsibility in providing adequate accommodation, which, according to the EU Feasibility Study of 2018 'was considered as one of the main benefits of implementing sponsorship schemes by national authorities and civil society organisations alike'.[886]

Regarding the involvement of sponsors, two aspects are crucial in the post-arrival situation: the scope of financial commitment and the post-arrival support sponsors usually provide. The scope of financial commitment raises the greatest controversies and affects both the principle of external

882 *Ibid*., at 595.
883 Labman, 'Private Sponsorship: Complementary or Conflicting Interests?', 32(2) *Refuge – Canada's Journal on Refugees* (2016) 67, at 69.
884 *Ibid*.
885 See further on this issue with a view to *ad hoc* humanitarian admission above Part 3 Chapter 13.5.3.
886 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 8.

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and of internal responsibility.[887] Overall, the main issue arises when the 'responsibility transfer' amounts to an undue transfer of 'burdens'.

The post arrival support represents one of the greatest advantages of sponsorship schemes with respect to the principle of external responsibility. International case studies point to the various benefits and positive effects sponsorship schemes can have in enhancing the agency of protection seekers by facilitating the learning of the local language and providing faster access to the job market and social networks.[888] There are studies stressing the fact that civil society is in a better position to offer post-arrival and integration support than State institutions may be.[889] While resettlement and other humanitarian admission schemes might include such support upon arrival, it is an *integral part* of sponsorship schemes and thus a major benefit with respect to the principles of external and internal responsibility.

14.4.2 Internal responsibility

This section assesses the effects of sponsorship schemes on the principle of internal responsibility with a view to beneficiaries (14.4.2.1), admission procedures (14.4.2.2) and the content of protection (14.4.2.3).

14.4.2.1 Beneficiaries: limited State discretion for more social acceptance

In private sponsorship schemes, in particular under the 'naming model', the State's discretion is limited compared to resettlement and other humanitarian admission schemes.[890] Nonetheless, the State remains responsible for making the final admission decision, thereby expressing its sovereignty with a view to the question of access to territory.

887 See below at Part 3 Chapter 14.5.1.

888 With regard to the international context see Kumin, *supra* note 822, at 20, with further references; see also European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 37, referring to international examples. For the EU legal context, however, more research and data would be necessary in this regard, see Tan, 'Community Sponsorship in Europe', *supra* note 823, at 7.

889 van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US', 4(2) Journal of International Migration and Integration (2003) 157, at 173; see also Krivenko, *supra* note 821, at 599.

890 See above Part 3 Chapters 12 and 13.

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Finally, sponsorship schemes may affect the social acceptance of humanitarian admissions, due to the involvement of civil society members as well as the requirement of ties to the respective State. This effect is more related to the strengthening of civil society as an active part of the reception systems than to the categorization of the respective beneficiaries as 'good' refugees instead of 'bad' asylum seekers.[891] This difference from other humanitarian admission schemes makes sponsorship schemes a particularly valuable instrument for promoting the principle of internal responsibility without having a detrimental effect on the principle of external responsibility.

14.4.2.2 Admission procedures: civil society as an internal driving force

With respect to the procedure, the flexibility and procedural framework of sponsorship schemes are relevant to the effect of this pathway on the principle of internal responsibility. Sponsorship schemes rely on the engagement of civil society. Most of the schemes in the EU were found not to be implemented in permanent legal frameworks at national level.[892] Some sponsorship schemes are tied into government-led resettlement schemes, thereby benefitting from the existing 'resettlement infrastructure'.[893] The requirement of 'close ties' to the receiving State, which is often an integral part of the schemes, makes the option of EU-wide sponsorship schemes with a 'distribution key' irrelevant. Nonetheless, a harmonisation of minimum standards for the procedure and the status granted upon arrival could enhance the internal stability of the Union in this respect. To further facilitate the implementation of sponsorship schemes for States, studies suggest 'piecemeal approaches'[894] (or 'incremental approaches'[895]), foreseeing small-scale regional pilot programs that may then be adapted at national or EU level.

While the granting of procedural rights is not specifically foreseen, it is not only a factor benefitting the individual protection seeker, thereby taking

891 For a discussion of this issue see Part 3 Chapter 13.5.1.
892 See above at Part 3 Chapter 14.3.2.
893 A national example is the German pilot program 'NesT'; see further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 214 ff.
894 Tan, 'Community Sponsorship in Europe', *supra* note 823, at 6.
895 Fratzke, *supra* note 825, at 10.

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up recourses from the respective States; procedural rights can also help guarantee that the respective schemes actually reach beneficiaries, thereby helping to reduce human smuggling.

Visa procedures are part of every pathway assessed in this book. Their inherent identity, security and health checks serve to safeguard public security and health. A difference between sponsorship schemes and other pathways lies in the fact that the checks of a potential beneficiary's identity can be facilitated through the personal (family) links the individual might have to the receiving State in cases where the sponsors are family members.

As outlined above, the State remains primarily responsible before the arrival of beneficiaries; after arrival, the sponsors' involvement becomes more important. However, the involvement of civil society is crucial in the establishment of the schemes, often serving as the main incentive for receiving States to engage in (complementary) humanitarian admissions in the first place.

14.4.2.3 Content of protection: the leading role of sponsors in the post-arrival phase

The two main areas regarding the content of protection affecting the principle of internal responsibility are the status granted upon arrival and the involvement of sponsors in the post-arrival phase.

As outlined above, the status granted to beneficiaries of existing sponsorship programs varies from State to State. While Canada grants a permanent status, some EU Member States rely on the outcome of the territorial asylum procedure or grant a national humanitarian status upon arrival. Consequently, there can be a trade-off between access and rights. As discussed with a view to *ad hoc* admission schemes,[896] this can, however, not only narrow the effect of the pathway on the principle of external responsibility but also negatively affect the principle of internal responsibility, since neglecting individual rights and interests can have detrimental consequences for the States as well.[897]

Although the State remains responsible as 'safety net' in case the relationship between the sponsor and the beneficiary breaks down after arrival, the responsibility transfer foreseen by sponsorship schemes regarding the post-

896 See above at Part 3 Chapter 13.5.3.
897 See further below at Part 3 Chapter 14.5.1.

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arrival situation is a major benefit for the receiving States. Admission costs are reduced, either through direct financial contributions and the provision of housing, or through the everyday support provided by sponsors. This may benefit the integration capacities of beneficiaries, who are then more likely to be financially independent.[898] Overall, the broad involvement of civil society can strengthen the social acceptance of admissions, again benefitting the internal order and well-being of the receiving State.

14.4.3 Inter-State responsibility: the scope of 'solidarity bonds'

At first sight the principle of inter-State responsibility does not seem to be greatly affected by sponsorship schemes unless their numerical impact is significant. However, the main feature of these schemes – the 'responsibility transfer' to civil society – invites some further reflections on the effect sponsorship schemes may have on the principle of inter-State responsibility. Even more than the 'close tie' requirement discussed in the previous chapter,[899] the responsibility transfer creates a bond between the protection seeker and the receiving State (with its civil society). With respect to the principle of inter-State responsibility, the argument brought forward in the Feasibility Study (on PEPs) of 2002 – namely, that these 'solidarity bonds'[900] may be seen as expression of a concept of (international) responsibility – is even more relevant here.[901]

Thus, the issue of complementarity plays a central role.[902] The principle of inter-State responsibility implies sharing a responsibility for *protection* – and not a responsibility for safeguarding (extended) family unity. Whenever sponsors are family members of protection seekers abroad, their commitment to the 'responsibility transfer' is likely not to be an expression of a (general) commitment to 'protection' but, rather, a commitment to the specific protection of their relatives, deriving from family ties and personal bonds. With respect to the principle of inter-State responsibility, it would

898 However, as pointed out above, more research providing evidence in the EU context would be necessary here, see above Part 3 Chapter 14.4.1.3.

899 See above Part 3 Chapter 13.5.2.

900 See Kritzman-Amir, 'Not in My Backyard', *supra* note 196, at 373, using this term with a view to the current (implicit) geographical allocation of international responsibility, thereby referring to the 'solidarity bond' countries in regions of conflicts might have with protection seekers from neighbouring countries.

901 Noll, Fagerlund and Liebaut, *supra* note 49, at 74.

902 See further below Part 3 Chapter 14.5.2.

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therefore be crucial to offer sponsorship schemes that rely not only on the commitment of family members as sponsors but also on the commitment of various civil society members based on a general commitment to engage in protection.

Finally, the focus of sponsorship schemes on the existence of 'responsibility bonds' between protection seekers and civil society leads to an absence of elements requiring reciprocity at inter-State level. None of the existing examples of sponsorship schemes showed a focus on migration control or admissions depending on migration cooperation with third States. This is in line with an 'unconditional' approach to responsibility-sharing, in favour of the principle of inter-State responsibility.

14.5 Tensions and trade-offs raised by sponsorship schemes

This section discusses the tensions and trade-offs raised by sponsorship schemes, focusing on two key issues: the tension between 'unduly burdening' and empowering sponsors on the one hand (14.5.1) and the issue of complementarity on the other (14.5.2).

14.5.1 Between 'undue burdens' and empowerment of civil society

The responsibility transfer to the sponsors is the main feature of sponsorship schemes, and at the same time the most controversial issue. The main criticism concerns the scope of financial guarantees, as no other area of responsibility transfer may have similar detrimental effects on the sponsor or the relationship between sponsors and beneficiaries. While financial commitments can lead to an undue burden, a responsibility transfer with a view to the selection process, such as foreseen by the option of 'naming', may empower civil society members and protection seekers alike.

The requirement of providing financial guarantees can impact on family relationships as it bears the risk of putting sponsors in situations of great emotional duress, eventually overstraining their financial capacities to facilitate the safe arrival of their relatives.[903] Even if the State provides a 'safety net' in case the sponsor fails to comply with the financial commitment,

903 On this issue see Labman, 'Private Sponsorship', *supra* note 883, at 67; Schwarz, *supra* note 405, at 4.

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the recourse a State may take against relatives can still impact on family relationships. The two solutions to this dilemma are a reasonable scope of financial guarantees on the one hand, as well as allowing for anyone (not just family members) to act as sponsors on the other. The scope of the financial commitment could, for instance, be adjusted to the economic situation of sponsors as well as the duration of the temporary residence permit. This way, sponsors would not have to commit themselves longer than the State is (initially) willing to commit itself to an admission.[904]

Overall, the relation between the sponsors and the State is the main area of tension in sponsorship schemes. This is interesting with regard to the approach taken to the principle of internal responsibility in this book. In her analysis of the Canadian private sponsorship schemes in the light of Derrida's notion of unconditional hospitality and sovereignty, Krivenko argues that through the active participation of civil society, 'international law will finally become a tool with which human rights, as a promise of protection for all, without regard to citizenship or place of residence, can be fulfilled'.[905] Krivenko goes even as far as concluding that the involvement of sponsors 'is not just a way for the government to attract additional financial support for its obligations [...] it reveals itself as a tool for individuals to become active subjects of international law, able to fulfil international obligations in the area of refugee and human rights protection'.[906] While this conclusion stems from an analysis based on a concept of human rights protection beyond State sovereignty, it tackles the issue of agency within civil society. This in turn is a strong legitimisation for a modern democratic understanding of sovereignty, which is based on the will of the people, strengthens the internal stability of a State and thus promotes the principle of internal responsibility as defined in Part 2.[907]

However, such a conclusion goes very far, seeing civil society in a major position of responsibility, potentially leading to new forms of sovereignty. Existing sponsorship schemes do not fulfil this promise. As has been shown in the above outline, the State remains primarily responsible by creating a policy and legal framework allowing for the admission of respective

904 For instance, while Germany grants temporary residence permits to beneficiaries with durations of one to two years, financial guarantees last five years, see further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 207 f.

905 Krivenko, *supra* note 821, at 602.

906 *Ibid*.

907 See above Part 2 Chapter 7.

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beneficiaries. Furthermore, the State functions as 'safety net', whenever the relationship between sponsors and beneficiaries ends or in case sponsors are not able to bear the financial commitment any longer. This ultimate responsibility is an important aspect: a complete transfer of responsibility to civil society would significantly impact upon the principle of internal responsibility, which entails the safeguarding of public security, well-being and order. The control States retain of the selection process allows them to be prepared for the arrival of protection seekers with different needs and adjust administrative structures accordingly, doing justice to the principle of internal responsibility.

At the same time, however, the distribution of responsibilities between the State and civil society causes tensions. With a view to the Canadian sponsorship schemes, Krivenko[908] and Labman[909] observe these tensions in all stages of the procedures. Thus, both interpretations of the dynamics of Canadian private sponsorship schemes focus on the State and civil society as two opposing sides, battling over sovereignty claims. In this book, the principle of internal responsibility has been set out as more than just a claim of sovereignty over territory. The principle is used as theoretical construct to describe the aim of safeguarding the rights and interests of the 'internal community' of a State. Overall, the 'responsibility transfer' in sponsorship schemes can empower civil society and foster the social acceptance of safe pathways. While the tensions discussed by Krivenko and Labman do play a role and potentially affect the principle of internal responsibility, they are not a result of the responsibility transfer as such (the '*if*') but, rather, of its scope and implementation in practice (the '*how*'). Here, complementarity plays a crucial role in mitigating some of these tensions, as will be discussed in the following.

14.5.2 The relevance of complementarity in sponsorship schemes

An emerging issue of sponsorship schemes (e.g., in Canada and Germany)[910] is a correlation between the setting up of sponsorship schemes

908 Krivenko, *supra* note 821.
909 Labman, 'Private Sponsorship', *supra* note 883.
910 For the Canadian program see Krivenko, *supra* note 821; Labman, 'Private Sponsorship', *supra* note 883; for Germany see Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470; Tometten, *supra* note 406; Schwarz, *supra* note 405.

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and decreasing numbers of government resettlement and fewer options for (extended) family reunification.[911] With respect to the principles of external and inter-State responsibility, complementarity is relevant in this context. Complementarity may be compromised, on the one hand, by policies that aim at replacing existing pathways, such as replacing a national resettlement scheme with a sponsorship scheme; and, on the other hand, by the setting up of sponsorship schemes that *officially* complement other pathways but *effectively* narrow the quotas of the latter.

To avoid a detrimental effect on the principles of external and inter-State responsibility the requirement of complementarity cannot only be a formal one. Instead, it must be assessed which role – effectively complementary or not – sponsorship schemes play within the existing legal or policy framework. Family members may therefore be provided with options of (extended) family reunification, to keep sponsorship schemes open to protection seekers with no other access option. This would also imply broadening the spectrum of sponsors to all members of civil society. The latter may have a positive impact on the principle of internal responsibility. On the one hand, this could mitigate some of the negative effects arising due to a responsibility transfer to relatives of protection seekers. On the other hand, it would place the social support for the admission of protection seekers on a broader basis.

14.6 Conclusion: sharing responsibility – not burdens

This chapter started with a discussion of the role and the overall development of sponsorship schemes as an increasingly prominent pathway to protection worldwide and in the legal context of the EU. Sponsorship schemes have a long tradition and are well-established in Canada. In the EU, they have gained particular attention since 2013. Sponsorship programs are currently attracting particular interest from both governments and civil society. The involvement of private actors in the admission of protection seekers promises to facilitate the governmental decision to set up safe pathways and strengthens the democratic legitimacy of admissions. Sponsorship schemes can empower members of civil society in the provision of protection, an area of law exclusively dominated by the state.

911 On this issue see Labman, *Crossing Law's Borders*, *supra* note 157, at 123.

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Despite the key characteristic being the 'transfer of responsibility' to private actors, the State retains a crucial role throughout the procedures. It remains solely responsible for the setting up of admission schemes (the 'if') and largely responsible for several aspects of the implementation (the 'how'). While civil society can play an active role in the selection of beneficiaries in the pre-departure phase (through 'naming'), the focus of the responsibility transfer lies in the post-arrival phase of sponsorship schemes. Here, civil society takes up responsibility by providing financial and integration support to beneficiaries. Overall, the most active part of civil society does not concern the admission itself, but the situation *after arrival*. This last aspect promises to have positive effects on the situation of beneficiaries and societies in the receiving States, thereby benefitting both the principle of internal and external responsibility.

However, there are also political stalemates in which cities or municipalities express their willingness to actively admit people seeking protection on the basis of a broad civil society commitment, but are hindered by the fact that the final sovereign decision on admission is made by the state. In addition, some of the existing sponsorship programs have met with harsh criticism, as they are seen as an attempt to outsource responsibility for protection to civil society. Some schemes have led to serious issues for sponsors, beneficiaries and States alike, including situations of duress and financial constraints on sponsors, a weak legal status of beneficiaries and excessive strain on administrative structures. This book argues that there are four key considerations that can mitigate some of the negative effects sponsorship schemes may have on the different responsibility principles, thereby leading to an overall positive normative effect on the asylum paradox:

- aligning the status of beneficiaries to protection needs;
- placing the responsibility transfer on a broad public basis;
- ensuring complementarity of the schemes, especially with respect to options of family reunification; and, lastly,
- not to overstretch the financial capacities of private sponsors, as this could have an indirect impact on the State (with its social "safety net")

The overall picture of sponsorship schemes shows a strong dynamic of reciprocity: while the State sets up safe pathways based on a commitment of civil society members to actively contribute to admissions, the main responsibility in terms of the procedure and the safety net upon arrival is borne by the State. This, in turn, facilitates the decision of sponsors to

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participate in respective schemes in the first place. This dynamic and the driving force of civil society as a motor for the implementation of safe pathways also shows in the fact that most existing sponsorship schemes are not limited in relation to their duration and not all are based on quotas. The involvement of civil society has a particularly positive effect on the principles of external and inter-State responsibility: so far, sponsorship schemes referred to in this chapter only entail exclusion criteria that are linked to serious security threats, and there are no requirements of 'reciprocity' with a view to the inter-State level. Thus, sponsorship schemes show great potential to strike a balance between the three principles of responsibility, as long as the focus of responsibility transfer lies on empowerment and not *burdens*.

15 Conclusion Part 3

This chapter seeks to summarise the findings of Part 3 in a brief overall conclusion (15.1) and provide an outline of key issues which were identified to set the course for the assessment of safe pathways to protection (15.2).[912]

15.1 Overall conclusion

The aim of Part 3 was to answer the overall research question regarding the normative effect of safe pathways on the asylum paradox, in particular the potential for safe pathways to bridge the protection gap inherent to the current system governing access to protection in the EU. The assessment in Part 3 was based on a theoretical (principle-based) approach. The aim was not to conduct a feasibility study by going into all the details of implementation. Instead, Part 3 structured safe pathways to protection according to principles of responsibility. The analysis in Part 3 confirms the hypothesis that the *normative* effect of safe pathways on the asylum paradox varies depending on the outline of the pathway and the details of implementation. Based on the assumption that the asylum paradox reflects an imbalance of three responsibility principles, the analysis was structured according to the responsibility framework outlined in Chapter 10. Thus, the assessment focused on an evaluation of the normative impact of safe pathways on

912 For a detailed outline of the findings of each Chapter see Part 4 Chapter 16.

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each responsibility principle, allowing for conclusions with a view to the (potential) effects on the asylum paradox.

While all pathways in the analysis can offer access to territory, and therefore primary safety, the asylum visa shows fundamental differences with a view to its *normative* effect on the responsibility principles and thereby on the asylum paradox. Legally implementing a permanent asylum visa scheme with individual rights and guarantees would strengthen the individual right to seek asylum and change the current protection paradigm, which is grounded in territorial access to protection and an allocation of responsibility on the sole basis of geographical proximity. The current legal framework and State practice governing access to territory and protection reflect a predominant focus on migration control and thus on the principle of internal responsibility. Looking at the decisions of the CJEU and the ECtHR in the two 'asylum visa' cases through the lens of the responsibility framework reflects this distorted picture: both Courts emphasised aspects related to the internal responsibility and demonstrated a very restrictive understanding of the legal norms expressing the external responsibility. Additionally, they did not even consider elements of an inter-State responsibility. Both decisions therefore perpetuate the asylum paradox.

This book argues that a dynamic and progressive interpretation of extraterritorial human rights *obligations* would not lead to new responsibilities that would otherwise not exist. Rather, a progressive interpretation of the relevant norms on jurisdiction would mean placing some weight on the other side of the scale. In practical terms this means legally implementing a permanent asylum visa scheme at EU level, as well as other permanent safe pathways *complementing* an asylum visa scheme. Thus, the relation of safe pathways to territorial access to asylum is key (*additionality*). Safe pathways with a focus on migration control, leading to (direct or indirect) deterrent effects can exacerbate the imbalance of responsibility principles manifested in the asylum paradox.

15.2 Key issues setting the course in the assessment

The analysis and assessment of safe pathways to protection was based on the responsibility framework, which served three functions: first, an analytical function, structuring the different elements of implementation according to the responsibility principles; second, a heuristic function, revealing

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and predicting tensions and trade-offs depending on the implementation; and, third, a normative function for the evaluation of the potential effects safe pathways can have on the asylum paradox. Chapter 10 established key factors to be considered in the assessment with a view to the normative effect on the asylum paradox: aspects of implementation pointing to a predominant focus on migration control, with potential deterrent effects; aspects promoting the application of individual rights in the extraterritorial context; and aspects providing alternatives to the allocation of responsibility at international level, promoting a 'common but differentiated' approach to responsibility-sharing.[913] Chapter 10 also made predictions with a view to tensions and trade-offs that could arise when considering one responsibility principle or the other.

Building on these *pre-established* considerations and predictions for the assessment of safe pathways, the analysis and assessment in Part 3 confirmed the areas of tension and trade-offs set out in Chapter 10 and added some additional considerations regarding the issue of access and safety, as well as the complementarity of safe pathways to each other. This section therefore concludes with an outline of the following key issues, which set the course in the assessment: the issue of access to and safety during the procedures of safe pathways (15.2.1); their implementation as permanent or *ad hoc* schemes (15.2.2); the outline of safe pathways as individual access routes or quota-based admission schemes (15.2.3); the distinction between access to territory and access to rights (15.2.4); the relation of safe pathways to territorial asylum (15.2.5); and, finally, the complementarity of safe pathways to each other (15.2.6).

15.2.1 Safe access to safe pathways

Two crucial factors determining the effect of safe pathways with a view to the individual seeking protection (and thus the principle of external responsibility), as well as the overall normative relevance of safe pathways regarding the asylum paradox, are *access* and *safety*. The notions of access and safety capture both *de facto* access and physical safety, as well as legal access to the procedure and legal safeguards. The assessment identified the following key factors as having an impact on access and safety:

913 See Part 2 Chapter 10.1.

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1. Accessibility of the procedure, including
   - availability and accessibility of impartial information on the existence of the pathway and the details of the procedure;
   - the *de facto* accessibility of the agents conducting the procedures (e.g., embassies, consulates or UNHCR), either personally or through online applications;
   - the legal possibility of directly approaching a State with a protection claim – while non-State actors involved in the selection process can facilitate access to procedures, they also risk functioning as 'gatekeepers';
   - complementarity of different pathways, ensuring that each pathway stays accessible for those with no other choice. This means, for instance, admitting family members through (extended) family reunification instead of humanitarian admission schemes.
2. Physical safety during the procedures, including the issues of:
   - *if, where* and *how* protection seekers are accommodated during the procedures, and tackling issues of international cooperation;
   - considering special needs;
   - the optional availability of online applications, to avoid potentially dangerous journeys to State embassies or consulates;
   - medical checks;
   - safe departure to the host State, again affecting international cooperation.
3. Legal safety, including issues of:
   - procedural safeguards;
   - legal assistance;
   - non-discrimination;
   - family unity;
   - best interest of the child;
   - transparency of the procedures (reasons for rejection);
   - options of legal remedies and judicial review. Here, again, the level of involvement of third parties is crucial: vis-à-vis non-State actors, protection seekers do not have the same rights and legal options to challenge a negative decision.
4. Ensuring physical and legal safety leads to the issue of the legal status of individuals during the procedures. Here, again, there is a particular need for international cooperation, as the procedures take place in third countries.
5. Independent monitoring mechanisms.

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This is not an exhaustive list. However, the way States answer these questions when implementing safe pathways reflects on all three principles of responsibility. This concerns the principle of *external responsibility*, since all these issues are crucial with a view to securing access and safety for protection seekers and the overall availability of safe pathways as an alternative to an irregular arrival. The issues affect the principle of *internal responsibility* by implying recourse to a range of financial, personal and administrative resources as well as limits regarding State discretion in the implementation. At the same time, taking these aspects into account strengthens the legitimacy of the pathway, ensures that safe pathways reach those most in need and aligns State policy with the goal of safeguarding human rights. Finally, these issues concern the *inter-State responsibility*, as the procedures of safe pathways – preliminary or not – necessarily take place in a third State, requiring international cooperation. Additionally, the more effective safe pathways are, the greater their contribution to international responsibility-sharing and thus their impact on the principle of inter-State responsibility. Depending on the priorities States set regarding the responsibility principles, the normative effect of the pathway on the asylum paradox varies. Finally, so called *'in-country' processing* – that is, admissions directly from home States – adds another layer of complexity to all the issues mentioned above, again affecting all three principles of responsibility.[914]

15.2.2 Permanent schemes vs. *ad hoc* schemes

The implementation of safe pathways as permanent schemes or *ad hoc* schemes impacts on all three principles of responsibility. *Ad hoc* schemes offer more flexibility for receiving States; however, they also diminish the predictability of admissions to the detriment of the principle of internal responsibility. With regards to the inter-State responsibility, *ad hoc* schemes can be seen as acts of 'emergency solidarity' rather than an approach of 'common but differentiated' responsibility-sharing or long-term commitment to protection. While they might be necessary in times of imminent crisis, they have a limited effect on the asylum paradox.[915]

914 For a discussion of these issues with respect to the asylum visa see above Part 3 Chapter II.6.1 and Chapter II.6.2.

915 See above Part 3 Chapter I3.5.4.

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15.2.3 State discretion vs. individual rights

As outlined in Chapter 10, considering aspects in favour of one responsibility principle or the other leads to tensions and trade-offs. With regard to the effect of safe pathways on the asylum paradox, there is a fundamental difference between pathways offering an individual access route, with individual rights and guarantees, or voluntary government-led programs, mostly based on quotas and of a temporary nature. The asylum visa is the only pathway considered in this book that offers the possibility of approaching a State representation extraterritorially and seeking protection independent of existing government-led admission schemes, quotas or belonging to a specific group of beneficiaries.

While the asylum visa strengthens the scope of the individual right to seek asylum, resettlement and *ad hoc* humanitarian admission programs focus on the right of States to grant protection – if and how they want to. There is no individual claim, no option of judicial appeal and the status granted upon arrival varies significantly among Member States, often leading to a trade-off between access and rights.[916]

The assessment of resettlement and *ad hoc* humanitarian admission schemes showed that the voluntary nature of these pathways does not imply the granting of individual rights and guarantees during the procedures. This book argues that this assumption may be challenged depending on the circumstances of the case and the legal grounds applicable, thereby drawing on the few cases of appeals against discrimination in resettlement procedures or the rejection of humanitarian visas in a German *ad hoc* emergency evacuation scheme.[917] However, even if the legal 'gatekeepers' can be overcome (which mainly depends on the issue of extraterritorial jurisdiction or applicability of EU law), the lack of transparency in the selection process from the perspective of the protection seeker functions as *de facto* 'gatekeeper' for the enforcement of individual rights.[918] Overall, resettlement and *ad hoc* humanitarian admission schemes reflect an understanding of asylum as a right of States, without individual claims attached. Just like the current legal framework governing access to protection in the EU, some of the examples of safe pathways addressed in this book show a strong focus on the principle of internal responsibility. Moreover, there are

916 See below at Part 3 Chapter 15.2.4.
917 See above Part 3 Chapter 12.4.1.2. and Chapter 13.4.1.2.
918 See above Part 3 Chapter 12.4.1.2 and Chapter 13.4.1.2.

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methods of implementation which bear the risk of safe pathways functioning as 'deterrence in disguise', thereby exacerbating instead of countering the imbalance of responsibilities leading to the asylum paradox.[919]

15.2.4 Access vs. rights

All pathways analysed in this book offer a method to access EU territory, avoiding the dangers of irregular flight routes. Thus, all the pathways have the potential to immediately bridge the protection gap with a view to safe *access to territory* for every person who individually benefits from the respective pathway. However, the analysis identified substantial differences between the legal status of beneficiaries before and after arrival, and thus *access to rights*, depending on the pathway. Providing refugee status upon arrival is not mandatory, even under resettlement procedures.[920] Depending on the pathway and its respective national legal framework, the status granted after arrival can differ substantially. This might affect the right to family reunification, the right to be granted a refugee passport, or prospects for long-term residency.

By drawing on the case of Germany in Chapters 13 and 14, the book discussed how there can be a 'trade-off' between access and rights when implementing *ad hoc* humanitarian admission and sponsorship schemes. For instance, individuals with similar backgrounds and reasons for fleeing Syria are granted different resident permits depending on how they arrived in Germany – through resettlement, an *ad hoc* humanitarian admission scheme (with or without the requirement of a financial guarantee by a sponsor) or irregularly. Applying a 'flexible status' upon arrival, not necessarily matching protection needs, has an impact on the principle of external responsibility. However, Chapter 14 also identified negative effects with a view to the principle of internal responsibility. The example of Germany showed that individuals who were granted a comparatively weak residence status after an admission through a sponsorship scheme applied for asylum after arrival to achieve a change in status. This dynamic can place a strain on administrative capacities and impact on the principles of both external and internal responsibility. Still, safe pathways go hand in hand with a trade-off between access and rights. As has been outlined in the previous

919 See further below Part 3 Chapter 15.2.5.
920 See Part 3 Chapter 12.

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section, this trade-off is not limited to the question of status upon arrival. It can be traced back to the extraterritorial context.[921]

The trade-off between access and rights seems to be an inevitable consequence of the attempt to reconcile the principles of internal and external responsibility in governmental admission schemes. While the granting of procedural rights reflects a commitment to the principle of external responsibility, it also takes up internal State resources and may narrow a State's discretion in the admission process. However, granting procedural guarantees can also foster the principle of internal responsibility. For instance, providing protection seekers with (access to) adequate information and legal assistance can ensure that the schemes benefit those most in need. It also helps combat human smuggling, a genuine national and EU interest.

Ultimately, there is a two-sidedness to upholding human rights: safeguarding procedural guarantees not only enhances the position of the protection seeker, and thus the principle of external responsibility, but also has an internal dimension, affecting the principle of internal responsibility. This becomes evident in the LIBE Report on humanitarian visas, in which the aim of upholding human rights is tied to the self-understanding of the Union and every Member State.[922]

15.2.5 Safe pathways and territorial asylum: the 'fig leaf' and the 'queue jumpers'

The key factor for determining the normative effect of safe pathways on the asylum paradox is the relation of a pathway to territorial asylum (additionality). The relation to territorial asylum affects the situation of protection seekers who do not benefit from safe pathways to protection – either because available pathways are scarce, or difficult to access (*de facto* or legally)[923] – or protection seekers who have been rejected after attempting to enter a State irregularly or attempting to be admitted through a safe pathway. Finally, this issue can also affect beneficiaries of safe pathways who enter a national asylum procedure after arrival, to improve their residence status based on a specific pathway.[924]

921 See below at Part 3 Chapter 15.2.3.
922 LIBE Report, *supra* note 409, Explanatory Statement – Justification for the Proposal.
923 See above Part 3 Chapter 15.2.1.
924 See above Part 3 Chapter 15.2.4.

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A safe pathway aiming at generally replacing the individual right to seek asylum in the territory or the border of a State would risk violating the principle of non-refoulement.[925] It is therefore crucial to offer safe pathways *in addition* to the option of seeking territorial asylum upon (irregular) arrival. None of the pathways assessed in this book foresees directly preventing or replacing the option of seeking territorial protection upon irregular arrival. However, there are modes of implementation that can still have deterrent effects. Two key issues in this regard are addressed with reference to the images of the 'fig leaf'[926] and the 'queue jumpers'[927] in the following.

If States draw on the implementation of safe pathways to legitimise restrictive asylum policies and 'migration deals' with third States, ultimately leading to further access restrictions, safe pathways degrade into a 'fig leaf' for the *de facto* restriction of access to territorial asylum. While being a tool for granting protection, safe pathways can thereby exacerbate the asylum paradox through the 'back door'.[928]

The same goes for proposals drawing on the implementation of safe pathways to *legally* restrict individual access to territorial asylum – e.g., by precluding access for individuals who have previously entered a State irregularly, have been rejected in an admission procedure, or have not made use of a (hypothetically) existing pathway ('queue jumpers').[929] Such an approach links the notion of abuse to the denial of a protection claim or procedural rights. A recent example of such legal reasoning in the context of access to protection is the ruling of the ECtHR in the case *N.D. and N.T.*, denying procedural rights due to, *inter alia*, prior misconduct of the applicants.[930]

15.2.6 Complementarity of safe pathways

Finally, the issue of complementarity of safe pathways impacts on all three responsibility principles. All the analysed pathways address different situ-

925 On the scope of international human rights and the principle of non-refoulement see Part 1 Chapter 5.1.
926 See Thym, *supra* note 112 on this image.
927 See Kneebone and Macklin, *supra* note 616, at 1091 on this image.
928 See Part 3 Chapter 12.5.2 for a discussion of this issue with regard to the Resettlement Framework Proposal of 2016 at EU level.
929 See Part 3 Chapter 12. On the issue of 'good' refugees vs. 'bad' asylum seekers see Part 3 Chapter 13.5.1.
930 See Part 3 Chapter 11.4.3.

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ations of protection seekers and host States. While the asylum visa is a pathway particularly promoting the right to an individual procedure, many protection seekers might not qualify for an admission through an asylum visa scheme. The high threshold of non-refoulement and the hurdles of individual visa procedures can have excluding effects. For instance, protection seekers in the focus of resettlement would most likely not qualify for an asylum visa. Overall, asylum visa schemes offer less predictability for States and most likely do not provide a measure to cope with the vast number of protection seekers worldwide. This limits the effect of asylum visas on the principle of external and inter-State responsibility.[931] Sponsorship schemes, on the other hand, are only accessible to protection seekers who have a sponsor in a specific receiving State.[932] Overall, a complementarity of safe pathways is necessary to consider the variety of protection needs and State concerns. For different pathways to be effective overall, complementarity would also have to guide each admission decision to ensure that every pathway reaches its full potential.

931 See Part 3 Chapter 11.6.4 for a discussion of the limits of the asylum visa.

932 See Part 3 Chapter 14 on sponsorship schemes, with a particular focus on 'complementarity' see Part 3 Chapter 14.5.2. On the 'close-tie' requirement see Part 3 Chapter 13.5.2.

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