Part 1: Introduction

There is no asylum without access to a State's territory. At the same time, States prevent access to territorial asylum. The paradoxical interplay between the granting of territorial protection and the prevention of access to territory is framed as 'asylum paradox' in this book. It is the point of departure for analysing and assessing safe pathways to protection in the legal context of the European Union (EU). In the focus are the asylum visa, resettlement, *ad hoc* humanitarian admission and sponsorship schemes. The overall aim is to assess the normative effects of safe pathways on the asylum paradox, which will be introduced in Chapter 1. The subsequent chapters elaborate on the aim of the book and respective research questions (Chapter 2), the scope of the book (Chapter 3), its structure and methodology (Chapter 4), as well as the legal context and state of research upon which the book builds (Chapter 5).[1]

1 The asylum paradox

Work on this book started in 2015, when the EU faced its 'refugee crisis',[2] an administrative crisis caused by the irregular arrival of over one million protection seekers.[3] It was the year the picture of the drowned three-year-old boy Alan Kurdi, whose body washed up on the Greek coast, went around the world. Alan Kurdi and his family were protection seekers from Syria, and in the absence of a safe pathway to reach protection, Alan died at sea, together with his mother and four-year-old brother. While Alan's

1 The assessment in this book considers legal developments, jurisprudence and academic sources until December 2023. All web addresses contained as hyperlinks in the footnotes or the bibliography were last checked on 31 December 2023. An exception is the consideration of the consolidated proposal for a 'Union Resettlement and Humanitarian Admission Framework' of February 2024, as it is relevant for the assessment in Chapter 12.

2 See further on this term Sergio Carrera *et al.*, 'The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities' (CEPS Essay No. 20/16, 2015).

3 See data at European Parliament (ed.), *Asylum and Migration in the EU: Facts and Figures* (updated July 2021), available at https://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures.

image gave the loss of life in the Mediterranean a human face, his death is only one of thousands every year.[4] The lack of political will to address the need for safe pathways reminds of State responses at the Conference of Evian in 1938, concerning a different European 'refugee crisis', when States could not agree on the admission of people fleeing Europe.[5] Today's international protection regime, with the Refugee Convention of 1951[6] and its 1967 Protocol[7] (together referred to as the 'Refugee Convention' in this book), was at its core initially designed with European refugees in mind.[8] Complemented by the evolution of international human rights, international refugee law establishes a regime providing for individual rights and guarantees. However, the system leaves a significant gap with a view to access to these rights: refugees are, by definition,[9] individuals in need of protection *outside* their country of origin. The entitlement to protection therefore depends on the ability to access another State. But the question of how a person may safely reach a State of refuge has to date been left open by international and EU law.[10] There is an international human right 'to leave any country',[11] but there is no corresponding 'right to enter any country' to seek protection. Refugee status is declaratory in nature and universal in its scope for all signatory States;[12] but the concept of asylum, as the act of granting protection, remains territorially bound.[13]

4 22,931 deaths during migration were recorded from 2014 to 2020 in the Mediterranean, see the Missing Migrants Project at https://missingmigrants.iom.int/data.

5 For a historical contextualisation of both scenarios of 'refugee crisis' see Ahonen, 'Europe and Refugees: 1938 and 2015–16', 52(2–3) *Patterns of Prejudice* (2018) 135.

6 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

7 Protocol relating to the Status of Refugees of 31 January 1967, 606 UNTS 267 No 8791.

8 The possibility of removing the geographic limitation of the Refugee Convention has been introduced by the Protocol relating to the Status of Refugees of 31 January 1967, 606 UNTS 267 No 8791. For an overview of the historical developments until 1946, see Guy S. Goodwin-Gill, 'International Refugee Law in the Early Years' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 23.

9 See Art. 1A Refugee Convention.

10 See further Part 1 Chapter 5.1.

11 The 'right to leave any country' is enshrined in Art. 13(2) UDHR, Art. 12(2) ICCPR, and Art. 2(2) of Protocol No. 4 ECHR; see further below at Part 1 Chapter 5.1.

12 See further on the universal scope of human rights and refugee law, Part 2 Chapter 8.1.1.

13 See the definition provided by the Institute of International Law (5th Commission), 'Asylum in Public International Law', Resolutions Adopted at its Bath Session (September 1950), Art. 1, describing asylum as 'the protection that a State grants on its

The EU incorporated the territorial concept of asylum in the Common European Asylum System (CEAS). According to Art. 3(1) of the EU Asylum Procedures Directive (APD),[14] an asylum application can only be made 'on the territory – including at the border, in territorial waters or in transit zones – of the Member States'.[15] As emphasised by the Court of Justice of the European Union (CJEU) in the case *X and X* in 2017, concerning applications by Syrian nationals for humanitarian visas to seek asylum in Belgium, there is no provision of EU law providing for the possibility of seeking asylum outside EU territory.[16] In 2020, the European Court of Human Rights (ECtHR) shut that same legal door, denying jurisdiction in the *M.N.* case, with a similar factual background.[17]

While asylum is dependent upon access to territory, the EU is shifting border and migration control away from its territory (so-called *extra territorialisation* or *externalisation*).[18] Restrictive visa requirements[19] are backed up by pre-entry controls and so-called carrier-sanctions.[20] While private rescue missions in the Mediterranean are criminalised,[21] migration control

territory or in some other place under the control of certain of its organs to a person who comes to seek it'. See further on the concept of asylum Guy S. Goodwin-Gill and Jane McAdam, with Emma Dunlop, *The Refugee in International Law* (4rd ed., 2021), Part 2 Chapter 8. On the concept of 'diplomatic asylum' as exception to the territorial concept of asylum, see Part 3 Chapter II.2.1 in this book.

14 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

15 The APD 'shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States', see Art. 3(2) APD.

16 Judgement of 7 March 2017, *X and X v Belgium*, C-638/16 *PPU* (EU:C:2017:173), para. 49.

17 *M.N. and Others v. Belgium*, Appl. No. 3599/18, Grand Chamber, Judgement of 5 March 2020 (CE:ECHR:2020:0505DEC000359918). See further on these two decisions Part 3 Chapter II.4.

18 See further Bernard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (2010); Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 502; on the notion 'externalisation' see Tan, 'Conceptualising Externalisation: Still Fit for Purpose?', 68 *Forced Migration Review* (2021) 8.

19 See further on visa regulations Part 3 Chapter II.3.1.

20 See further Part 3 Chapter II.3.2.

21 On the criminalisation of private rescue initiatives see for instance Chiara M. Ricci, 'Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the "Facilitators' Package"' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges*

is outsourced to private actors[22] and third countries.[23] So called 'push-backs' and 'pull-backs' prevent access to territory,[24] and safe third country concepts[25] facilitate the rejection of protection seekers. These are only a few examples of measures that create a multi-layered system effectively preventing access to territory and the triggering of territorial jurisdiction.[26] At the same time, the concept of *extraterritorial* jurisdiction is being contested.[27]

This asylum paradox,[28] with its lack of safe access to protection, leaves States unprepared for the arrival of protection seekers, neglects host States in the Global South[29] and, above all, creates a massive protection gap, with numerous human rights issues.[30] In their attempt to reach the EU, protection seekers travel in so called 'mixed flows' of migration, rely on

for Human Rights (2020) 34; see also Amnesty International, *Punishing Compassion: Solidarity on Trial in Fortress Europe* (2020).

22 On the outsourcing of protection responsibilities to private actors see Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011).

23 On third country cooperation see Daniela Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020) 130.

24 On push-backs and pull-backs see Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', 27(3) *European Journal of International Law* (2016) 591.

25 See further Luisa F. Freier, Eleni Karageorgiou and Kate Ogg, 'The Evolution of Safe Third Country Law and Practice' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 518.

26 On access prevention in the context of the COVID-19 pandemic, see Ghezelbash and Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' 32(4) *International Journal of Refugee Law* (2020) 668.

27 See further Part 3 Chapter 11.4.1.

28 For an introduction of the corresponding German term 'Asylparadox', see Endres de Oliveira, 'Legaler Zugang zu internationalem Schutz: zur Gretchenfrage im Flüchtlingsrecht', 49(2) *Kritische Justiz* (2016) 167, at 171.

29 For an overview of different views on this term see Marlea Clarke, 'Global South: What Does It Mean and Why Use the Term?'. *Global South Political Commentaries*, at https://onlineacademiccommunity.uvic.ca/globalsouthpolitics/2018/08/08/global-south-what-does-it-mean-and-why-use-the-term/.

30 For a comprehensive study on human rights challenges to EU migration policy see Jürgen Bast, Frederik von Harbou and Janna Wessels, *Human Rights Challenges to European Migration Policy: The REMAP Study* (2nd ed., 2022), in particular Chapter 1 'Ensuring Access to Asylum', 28.

smugglers,[31] risk being victims of human trafficking[32] and many, like Alan Kurdi, lose their lives on irregular flight routes. To counter this situation, the need for safe pathways to protection, such as resettlement or humanitarian visas, is constantly under political discussion at EU level. Accordingly, the New Pact on Migration and Asylum[33] recommended various 'legal pathways to protection in the EU'.[34] While much has already been written on the different facets of access prevention,[35] this book puts its focus on safe pathways as measures facilitating access to protection. The book is driven by an interest in assessing the effects of safe pathways to protection on the asylum paradox. The following chapter will explain this aim and outline the research questions.

2 Aim and research questions

The overall aim of this book is to undertake an analysis and normative assessment of safe pathways to protection in the legal context of the EU. Safe pathways, such as resettlement or asylum visas, promise to strike a balance between the individual need for protection and the sovereign right of States to control entry to their territories, as well as the need for international solidarity with host States of the Global South. Safe pathways would therefore promise a solution to the asylum paradox. Testing this assumption is an integral part of this book. It goes without saying that safe pathways can spare beneficiaries from the risks inherent in irregular flight routes. Safe pathways can be lifesaving and bridge the existing protection gap on an individual basis. Acknowledging this *individual* impact of safe pathways, the book aims at assessing the normative effects safe pathways have on the asylum paradox.

31 See further Andreas Schloenhardt, 'Smuggling of Migrants and Refugees' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 28.

32 See further on the issue of trafficking Catherine Briddick and Vladislava Stoyanova, 'Human Trafficking and Refugees' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 553.

33 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Rights Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM/2020/609 final.

34 Commission Recommendation (EU) 2020/1364 of 23 September 2020 on Legal Pathways to Protection in the EU: Promotion Resettlement, Humanitarian Admission and other Complementary Pathways, C2020/6467.

35 For an overview of the state of research see below at Part 1 Chapter 5.

To this end, the first research question is:

1. What are the normative principles underlying the asylum paradox?

This question can be broken down into two sub-questions:

   a. What is the role of the three principles of sovereignty, human rights and solidarity in relation to the asylum paradox?
   b. Can the asylum paradox be reconstructed according to three principles of responsibility?

Against this backdrop, the second research question is:

2. What are the normative effects safe pathways to protection can have on these underlying principles, and thereby on the asylum paradox?

This second question can be broken down into two sub-questions:

   a. Can safe pathways effectively bridge the protection gap left by the absence of a right to enter any State to seek protection?
   b. Are there safe pathways or methods of implementation that can exacerbate the asylum paradox?

The two main research questions are guided by two hypotheses:

1. The asylum paradox is the result of an imbalance of responsibility principles.
2. The normative effect of safe pathways on the asylum paradox varies depending on the pathway and the details of implementation.

To address these research questions, the book develops an analytical and normative framework based on responsibility principles to structure the analysis and facilitate the assessment of safe pathways: a responsibility framework. This framework is composed of a triad of responsibility principles: the *internal responsibility* of States for the protection of their 'internal community', including citizens, residents, as well as anyone de facto present in a State's territory; the *external responsibility* of States for protection seekers not yet part of this internal community; and, finally, the *inter-State responsibility* at international level.

Always with a view to the effect of safe pathways on the different responsibility principles, sub-questions raised throughout this book are: what effects do utilitarian admission requirements, such as the belonging of beneficiaries to specific nationalities, religious or ethnic groups, have on the assessment of safe pathways? How to judge the interdependency of

admissions with 'migration deals' with third States? What difference does it make if a pathway is designed as an individual admission scheme or as quota-based program? What effect does the existence – or absence – of procedural rights and guarantees have? And what is the relevance of the status granted to beneficiaries of safe pathways after arrival?

This book aims at contributing to the legal research in the field of asylum and migration law. The findings may be of use to academics as well as policymakers and practitioners working in the field. On the one hand, the book aims to advance academic research on the issue of access to protection, thereby addressing an academic audience. On the other hand, the usefulness of the assessment tool this book develops might extend beyond the academic realm. The responsibility framework can be used for the assessment of safe pathways as well as to provide an argumentative tool when drafting new laws and policies on access to protection.

3 Scope of the book

This book puts a focus on safe pathways as measures facilitating access to protection. To further delimit the scope, this chapter provides a clarification of terms (3.1). The chapter then specifies the legal scope of the book, outlining key legal sources (3.2).

3.1 Definitions and delimitations: 'protection seekers', 'safe pathways to protection' and the notion of 'State'

This section clarifies the content ascribed to the term 'protection seekers', delimiting the notion from the terms 'refugees' and 'asylum seekers' (3.1.1), then focusing on a definition of 'safe pathways to protection' (3.1.2) and the notion of 'State' (3.1.3) with a view to the purpose of this book.

3.1.1 Protection seekers

In this book, the term 'protection seekers' is used when referring to third country nationals[36] in need of or seeking any kind of human rights protection, be it 'international protection' according to the EU Qualification Directive (QD),[37] including refugee status under the Refugee Convention and 'subsidiary protection',[38] or other forms of human rights protection, possibly covered by a national humanitarian status. Therefore, the term 'protection seeker' is broader than the terms 'refugee' or 'asylum seeker'.

This use of the term 'protection seeker' resembles the broad and non-legal use of the term 'refugee' by scholars, the media or the political discourse.[39] This book seeks to avoid confusing a broad notion with the legal definition of a status. The term 'refugee' is therefore only used when specifically referring to refugees under the Refugee Convention, or so called 'resettled refugees',[40] or when quoting other sources. The term 'asylum seekers' is used when specifically referring to individuals who have applied for international protection under EU law. While originally referring to a place of refuge and shelter,[41] the notion of 'asylum' is a broad term used to describe the concept of granting protection[42] and designates the (asylum) procedure leading to an international protection status under EU law.[43]

36 Third country nationals are individuals who are not citizens of the European Union according to Art. 20(1) Treaty on the Functioning of the European Union (TFEU).

37 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2012 L 337/9.

38 According to Art. 2(g) Directive 2011/95/EU '"subsidiary protection status" means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection'.

39 See for instance the use of the term by Goodwin-Gill and McAdam, *supra* note 13.

40 See Chapter 12.3.1.

41 See further Alte Grahl-Madsen, *Territorial Asylum* (1980).

42 See also the term as used in the title of this book and other monographs such as Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017); Gammeltoft-Hansen, *Access to Asylum*, *supra* note 22.

43 The recognition procedure is governed by the EU Asylum Procedures Directive (APD), Directive RL 2013/32/EU.

3.1.2 Safe pathways to protection

The term 'safe pathway' is not defined by law and needs clarification. With a view to the purpose of the assessment undertaken in this book, safe pathways to protection are defined as:

> *visa procedures granting safe and regulated access to State territory to protection seekers, based on an individual protection claim or on quota-based admission programs, with the ultimate objective of providing a protection status after arrival.*

Generally, a pathway to a country is 'safe' when it offers an alternative to the dangers of an irregular flight route. The only alternative to an *irregular* arrival is an arrival regulated by law, in the sense of a legal authorisation for entry. Safe pathways are therefore also referred to as 'legal pathways' in the political discourse.[44] This book choses the term 'safe' over the term 'legal' to avoid reproducing a narrative of 'legal' and 'illegal' protection seekers and migrants.[45] As third-country nationals, individuals wanting to seek protection are subject to EU visa requirements.[46] Most protection seekers come from countries on the EU 'visa blacklist', meaning they need a visa to enter the Schengen area.[47] Therefore, 'safe pathway' is an umbrella term for various visa schemes for protection seekers. Alternative terms include 'humanitarian admission',[48] 'protected entry procedures' (PEPs)[49]

44 See for instance Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promotion resettlement, humanitarian admission and other complementary pathways, C2020/6467.

45 See further PICUM, *Words Matter! Alternatives to "Illegal Migrant" in EU Languages*, available at https://picum.org/Documents/WordsMatter/Words_Matter_Terminology_FINAL_March2017.pdf.

46 See further on visa regulations under EU law, Part 3 Chapter 11.3.

47 See Annex 1 to the Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, PE/50/2018/REV/1.

48 For an overview see Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020).

49 See Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure: Final Report* (Study undertaken on behalf of the European Commission, 2002), 3.

and 'Active Refugee Admission Policies' (ARAP).[50] While the visas granted through safe pathways could all be referred to as *humanitarian visas*, the term 'humanitarian visa' is commonly used to denote an admission on an individual basis, in contrast to quota-based admission programs.[51]

UNHCR distinguishes between two types of safe pathways: *resettlement* on the one hand, and *complementary pathways* on the other. According to UNHCR's definition,

> '[r]settlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them – as refugees – with permanent residence status'.[52]

Complementary pathways are defined by UNHCR as

> 'safe and regulated avenues that complement refugee resettlement and by which refugees may be admitted in a country and have their international protection needs met while they are able to support themselves to potentially reach a sustainable and lasting solution'.[53]

Complementary pathways can in turn be divided into two categories: On the one hand there are complementary pathways leading to a protection status upon arrival, such as quota-based *ad hoc* humanitarian admission schemes, sponsorship schemes or humanitarian visas in individual cases.[54] On the other hand there are complementary pathways not leading to a *protection* status, such as family reunification, education programs, including scholarships, and labour mobility schemes.[55] Tamara Wood distinguishes these pathways as 'needs-based' complementary pathways on the one hand

50 See Natalie Welfens *et al.*, 'Active Refugee Admission Policies in Europe: Exploring an Emerging Research Field', *Flüchtlingsforschungsblog* (13 May 2019), available at https://blog.fluchtforschung.net/active-refugee-admission-policies-in-europe-exploring-an-emerging-research-field/.

51 For a delimitation of the terms 'humanitarian visa' and 'asylum visa' see Part 3 Chapter 11.1 below.

52 UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook* (2011) 3.

53 UNHCR, *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations* (April 2019), 5.

54 *Ibid.*

55 See OECD-UNHCR, *Safe Pathways for Refugees – Study on Third Country Solutions for Refugees: Family Reunification, Study Programmes and Labour Mobility* (December 2018), available at https://www.unhcr.org/protection/resettlement/5c07a2c84/safe-pathways-for-refugees.html.

and 'qualifications-based' pathways on the other.[56] 'Qualifications-based' complementary pathways are important regular access routes and part of a comprehensive approach to migration. Pathways providing for a resident status independent of protection grounds, however, fall outside the scope of this book.

This book focuses on pathways to safely reach protection, including the specifics of a protection status after arrival. The expression 'safe pathways *to protection*' therefore specifies that access to territory is granted with the objective of providing a protection status – either by providing access to the national asylum procedure after arrival or by directly granting an international protection or other humanitarian status. The scope of protection is not limited to refugee protection under the Refugee Convention or subsidiary protection under the QD. The term 'protection' encompasses human rights protection covered by the international protection status under EU law, as well as human rights protection covered by a national protection status in an EU Member State.

Given this scope, this book considers neither 'qualification-based' pathways, nor proposals for so called 'offshore' processing, which have been criticised as a measure of externalisation and deterrence rather than protection.[57] However, it will pick up on the concept of 'offshore' processing when discussing proposals for responsibility-sharing mechanisms, as well as issues of 'in-country' processing and the element of 'resettlement' entailed in these proposals.[58]

With its focus on visa procedures to avoid the dangers of an irregular *arrival in* the EU, this book does not consider 'relocation' mechanisms for a transfer of protection seekers *within* the EU under EU law. Relocation is a term used for the transfer of persons with an international protection status granted under EU law from one Member State to another; or the

56 Tamara Wood, 'The Role of 'Complementary Pathways' in *Refugee Protection: Reference Paper for the 70th Anniversary of the 1951 Refugee Convention* (UNHCR, 2020), 3.

57 On extraterritorial processing and issues of deterrence see Jane McAdam, *Extraterritorial Processing in Europe: Is "Regional Protection" the Answer, and If Not, What Is?* (2015); Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' 18(3–4) *International Journal of Refugee Law* (2006) 601; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (2018) 100 ff.; see also Catherine Woolard, 'Editorial: Lost in Externalization Fantasyland', *ECRE Weekly Bulletin* (22 June 2018), with reference to the idea of EU 'disembarkation platforms', available at https://perma.cc/NJL5-T4U5.

58 See Part 2 Chapter 9.3.2. and Part 3 Chapter 12.

transfer of *asylum seekers* from one Member State to another, where their application for international protection is further processed.[59] The latter is an emergency scheme, which aims at easing the pressure on asylum systems under EU law. A prominent example was the relocation of asylum seekers who had arrived in Italy and Greece from 2015 to 2018.[60]

Against the backdrop of this delimitation, the assessment in this book focuses on the following safe pathways to protection (also briefly referred to as 'safe pathways' throughout the work):

1. The asylum visa (see Chapter 11).
2. Resettlement (see Chapter 12).
3. *Ad hoc* humanitarian admission (see Chapter 13).
4. Sponsorship schemes (see Chapter 14).

3.1.3 The notion of 'State'

As set out above, the book develops a *responsibility framework* as analytical tool for safe pathways to protection. This framework is based on three principles of responsibilities attributed to the 'State'. With a view to its heuristic function, the responsibility framework is based on a broad understanding of the 'State' as a politically organised territorial community, a polity, with the delegated power of granting access and protection in a designated (supra-)national space. Access to territory remains, in principle, a Member State's prerogative in the EU. However, as Costello argues with a view to the complex system of shared competences in the areas of immigration and asylum, 'the EU provides a transformative political space, in institutionalizing shared competences over admissions'.[61] Following this line of thought, Part 2 outlines how the responsibility principles can be attributed to a single State, as well as the EU as political entity.[62] With a view to safe pathways to protection, the EU is regarded as unified polity vis-à-vis the international

59 See European Commission, Migration and Home Affairs, *Glossary*, 'Relocation', available at https://ec.europa.eu/home-affairs/pages/glossary/relocation_en.

60 See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ 2015 L 239/146.

61 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (2016) 17.

62 Hans J. Lietzmann, 'European Constitutional Politics and Contingency. The European Union as a 'Sui Generis' Political Entity' in Claudia Wiesner, Tapani Turkka and Kari Palonen (eds), *Parliament and Europe* (2011) 95.

community of States. Thereby, each EU Member State can represent the EU in the granting of protection by admitting protection seekers to its territory.

Apart from this broad approach to the notion of 'State' with a view to the responsibility framework, this book also draws on specific notions of 'States', such as EU 'Member States', or 'State Parties' to international treaties. With specific reference to safe pathways, the book refers to the State (potentially) admitting protection seekers as 'receiving State', 'destination State' or 'State of refuge'. This stands in contrast to 'home State' or 'State of origin', as States from where a protection seeker originally departs. Lastly, the notions 'third State' or 'host State' are used when referring to a State of transit or temporary stay during an admission procedure.

3.2 Legal sources

The regional scope of the assessment in this book encompasses safe pathways to protection in 'Europe', thereby referring to the legal context of the EU. Safe pathways to protection lie at the intersection of EU law on borders, immigration and asylum, governed by the Schengen borders and visa regime, as well as provisions of the Common European Asylum System (CEAS).[63] Thereby, the Refugee Convention is fully integrated in the CEAS, since all legal and policy measures on asylum in the latter must be in accordance with the former, as set out in Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU).

The examples of safe pathways discussed in the following can be relevant for EU Member States, as well as non-EU States associated to the Schengen area.[64] With this, the legal scope of the assessment encompasses relevant provisions of EU primary law, namely the Treaty on European Union (TEU) and the TFEU,[65] as well as fundamental rights under the EU

63 For a comprehensive discussion of the CEAS and its legal foundations see Thym, *European Migration Law* (2023), in particular Chapter 13; for a general overview see European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Asylum, Borders and Immigration* (2020) 29 ff.

64 Non-EU States part of the Schengen area are Iceland, Liechtenstein, Norway and Switzerland.

65 European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 26 October 2012, C 326, 26/10/12P. 0001–0390.

Charter of Fundamental Rights (CFR).[66] The legal scope also includes EU secondary law regulating access to territory, such as the Schengen Borders Code and the EU Visa Code.[67] The assessment further considers provisions of EU secondary law that are part of the CEAS, such as the APD and the QD. While the draft proposals for a reform of the CEAS, inter alia replacing the APD and the QD by regulations, are not in the focus of this book, the assessment includes the proposal for a regulation establishing a 'Union Resettlement Framework' of 2016 as well as the 2024 proposal for a 'Union Resettlement and Humanitarian Admission Framework'.[68] The assessment also considers relevant jurisprudence of the CJEU.

The assessment of safe pathways to protection focuses on potential beneficiaries (the 'who'), the procedures (the 'how') and the content of protection (the 'what'). As the REMAP Study points out, these are 'the three fundamental questions any asylum system must answer regarding the protection of refugees'.[69] Thus, EU law does not conclusively regulate access to territory and protection. Although the EU has progressively acquired extensive legislative competencies in the field of immigration and asylum, there are several areas left to national discretion. Above all, the national competence to offer opportunities for immigration and protection remains.[70] Stays of more than three months, for instance, are not regulated under the EU Visa Code and are governed solely by national law. Although

66 European Union, Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391.

67 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ 2009 L 243/1; on the latest amendments see Regulation (EU) 2021/1134 of the European Parliament and the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1861, (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System, OJ 2021 L 248/11.

68 For an overview of the latest conclusions on the CEAS reform see Council of the EU press release, 8 February 2024, 'Asylum and migration reform: EU member states' representatives green light deal with European Parliament', available at https://www.consilium.europa.eu/en/press/press-releases/2024/02/08/asylum-and-migration-reform-eu-member-states-representatives-green-light-deal-with-european-parliament/.

69 Bast, Harbou and Wessels, *supra* note 30, at 28.

70 See further on the institutionalisation of shared competences in EU immigration and asylum law Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 27 ff.

national law is not the focus of this book, it is referred to by way of example when pointing to national modalities of safe pathways to protection.

The concept of international protection under EU law relies on international refugee and human rights law (see Art. 78(1) TFEU), and the respect for human rights is one of the founding values of the EU (Art. 2 TEU). Additionally, EU Member States are internationally bound by human rights treaties. Thus, international human rights and refugee law provide further key legal sources of this book, in particular the Refugee Convention, and the ECHR as blueprint for the CFR.[71] The jurisprudence of the ECtHR is another key source, considering the Courts' leading role 'as a constitutional court in the legal architecture of Europe'.[72]

Finally, reference is also made to 'soft law'[73] instruments such as the Global Compact on Refugees (GCR)[74] and the Global Compact for Migration (GCM),[75] when discussing their relevance for the implementation of safe pathways to protection.

4 Structure and methodology

The structure of the book is an outcome of its methodology. To avoid redundancies, this chapter therefore explains structure and methodology jointly. With a view to the aim of assessing the normative effects of safe pathways to protection on the asylum paradox, this book is divided into four parts. Following this introduction (Part 1), the book undertakes a normative reconstruction of the asylum paradox, identifying three principles of responsibility (Part 2). Drawing on the structuring function of this responsibility triad, Part 2 ultimately develops a *responsibility framework*, which serves analytical, heuristic and normative functions. Against the backdrop of this responsibility framework, Part 3 undertakes an analysis and assessment of safe pathways to protection in the context of EU law.

71 Costello addresses 'the overlapping EU-ECHR human rights systems' by drawing on the term 'human rights pluralism'; see *ibid*. at 42 ff.

72 Bast, Harbou and Wessels, *supra* note 30, at 24.

73 On soft law in global migration governance, see Vincent Chetail, *International Migration Law* (2019) 280 ff, as well as at 328 ff, specifically on the GCR and the GCM.

74 UN General Assembly, 'Global Compact on Refugees', UN Doc. A/73/12 (Part II), 17 December 2018).

75 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', UN Doc. A/ES/73/195, 19 December 2018.

Eventually, the book provides conclusions, answers the research questions and points to areas for further research (Part 4).

Overall, the book takes a conceptual approach to the issue of safe access to protection. It is not a feasibility study. The assessment in this book combines elements of a normative-reconstructive method based on principles, with a structured analysis and normative assessment of safe pathways, drawing on the developed responsibility framework. Thus, the assessment is based on an integrated approach to refugee and human rights law,[76] following a liberal internationalist interpretation of the legal framework. The following sections will delve into the normative reconstruction of the asylum paradox (4.1) and the specifics of the analysis and assessment of safe pathways to protection based on the responsibility framework (4.2).

4.1 Normative reconstruction of the status quo: developing a responsibility framework

Part 2 provides the normative basis for the analysis and assessment of safe pathways in Part 3, by developing an assessment framework. The assessment is based on a principle-based approach drawing on the current legal regime governing access to protection under EU law. This is in line with a legal doctrine of principles, which operates from within the law.[77] In essence, Part 2 argues that the asylum paradox is the result of an imbalance of responsibility principles. To make this argument, Part 2 reconstructs the asylum paradox according to three principles of responsibility, following a normative-reconstructive method.

Part 2 starts by clarifying the terminology and the function of a principle-based normative concept, including the function of (responsibility) principles for the purpose of this book (Chapter 6). Such a principle-based approach does not stand alone in the field of migration law.[78] With a view

76 For an overview see Vincent Chetail, 'Moving Towards an Integrated Approach of Refugee Protection and Human Rights Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 202.

77 See von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 12 *Revus* (2010) 35, at 38.

78 See for instance the works of Anuscheh Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (2014); Lübbe, 'Prinzipien der Zuordnung von Flüchtlingsverantwortung und Individualrechtsschutz im Dublin-System', *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)* [2015] 125.

to the normative character of principles, Part 2 draws on the works of Alexy[79] and von Bogdandy.[80] In contrast to Alexy, the assessment in this book places the focus on the structuring function of principles, referring to the law in force.[81] Chapter 6 further clarifies the normative function of *responsibility* principles, delimiting the notion of responsibility with respect to other (terminologically) related concepts, such as the Responsibility to Protect (R2P) doctrine and the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[82]

The academic debate on the tensions between sovereignty, human rights, and solidarity in refugee law serves as a starting point to identify three principles of responsibility underlying the asylum paradox: the *internal responsibility* (Chapter 7); the *external responsibility* (Chapter 8); and, lastly, the *inter-State responsibility* (Chapter 9). Part 2 concludes with an outline of how this triad of responsibility principles creates a field of legality and tensions, which is used as analytical tool (with a structuring function) and assessment framework (with a normative function) for safe pathways to protection in Part 3. As the responsibility triad is the normative basis for the assessment framework, the latter is referred to as a *responsibility framework* (Chapter 10).

Drawing on the principles of sovereignty and human rights to ultimately identify two principles of responsibility is in line with a liberal internationalist understanding of the international protection framework.[83] Unlike representatives of liberal nationalism,[84] who argue that the paramount responsibility of States is protecting their population, liberal internationalists argue that the commitment to international human rights norms is not at

79 Alexy, 'On the Structure of Legal Principles' 13(3) *Ratio Juris* (2000) 294; Robert Alexy, *A Theory of Constitutional Rights* (2002).

80 See von Bogdandy, 'Founding Principles of EU Law', *supra* note 77; see also Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edition, 2009) 11.

81 This corresponds with the approach put forward by von Bogdandy, 'Founding Principles', *supra* note 80, at 14.

82 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001).

83 Prominent scholarly representatives of liberal internationalism include James C. Hathaway (ed.), *Reconceiving International Refugee Law* (1997); Anne-Marie Slaughter, *A New World Order* (2005).

84 See David Miller and Michael Walzer, *Pluralism, Justice, and Equality* (1995); John Rawls, *A Theory of Justice* (Rev. ed., 1999).

a single State's discretion.[85] While the normative standpoint of this book influences the outline of each responsibility principle, the responsibility framework is not primarily a benchmark for delimiting State conduct as right or wrong. First and foremost, the responsibility framework serves analytical and heuristic functions, heling to structure the analysis of safe pathways to protection, as well as revealing and predicting tensions and trade-offs between the responsibility principles.

4.2 Structured analysis and normative assessment: safe pathways in the light of the responsibility framework

Part 3 argues that the effect of safe pathways on the asylum paradox depends on the specific pathway and its details of implementation. To make this argument, Part 3 undertakes an analysis of safe pathways, which is structured according to the responsibility principles to facilitate a normative assessment. 'Normative' means that safe pathways are assessed with the responsibility framework as the evaluative standard.

The choice of safe pathways follows an inductive approach, focusing on pathways which are already in place or in political discussion at EU level. Part 3 focuses on the normative outline of each pathway, based on desk research, pointing to existing national laws and case studies by way of example. In contrast to the common conceptual partition between resettlement, as ultimate pathway of reference, and all other humanitarian pathways, Part 3 groups safe pathways into different categories: The asylum visa as individual admission procedure (Chapter 11); resettlement as quota-based permanent scheme (Chapter 12); *ad hoc* humanitarian admission schemes as discretionary 'emergency' schemes (Chapter 13); and, lastly, sponsorship schemes, which depend on a 'responsibility transfer' to civil society (Chapter 14). While the assessment acknowledges that different modalities of safe pathways might overlap, this categorial distinction facilitates identifying key characteristics, making them accessible for the assessment. After outlining the respective pathway and tracing its background at international and EU level, Part 3 looks at the three key elements of (potential) access regulation through each measure (the 'who', the 'how', and the 'what'). The subse-

85 For an overview of different positions on the ethics of refugee protection see Seyla Benhabib and Nishin Nathwani, 'The Ethics of International Refugee Protection' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 114.

quent analysis structures the assessment of these key elements according to the responsibility principles.

5 Legal context and state of research

This section discusses the academic relevance of the study, considering the state of research in the field. The assessment of safe pathways in this book is based on the assumption that the laws and policies governing access to territory and protection in the EU can be framed along the lines of the aforementioned asylum paradox.[86] Given this point of departure, the book builds upon the legal context and leading academic work on the following issues: the question whether protection seekers have an 'entry right' (5.1), the impact of border and migration control measures on access to protection (5.2.), the relationship of sovereignty and human rights in refugee law (5.3) and, eventually, the current state of research with a view to safe pathways to protection (5.4).

5.1 No asylum without access: the absence of an 'entry right' to seek protection

While this is a book on access to protection, its focus does not lie on the 'Gretchenfrage'[87] of refugee law – namely, the never-ending search for an (enforceable) 'entry right' to seek protection in any State. However, the legal context and state of research with regard to the question of an 'entry right' for protection seekers is a fundamental basis for the responsibility framework this book develops. This section therefore briefly sketches the state of research on the limited scope of the right to seek asylum and the principle of non-refoulement (5.1.1), as well as the legal debate on the extraterritorial scope of non-refoulement in visa cases (5.1.2).[88]

86 See above Part 1 Chapter 1.

87 Cf. Endres de Oliveira, 'Legaler Zugang zu internationalem Schutz: zur Gretchenfrage im Flüchtlingsrecht', *supra* note 28. On this term borrowed from Goethe's 'Urfaust' see John Smith, '*Die Gretchenfrage*: Goethe and Philosophies of Religion around 1800', 18 *Goethe Yearbook* (2011) 183 ff.

88 For an overview of the right to entry and free movement outside the scope of protection, see Chetail, *International Migration Law*, *supra* note 73, at 92–119.

5.1.1 The limited scope of the right to seek asylum and the principle of non-refoulement

In the search for an access right for protection seekers, particular academic attention has been given to the right enshrined in Art. 14(1) UDHR 'to seek and enjoy in other countries asylum', and the 'right to leave a country, including one's own', set out in Art. 13(2) UDHR. Although the UDHR is not a legally binding instrument, it represents a significant human rights commitment by all signatory States. The 'right to leave any country' can also be found in other (legally binding) human right instruments, such as Art. 2 of Protocol No. 4 to the ECHR, Art. 12(2) International Covenant on Civil and Political Rights (ICCPR),[89] and Art. 10 of the Convention on the Rights of the Child (CRC).[90] The 'right to leave any country' is a necessary precondition for seeking asylum in another state.[91]

However, international law does not provide for a corresponding 'right to enter any country'. While the initial drafting of Art. 14 UDHR provided for a 'right to seek and be granted asylum', the final wording reflects the unwillingness of States to give up their sovereign right to decide on access to their territory.[92] Despite the restrictive wording of Art. 14(1) UDHR, various authors have claimed that the provision entails (at least) the right to an asylum procedure, as it would otherwise be meaningless.[93] A limited scope with a view to a right to enter is also ascribed to the 'right to asylum'

89 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

90 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

91 See Markard, *supra* note 24; for an overview of the 'right to leave' according to the ECHR and the respective case law of the ECtHR, see *The Right to Leave a Country*, Issue Paper by the Council of Europe Commissioner of Human Rights (2013), available at https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510.

92 See further Goodwin-Gill and McAdam, *supra* note 13, at 484 ff.

93 See, *inter alia*, Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', 12(2) *Human Rights Law Review* (2012) 287, at 292; Gammeltoft-Hansen, *Access to Asylum*, *supra* note 22, at 439; Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU', 10(4) *European Journal of Migration and Law* (2008) 439; Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 23(3) *International Journal of Refugee Law* (2011) 443; see also on the concept of asylum Goodwin-Gill and McAdam, *supra* note 13, Part 2 Chapter 8; Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27(1) *International Journal of Refugee Law* 3; María-Teresa Gil-Bazo and

enshrined in Art. 18 CFR, as its scope does not go beyond the guarantees provided by the Refugee Convention.[94]

Given the limited scope of the right to (seek) asylum, the academic debate revolves around the principle of non-refoulement, enshrined in the Refugee Convention as well as various provisions of international human rights law.[95] Art. 33(1) of the Refugee Convention prohibits expelling or returning (*refouler*) a refugee in 'any manner whatsoever' to a risk of persecution. The principle of non-refoulement is interpreted to provide for an implicit entry right at the border, as States have to fairly assess a *prima facie* claim for protection.[96] The principle also finds its expression in human rights norms prohibiting exposing anyone to severe human rights violations, such as torture or inhumane treatment, codified *inter alia* in Art. 3 ECHR, Art. 4 and Art. 19(2) CFR and Art. 3 of the Convention against Torture (CAT),[97] as well as in Art. 7 ICCPR. These provisions have a broader scope of application as they do not entail an exception clause, such as Art. 33(2) Refugee Convention, and are not limited to refugees under the Refugee Convention.[98] The principle of non-refoulement is widely recognised as a principle of customary international law[99] and is generally considered to apply at the border and on vessels on the high seas in the

Elspeth Guild, 'The Right to Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 867.

94 For a comprehensive discussion of the scope of this provision see Maarten den Heijer, 'Article 18 – Right to Asylum', in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, (eds), *The EU Charter of Fundamental Rights: A Commentary* (2022) 551; see also Thym, *supra* note 63, at 354.

95 See further Chetail, *International Migration Law*, *supra* note 73, at 119–124.

96 See further James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed. 2021), Chapter 4.1; Stoyanova, 'The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory', 3(1) *Interdisciplinary Journal of Human Rights Law* (2008) 1.

97 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

98 For a discussion of the contrasts between the Refugee Convention and the ECHR protections, see Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 176 ff.; for a discussion of the differences between non-refoulement under the ECHR and the CAT, see Nikolas F. Tan, *International Cooperation on Refugees: Between Protection and Deterrence* (PhD thesis, Aarhus University, 2019), at 79 ff.

99 E. Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion* (2003), at 149–151; Chetail, *International Migration Law*, *supra* note 73, at 120–122.

legal context of the EU.[100] However, a possibly wider scope, eventually offering an access right in (other) extraterritorial contexts, remains contentious.[101]

5.1.2 The scope of non-refoulement in 'asylum visa' cases

Regarding safe pathways, the legal debate on the scope of non-refoulement is sparked by the question whether the rejection of an 'asylum visa'[102] applied for to seek asylum in a specific State could amount to refoulement, depending on the circumstances. Two contested issues frame the debate: the first issue is the application of the relevant legal provisions in the extraterritorial context, with a focus on jurisdiction. The second is the question of whether the rejection of a visa could qualify as a violation of the respective provisions, in particular the principle of non-refoulement.

In 2005, Noll argued that the act of rejecting a visa did not suffice for qualifying as refoulement under the Refugee Convention.[103] However, Noll sees an access right to be engaged in exceptional situations by the obligations laid down in the CRC and the ECHR, since these treaties can impose positive obligations on States.[104] To determine such an 'exceptional situation', Noll refers to the *Soering*[105] case, in which the ECtHR set out the level of severity required for an action to fall under the scope of Art. 3 ECHR and established the validity of the provision in extradition cases.[106] In contrast, Moreno-Lax argued in 2012 that the rejection of a visa may well amount to an act of refoulement under Art. 33(1) of the Refugee Con-

100 See further Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', 23(2) *International Journal of Refugee Law* (2011) 174; den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case', 25(2) *International Journal of Refugee Law* (2013) 265.

101 For an overview see Hathaway, *The Rights of Refugees under International Law*, *supra* note 96, at 379 ff.

102 On the delimitation of this term to the notion of 'humanitarian visa' see below at Part 3 Chapter 11.1.

103 Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17(3) *International Journal of Refugee Law* (2005) 542.

104 *Ibid.*, at 572. Art. 37(a) CRC states in its first sentence that 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.'

105 *Soering v. UK*, Appl. no. 14038/88, Judgement of 7 July 1989 (CE:ECHR:1989:0707JUD001403888).

106 Noll, 'Seeking Asylum at Embassies', *supra* note 103, at 572.

vention, provided the asylum seeker meets the material requirements of the convention.[107] Adding another layer of differentiation, Ogg argued in 2014 that 'if the embassy or consular staff engages with the asylum-seekers by listening to their claim and provides at least temporary protection (even for a few hours), then jurisdiction can be established which will trigger the State's non-refoulement obligations under the ICCPR, CAT and Refugee Convention'.[108]

The legal standpoints of the CJEU[109] and the ECtHR[110] in humanitarian visa cases led to a revival of the debate.[111] Both Courts engaged only in the first issue concerning the applicability of respective human rights norms (of the CFR and the ECHR respectively) and did not discuss whether the rejection of an 'asylum visa' could amount to refoulement. Thus, as Thym concluded regarding the rulings, 'the legal entries revolution did not happen'.[112] Part 3 will further discuss these decisions, which perpetuate the territorial concept of asylum.[113]

5.2 No access to asylum: the legality of border and migration control with a view to access to protection

This section outlines the state of research regarding the legality of border and migration control with a view to access to protection. In the academic literature, the issue of access to protection is primarily dealt with from the perspective of access prevention. The focus lies on human rights implica-

107 Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?', 12(3) *Human Rights Law Review* (2012) 574, at 574.

108 Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates', 33(4) *Refugee Survey Quarterly* (2014) 81, at 102.

109 *X and X v Belgium*, *supra* note 16.

110 *M.N. and Others v. Belgium*, *supra* note 17.

111 For an overview of the reactions to the X and X case, see Luc Leboeuf and Marie-Claire Foblets, 'Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (2020) 11, at 11 note 2.

112 Thym, 'The End of Human Rights Dynamism? Judgements of the ECtHR on 'Hot Returns' and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy', 32(4) *International Journal of Refugee Law* (2020) 569, at 588.

113 See Part 3 Chapter 11.4.

tions of border and migration control measures, with a particular view to possible breaches of the principle of non-refoulement.[114] In his early work Noll assessed how asylum is regulated in the EU and concluded that with respect to protection seekers, visa requirements may constitute a breach of the rights set out in the ECHR.[115] The ECtHR's 2012 *Hirsi* judgment[116] on Italian 'push-backs' of migrants to Libya carried out on the basis of an Italian–Libyan cooperative agreement has received a lively scholarly response, as it had a major impact on the question of extraterritorial application of the ECHR.[117] Particular academic attention has been devoted to questioning the lawfulness of visa policies and the externalisation of immigration control.[118] Drawing on the concept of collective action, Hurwitz has shown how States tend to protect their interests rather than the rights of protection seekers, assessing the validity of safe third country practice under international law.[119] Gammeltoft-Hansen provides a comprehensive analysis of the extraterritorial dimensions of migration control and the effects of 'offshoring' and 'outsourcing' on access to protection.[120] An assessment of 'extraterritorial asylum' is provided by den Heijer, arguing that EU Member States remain responsible under international law even when controlling the movement of protection seekers outside their territories.[121] Costello has provided a comprehensive assessment on human rights challenges with a view to migration control and migration status in the EU;[122]

114 See further Gammeltoft-Hansen and Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' 53(2) *Columbia Journal of Transnational Law* (2015) 235.

115 Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000).

116 *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, Grand Chamber, Judgement of 23 February 2012 (CE:ECHR:2012:0223JUD002776509).

117 For an analysis of this judgement see, *inter alia*, den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case', *supra* note 100; Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?', *supra* note 107; on the extraterritorial application of human rights treaties see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011).

118 See, *inter alia*, Ryan and Mitsilegas, *supra* note 18; Fabiane Baxewanos, *Defending Refugee Rights: International Law and Europe's Offshored Immigration Control* (2015); Gammeltoft-Hansen and Tan, *supra* note 18.

119 Agnès G. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009).

120 Gammeltoft-Hansen, *Access to Asylum*, *supra* note 22.

121 Maarten den Heijer, *Europe and Extraterritorial Asylum* (2012).

122 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61.

she specifically dedicates a chapter of her book to the issue of 'access to protection',[123] discussing measures restricting access to protection as well as the scope of the principle of non-refoulement. Another in-depth assessment of the interplay of human rights and measures of migration and border control has been provided by Moreno-Lax.[124] With a specific focus on the issue of extraterritorialisation, she determines the compatibility of pre-entry controls with the fundamental rights *acquis* of the EU, particularly with a view to the principle of non-refoulement. A comprehensive overview of measures of 'remote control', enhancing 'Fortress Europe', is provided by FitzGerald.[125] With a view to the vast number of measures preventing access to territory, Shachar concludes that the EU has 'one of the world's most complex, inter-agency, multi-tiered visions of the shifting border'.[126] Besides the issue of deterrence and externalisation, the securitisation of migration policies is another focal point of academic research.[127]

The cited monographs are only exemplary of a comprehensive body of academic work assessing the effects of border and migration control on access to protection. While the academic research in this area provides important points of reference, this book shifts the focus from an assessment of access *prevention* to an assessment of access *facilitation*. To this end, the book builds on the academic debate on the role of sovereignty and human rights in refugee law, which will be outlined in the next section.

5.3 The relation of sovereignty and human rights in refugee law

The assessment in this book takes the academic debate on the relation of territorial sovereignty and universal human rights in refugee law as the starting point for a reconstruction of the asylum paradox. Across disciplines, scholars have claimed that the phenomenon described as the 'asylum paradox' in this book is the result of a tension between territorial

123 *Ibid*., Chapter 6.

124 Moreno-Lax, *Accessing Asylum in Europe*, *supra* note 42.

125 David FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (2019), at 160–252.

126 Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (2020), at 55.

127 For an overview, see Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020).

sovereignty and universal human rights. As early as 1951, Arendt argued that 'the paradox involved in the declaration of inalienable human rights was that it reckoned with an "abstract" human being who seemed to exist nowhere'.[128] Since then, a range of scholars have followed this line of thought. As prominently argued with reference to the 'shifting border' by Shachar,[129] or with a view to 'the rights of others' by Benhabib,[130] territorial sovereignty and universal human rights are the key principles played out against each other in the legal debate over access to territory and protection.[131] In his 'reconsideration of the underlying premise of refugee law', Hathaway traces the origins of international refugee law between humanitarianism, human rights and State interests.[132] Goodwin-Gill and McAdam argue that

> 'the refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law'.[133]

128 Hannah Arendt, *The Origins of Totalitarianism* (2017, first published in 1951), at 381.

129 Shachar, *supra* note 126.

130 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (2006).

131 An overview of the debate with a specific focus on EU migration is provided by Thym, *supra* note 63, Chapter 5 on 'Human Rights and State Sovereignty'; for a more general and interdisciplinary discussion with a view to international refugee law see *inter alia* Benhabib and Nathwani, *supra* note 85; Noll, *Negotiating Asylum, supra* note 115, at 82 ff.; Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', 34(1) *Berkeley Journal of International Law* (2016) 1; Sandra Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security* (2002); Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty?', 14(2) *Melbourne Journal of International Law* (2013) 392, at 393 ff.; Chalk, 'The International Ethics of Refugees: A Case of Internal or External Political Obligation?', 52(2) Australian Journal of International Affairs (1998) 149; Richard Falk, *Human Rights and State Sovereignty* (1984); Sibylle Scheipers, *Negotiating Sovereignty and Human Rights: International Society and the International Criminal Court* (2009); with a focus on the ethics of immigration see Carens, 'Aliens and Citizens: The Case for Open Borders', 49(2) *The Review of Politics* (1987) 251–273; Joseph H. Carens, *The Ethics of Immigration* (2015); Michael Walzer, *Spheres of Justice* (1983); Miller and Walzer, *supra* note 84; David Miller, *On Nationality* (1995).

132 Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', 31(1) *Harvard International Law Journal* (1990) 129.

133 Goodwin-Gill and McAdam, *supra* note 13, at 1.

In her comprehensive analysis of State responses to different groups of protection seekers, Lamis Elmy Abdelaaty claims that protection seekers 'highlight the tension between sovereignty and international human rights norms'.[134] From a political science perspective, Lavenex concludes that while sovereignty and human rights are 'conceptually complementary within a given national community, they turn out to be contradictory in a transnational perspective', as the 'principle of national popular sovereignty presupposes the maintenance of a certain degree of exclusion'.[135]

Depending on whether one takes a strictly legalistic, political or philosophical perspective, sovereignty and human rights can be set within a broader context of yet further principles and concepts which are said to be in conflict or tension. Against the background of the *Chahal* case,[136] in which the ECtHR stressed the absolute nature of Art. 3 ECHR, Noll retraces the divide between a global implementation of universal human rights and the interests of territorially defined nation-States as part of a larger conflict between universalism and particularism.[137] He sees the same pattern in the debate between idealists and realists within the discipline of international relations, and utilitarian and deontological approaches within moral philosophy.[138]

Referring to the 'statist entry control assumption',[139] Costello sees three main lines of thought in the academic debate surrounding the tensions between human rights and migration control.[140] On the one hand are scholars supporting a strictly universal reading of human rights law, exemplified by Soysal,[141] while on the other hand are those supporting the statist assumption, exemplified by Bosniak.[142] Costello locates her work in a third category 'the more ambivalent middle terrain, drawing on the

134 Lamis E. Abdelaaty, *Discrimination and Delegation: Explaining State Responses to Refugees* (2021) 3.
135 Lavenex, *supra* note 131, at 9.
136 *Chahal v. the United Kingdom*, Appl. no. 22414/93, Grand Chamber, Judgement of 15 November 1996, (CE:ECHR:1996:1115JUD002241493).
137 Noll, *Negotiating Asylum*, *supra* note 115, at 82.
138 *Ibid*, at 85.
139 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 10.
140 *Ibid*., at 11.
141 Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994).
142 Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2006).

work of Benhabib'.[143] Benhabib claims that 'there is not only a tension, but often an outright contradiction, between human rights declarations and states' sovereign claims to control their borders as well as to monitor the quality and quantity of admittees'.[144] However, these contradictions are not set in stone and can be part of negotiating processes – for instance, in jurisprudence.[145] In a recent contribution, Benhabib and Nathwani outline the debate along the lines of liberal nationalism, liberal internationalism and cosmopolitanism, making an argument for resisting 'dichotomous approaches to the ethics of refugee protection'.[146]

Picking up on this debate in Part 2, this book shares the balanced approach of Benhabib, Nathwani and Costello. By drawing on principles of responsibility in the reconstruction of the underlying principles of the asylum paradox, the book seeks to avoid the framing of sovereignty and human rights as antagonistic principles. In contrast to sovereignty claims, the principle of internal responsibility, outlined in Chapter 7 of this book, is not an 'end in itself'. It implies the need for justification regarding its scope. Still, it takes States' interests into account and acknowledges the reality of border control.[147] The principle of external responsibility identified in Chapter 8 is based on the argument that States cannot exercise their sovereignty in an extraterritorial context without at the same time being bound by their human rights commitments. This understanding of the external responsibility is in line with the argument put forward by Shachar, who suggests 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'.[148] In contrast to Shachar,[149] however, this book does not conclude with an overall recommendation of any safe pathways to protection. Instead, the respon-

143 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 11.
144 Benhabib, *supra* note 130, at 2; see also Benhabib and Nathwani, *supra* note 85.
145 See Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 11.
146 Benhabib and Nathwani, *supra* note 85, at 133.
147 With this, the approach of this study differs from an 'open borders' approach. On the concept of open borders see, for instance, Carens, 'Aliens and Citizens', *supra* note 131.
148 Shachar, *supra* note 126, at 85.
149 *Ibid*., at 89.

sibility framework leads to a differentiated assessment of safe pathways, identifying fundamental normative differences between the pathways.[150]

5.4 Studies of safe pathways to protection

Particularly valuable in view of the scope of this book are a range of comprehensive policy papers and studies on safe pathways such as the 'Feasibility Study'[151] undertaken by Noll, Fagerlund and Liebaut in 2002, the study on humanitarian visas[152] by Jensen in 2014 and the 'Added Value Assessment'[153] undertaken by Moreno-Lax on behalf of the European Parliament in 2018. In contrast to measures preventing access to territory, safe pathways have received less academic attention to date. One reason for this might be that safe pathways do not raise the same controversies and human rights issues as measures of border and migration control – the general purpose of safe pathways is to save lives.

Still, critical academic research on safe pathways is on the rise, particularly in the field of political sciences. Based on theories of International Relations, Hashimoto identifies four traditional perspectives on a State's motives for engaging in resettlement and provides a comprehensive assessment of resettlement in Japan in her thesis.[154] In an insightful collective volume,[155] Garnier, Jubilut and Bergtora Sandvik examine resettlement practices worldwide, highlighting the interplay between control-orientated State practices and the individual's need for protection. In the same volume, van Selm discusses the 'strategic use' of resettlement as a means

150 For a summary of the findings see below at Part 4.

151 Noll, Fagerlund and Liebaut, *supra* note 49.

152 Ulla I. Jensen, *Humanitarian Visas: Option or Obligation?* (2014).

153 Violeta Moreno-Lax, 'Annex I: The Added-Value of EU Legislation on Humanitarian Visas – Legal Aspects' in European Parliamentary Research Service (ed.), *Humanitarian visas: European Added Value Assessment accompanying the European Parliament's legislative own-initiative report (Rapporteur: Juan Fernando López Aguilar)* (2018).

154 Hashimoto, 'Refugee Resettlement as an Alternative to Asylum', 37(2) *Refugee Survey Quarterly* (2018) 162; Naoko Hashimoto, *Why has the government of Japan embarked on refugee resettlement?* (PhD thesis, University of Sussex, 2019).

155 Adele Garnier, Liliana L. Jubilut and Kristin B. Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (2018).

to resolve issues such as smuggling.[156] Comprehensive legal research on resettlement in the Canadian context is inter alia provided by Labman, who argues with a view to the Canadian program that resettlement is not a wholly political solution but is instead linked to the law.[157] In the Australian context, extensive historical research on resettlement has been provided by Higgins.[158] A collective volume on humanitarian admission with a view to the legal context of the EU was published in 2020, bringing together contributions from various legal scholars and practitioners.[159] Further insightful legal research from a German perspective has emerged from 2022 onwards. While Holst undertakes a comprehensive assessment of humanitarian visa schemes against the background of the constitutional right to asylum in Germany,[160] Heuser analyses how German cities and communities can engage in humanitarian admission.[161] A specific focus of recent academic attention lies on resettlement, particularly on the emerging legal framework for refugee resettlement to the EU, as comprehensively examined by Prantl.[162] Against the background of these works, this book provides a conceptual legal assessment of different types of safe pathways in the light of State responsibility.

156 Joanne van Selm, 'Strategic Use of Resettlement: Enhancing Solutions for Greater Protection?' in Adele Garnier, Liliana L. Jubilut and Kristin B. Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (2018) 29.

157 Shauna Labman, *Crossing Law's Borders: Canada's Refugee Resettlement Program* (2019).

158 Claire Higgins, *Asylum by Boat: Origins of Australia's Refugee Policy* (2017).

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

160 Marie Holst, *Visa für Schutzsuchende – Extraterritoriale Migrationssteuerung im Lichte der Menschenrechte* (2022).

161 Helene Heuser, *Städte der Zuflucht – Kommunen und Länder im Mehrebenensystem der Aufnahme von Schutzsuchenden* (2023).

162 See Janine Prantl, *The Legal Framework for Refugee Resettlement to the European Union with Lessons from the American Model* (2023); for an overview of academic papers from various disciplines on the issue of resettlement and complementary pathways from 2021 onwards see Garnier and Hashimoto, 'Editorial: Managing Forced Displacement: Refugee Resettlement and Complementary Pathways', 4 Frontiers in Human Dynamics (2022) article 931288.