Part 2: The responsibility framework

This part develops a responsibility framework as the theoretical basis of this book. The responsibility framework is based on a triad of responsibility principles identified as underlying the asylum paradox.[163] Chapter 6 starts with a theoretical elaboration on this principle-based approach. Chapters 7 through 9 develop the principles of internal, external and inter-State responsibility respectively. Finally, Chapter 10 connects the dots by outlining the responsibility framework as tool for the assessment of safe pathways to protection.

6 A principle-based normative concept

This chapter elaborates on the theoretical approach to the assessment of safe pathways discussed in Part 3. The responsibility framework this book develops for the assessment of safe pathways is a principle-based normative concept.[164] To specify this theoretical approach, this chapter starts by clarifying the meaning (6.1) and function (6.2) of 'principles' for the purpose of this book, to then draw on the specific normative function of *responsibility* principles (6.3).

6.1 The notion of principles: from legal principles to principles in legal philosophy

This section briefly outlines the different approaches to the notion of 'principles' in legal studies, and then explains the meaning attributed to the notion for the purpose of this book in the following section. As there is no legal definition of the term 'principle', its content depends on the specific context. The versatility of the notion leads to a variety of meanings ascribed to it, even within the disciplines. From a strictly legal perspective, there are

163 On the asylum paradox see Part 1 Chapter 1.

164 On the functions of a legal doctrine of principles see von Bogdandy, 'Founding Principles of EU Law', *supra* note 77, at 38 ff.

legal principles that can be found in different sources of international[165] and European law,[166] as well as national constitutions.[167]

A broader understanding of the notion can be found in the work of legal philosophers.[168] Dworkin, for instance, who develops a theory of principles as part of his criticism of legal positivism, attributes elements of morality to the notion.[169] Alexy, one of the most prominent German advocates of principles in legal theory, defines them as 'optimization commands',[170] in contrast to *rules* as 'definitive commands'.[171] Drawing on Dworkin, Alexy distinguishes between rules and principles and sees the latter as carrying an element of weight, implying 'that something be realized to the greatest extent possible given the legal and factual possibilities'.[172] Alexy argues that 'a conflict between two rules can only be resolved if either an appropriate exception is read into one of the rules, or at least one of the rules is declared invalid.'[173] In contrast, 'competitions between principles are played out in the dimension of weight instead'.[174] Alexy suggests that 'the solution of the competition consists in establishing a *conditional relation of precedence* between the principles in the light of the circumstances of the case'.[175] According to this theory, principles are 'reasons for rules'.[176]

Alexy's work has paved the way for a variety of theories further elaborating on or abandoning his approach to the notion.[177] There are legal scholars who criticise Alexy's theory of principles as not offering a coherent

165 See for instance Art. 38 para. 1 lit. (c) of the Statute of the ICJ, laying down 'general principles of law'.
166 See further von Bogdandy, 'Founding Principles of EU Law', *supra* note 77.
167 Franz Reimer, *Verfassungsprinzipien: Ein Normtyp im Grundgesetz* (2001).
168 See the principle-based structure of thought as proclaimed by Immanuel Kant, *Kritik der reinen Vernunft* (1781); Rawls, *supra* note 84; Ronald Dworkin, *Taking Rights Seriously* (1977); Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992).
169 Dworkin, *Taking Rights Seriously*, *supra* note 168; Ronald Dworkin, *A Matter of Principle* (1985).
170 Alexy, 'On the Structure of Legal Principles', *supra* note 79, at 294.
171 *Ibid*., at 295.
172 Alexy, *A Theory of Constitutional Rights*, *supra* note 79, at 47.
173 *Ibid*., at 49.
174 *Ibid*., at 50.
175 *Ibid*., at 52.
176 Alexy, 'On the Structure of Legal Principles', *supra* note 79, at 297.
177 For an overview see Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (2012).

conception of principles as norms open to a real balancing process.[178] Other scholars consider the strict distinction between principles and rules not always feasible.[179] In contrast to the approach undertaken by legal philosophers, von Bogdandy argues that a legal doctrine of principles operates hermeneutically and therefore within the law.[180] In line with this approach, principles can find their expression not only in positive law, but also in jurisprudence.[181] According to von Bogdandy, a legal doctrine of principle does not serve the function 'to delimit right and wrong in a concrete case'.[182] Instead, 'a *principle* usually lays down *general* requirements',[183] allowing a conflict to be structured.

A range of legal scholars in Germany make use of this structuring function of principles. For instance, Sieckmann argues that 'the theory of principles should not focus primarily on the norm theoretic issue but present itself as a theory that allows one to reconstruct a normative system starting from its normative foundations'.[184] With a view to the law of development cooperation, Dann sees principles as having a heuristic, systematising or evaluative function.[185] In his work, Dann takes the legal basis, the content (duties and requirements) and the addressees of the respective principles into account. This is in line with the assumption that principles do not exist by themselves but always within a certain context. Within the context of migration and asylum law, the works of Farahat and Lübbe are impor-

178 Jan-Reinard Sieckmann, 'Zur Prinzipientheorie Robert Alexys. Gemeinsamkeiten und Differenzen' in Matthias Klatt (ed.), *Prinzipientheorie und Theorie der Abwägung* (2013) 271.

179 András Jakab, 'Re-Defining Principles as "Important Rules": A Critique of Robert Alexy' in Martin Borowski (ed.), *On the Nature of Legal Principles: Proceedings of the Special Workshop 'The Principles Theory' held at the 23rd World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Kraków, 2007* (2010) 145; von Bogdandy, 'Founding Principles of EU Law', *supra* note 77, at 47.

180 von Bogdandy, 'Founding Principles of EU Law', *supra* note 77, at 38.

181 von Bogdandy, 'Founding Principles', *supra* note 80, at 14.

182 von Bogdandy, 'Founding Principles of EU Law', *supra* note 77, at 43.

183 *Ibid*., at 47.

184 Jan-Reinard Sieckmann, 'The Theory of Principles: A Framework for Autonomous Reasoning' in Martin Borowski (ed.), *On the Nature of Legal Principles: Proceedings of the Special Workshop 'The Principles Theory' held at the 23rd World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Kraków, 2007* (2010) 49, at 61.

185 Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (2013), at 222 ff.

tant references for a principle-based approach with a structuring function. While Farahat makes use of the notion of principles ('Prinzipien') to structure the laws governing migration and integration in Germany,[186] Lübbe uses the notion to structure her assessment of the principles governing the system of allocating responsibility in the European Union.[187] Considering these different approaches to the notion of principles, the following section brings the findings together, to define principles with a view to the purpose of the assessment undertaken in Part 3.

6.2 The notion and structuring function of principles in this book

This book draws on the notion of principles to reconstruct the underlying premises of the asylum paradox and use the findings to structure the analysis of safe pathways to protection. The notion of 'principle' is particularly apt as it differs from the notions of 'concept' or 'interest' by being directive[188] in nature and not primarily subjective. While Alexy's theory of principles is insightful, the approach in this book is more in line with the work of von Bogdandy and Dann, identifying the principles from within the law and drawing on their structuring and heuristic function.

Applying Alexy's theory of principles would mean arguing that there are legal *rules* governing access to territory on the one hand – finding their current expression in the Schengen Borders Code and the Visa Code, based on EU primary law. And, on the other hand, there are legal rules governing the granting of protection, finding their current expression in the Directives and Regulations governing the CEAS, also based on EU primary law and underlying norms of international human rights and refugee law. Similarly, Noll draws on Alexy's perception of human rights as 'optimisation commands' in his attempt to refine proportionality reasoning with a view to the jurisprudence of the ECtHR regarding visa requirements.[189] The question of this book would then be what the 'reasons' – and thus the *principles* behind the rules governing access to territory and protection –

186 Farahat, *supra* note 78.
187 Lübbe, *supra* note 78.
188 For a use of the notion 'directive principles' see Hans Morten Haugen, 'Human Rights Principles – Can They be Applied to Improve the Realization of Social Human Rights?', 15(1) Max Planck Yearbook of United Nations Law (2011) 419, at 426.
189 Noll, *Negotiating Asylum*, *supra* note 115, at 485 ff.

are, to then establish a conditional relation of precedence depending on the circumstances of the case. However, the main aim of this book is not to find a 'solution' to the asylum paradox, but to develop a normative *structure* that can be useful for the assessment of safe pathways.

This primarily *structuring function* differs from the delimiting function put forward by Alexy. In his discussion of the differences between legal philosophy and legal doctrine with a view to the use of principles, von Bogdandy points out that 'a philosophical discourse on principles can proceed deductively, whereas a legal discourse on principles has to be linked to the positive legal material made up of legal provisions and judicial decisions'.[190] Therefore, 'principles can fulfil the function of "gateways" through which the legal order is attached to the broader public discourse'.[191] The hermeneutical approach and structuring function put forward by von Bogdandy are in line with the approach of this book.[192] In its analysis and assessment, this book refers to the legal regime governing access to territory and protection in the EU, which is based on international human rights and refugee law. The following section will further clarify the choice of *responsibility* principles with a view to the assessment of safe pathways to protection undertaken in Part 3.

6.3 The normative function of responsibility principles

Across the disciplines, territorial sovereignty and universal human rights are the key principles played out against each other in relation to the question of access to territory and protection.[193] Given the tensions caused by the asylum paradox at international level, the principles of solidarity and responsibility-sharing are widely discussed.[194] This book takes sovereignty, human rights and solidarity as starting points to ultimately identify principles of responsibility: the (vertical) *internal responsibility* of States for protecting the rights of everyone belonging to their 'internal community'; the (diagonal) *external responsibility* of States for the protection of individuals

190 von Bogdandy, 'Founding Principles of EU Law', *supra* note 77, at 38.
191 *Ibid.*, at 43.
192 von Bogdandy, 'Founding Principles', *supra* note 80; von Bogdandy, 'Founding Principles of EU Law', *supra* note 77.
193 See Part 1 Chapter 5.3. for an overview of the academic debate; see also Part 2 Chapter 7.1.2 and 7.1.3 below.
194 See further Part 2 Chapter 9 below.

not yet part of this 'internal community'; and the (horizontal) *inter-State responsibility*, which governs the relationship of States towards each other. This triad of responsibilities lays the ground for an assessment framework for safe pathways to protection, a *responsibility framework*.

While this 'responsibility framework' is a normative concept developed in this book, drawing on responsibility principles is not a novelty in the legal field. With a view to refugee protection, the principle of responsibility is a key principle in the legal discourse.[195] Thereby, the focus lies on the principle of 'responsibility-sharing'[196] and the principle of 'international responsibility'.[197] In his comprehensive analysis of responsibility in international law, Roeben points out that '[l]aw shares the concept and terminology of responsibility with other disciplines'.[198] Terminologically, 'responsibility' implies an accountability for someone or something in a specific context.[199] Therefore, the notion of responsibility is closely linked to a concept of protection. Just as with the responsibility framework, other legal concepts based on responsibility incorporate this terminological understanding. Prominent legal concepts based on responsibility are the

195 See for instance Hurwitz, *supra* note 119; Annick Pijnenburg, *At the Frontiers of State Responsibility: Socio-Economic Rights and Cooperation on Migration* (2021); Tan, *International Cooperation on Refugees*, *supra* note 98.

196 See for instance the research of Dana Schmalz: 'The Principle of Responsibility-Sharing in Refugee Protection: An Emerging Norm of Customary International Law', *Völkerrechtsblog* (2019), available at https://voelkerrechtsblog.org/de/the-principle-of-responsibility-sharing-in-refugee-protection; 'Verantwortungsteilung im Flüchtlingsschutz: Zu den Problemen "globaler Lösungen"', 1(1) *Z'Flucht – Zeitschrift für Flüchtlingsforschung* (2017) 9; 'Global Responsibility-Sharing and the Production of Superfluity in the Context of Refugee Protection' in Stefan Salomon *et al.* (eds), *Blurring Boundaries: Human Security and Forced Migration* (2017) 23; see also Kritzman-Amir and Berman, 'Responsibility-Sharing and the Rights of Refugees: The Case of Israel', 41(3) *The George Washington International Law Review* (2010) 619; Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility-sharing in Refugee Law', 34(2) *Brooklyn Journal of International Law* (2009) 355; Asha Hans and Astri Suhrke, 'Responsibility-Sharing' in James C. Hathaway (ed.), *Reconceiving International Refugee Law* (1997) 83; Dowd and McAdam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?', 66(4) *International and Comparative Law Quarterly* (2017) 863.

197 For an overview see den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 61 ff.

198 See Volker Roeben, 'Responsibility in International Law' in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (vol 16., 2012), 99.

199 See *Oxford Learner's Dictionary*, defining responsibility as 'a duty to deal with or take care of someone or something, so that it is your fault if something goes wrong'.

R2P doctrine[200] and the rules for holding States accountable for breaches of international law, based on the Draft Articles on State Responsibility,[201] adopted by the International Law Commission in 2001. While sharing the terminology and the concept of accountability of these doctrines, the responsibility framework is not a legal doctrine, but a heuristic tool, functioning at a meta-level vis-à-vis the international protection system. In this regard, responsibility sets a justification context. The term captures the element of justification entailed in the relevant legal relationships in the context of international human rights and refugee law. This is in line with the understanding of responsibility as 'regulative principle that occupies a meta-level shared with other disciplines using identical terminology'.[202]

The aim of the responsibility framework is not to prescribe a fixed content to each responsibility principle. The main value of a theoretical approach based on responsibility principles lies in its structural, heuristic function. At the same time, the normative content of responsibility adds elements of accountability and justification to the legal discourse on safe pathways to protection. As Schmalz points out with regard to responsibility-sharing, '[i]t is the nature of a principle that it does not regulate details but captures an agreement on the general direction and about the ground on which one argues'.[203] Against this backdrop, the next chapters will outline three principles of responsibility underling the asylum paradox, identifying them in the legal framework governing access to territory and protection in the EU.

7 Internal responsibility

This chapter outlines the principle of internal responsibility of States as a structural principle underlying the legal regime governing territorial access to the EU. In essence, this chapter argues that invoking the principle of internal responsibility instead of drawing on sovereignty claims can lead to

200 Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (2010) 3, at 4 ff.

201 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).

202 Roeben, *supra* note 198, at 104.

203 Schmalz, 'The Principle of Responsibility-Sharing in Refugee Protection', *supra* note 196.

a shift in argumentation regarding access control. Drawing on sovereignty can lead to a circular reasoning – States control access because they can. In contrast, the principle of internal responsibility implies a purpose, adding transparency and justification requirements to the discussion. To make this argument, this chapter starts by discussing sovereignty as structural principle of the legal regime governing access to territory in the EU (7.1), and then addresses the notion of sovereignty as responsibility (7.2). Against this backdrop, the chapter outlines the principle of internal responsibility as a normative relationship between a State and its 'internal community' (7.3).

7.1 Point of departure: sovereignty as structural principle governing access to territory

The aim of this section is to outline sovereignty as structural principle of the legal regime governing access to territory in the legal context of the EU. To this end, the section starts by tracing the origins of sovereignty from a Westphalian principle of power and control over territory, to an international principle of State equality and autonomy (7.1.1). Thus, the section points to the fact that the principle of territorial sovereignty not always implied the exclusion of aliens. In a second step, the section discusses the relation of sovereignty to the concept of asylum, considering the developments in the fields of human rights and refugee law (7.1.2). This includes a discussion of how States tend to respond with 'shifting borders',[204] to borrow Ayelet Shachar's term, to avoid the restrains on sovereignty imposed by international human rights and refugee law. Against this backdrop, the section eventually points to the dominance of sovereignty claims in the context of migration control (7.1.3).

7.1.1 From Westphalian sovereignty to State autonomy

This section briefly sketches the evolution of sovereignty as a principle strongly interlinked with the notion of power over territory. Sovereignty has been referred to as 'the competence of states in respect of their territory',[205]

204 Shachar, *supra* note 126.

205 James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (8th ed., 2012), at 204.

as well as a 'theory or assumption about political power'.[206] While this link to power over territory has existed since antiquity, the principle regained relevance with the emergence of nation States in Europe, marked by the Peace of Westphalia in 1648.[207] Thus, an understanding of sovereignty as a principle implying not only power over territory but also the 'power to exclude' is a dominant narrative. The British House of Lords stated in the *Prague Airport* case in 2004 that the power to include and exclude 'was among the earliest and most widely recognised powers of the sovereign State'.[208]

While sovereignty has come to be the dominant principle drawn upon with a view to migration control,[209] territorial sovereignty did not always imply this power of exclusion. As Chetail points out in his discussion of the 'rise and fall of free movement', under legal doctrine until the 19th century '[t]he peaceful coexistence between state sovereignty and free movement constituted the common understanding of scholars'.[210] Drawing on, *inter alia*, the 'International Rules on the Admission and Expulsion of Aliens' adopted by the Institute of International Law in 1892,[211] Chetail outlines how the right to enter was the rule and the exclusion of aliens the exception.[212]

The 20th century brought several changes in this regard, impacting on the notion of sovereignty. The two most influential changes were the development of international law and the widespread implementation of immigration control. On the one hand, the sovereign had long since changed in most European nations from a single ruler to the people.[213] On the other hand, the evolution of international law, globalisation, and the rising

206 Francis H. Hinsley, *Sovereignty* (1986), at 1.

207 *Ibid.*; see also Samantha Besson, 'Sovereignty' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2011), at para. 13.

208 *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Other* (2004) UKHL 55, para. 11.

209 See below at Part 2 Chapter 7.1.3.

210 Chetail, *International Migration Law*, *supra* note 73, at 42.

211 Art. 6 of the International Rules on the Admission and Expulsion of Aliens states: 'free entrance of aliens into the territory of a civilized state cannot be prohibited in a general and permanent manner other thran in the interest of public welfare and on extremely serious grounds'.

212 Chetail, *International Migration Law*, *supra* note 73, at 45.

213 Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107(2) *American Journal of International Law* (2013) 295, at 296.

role of international organisations have further influenced the political and legal grounds of authority, and thus sovereignty.[214] As Benhabib observes, '[t]he "Westphalian model" presupposes that there is a dominant and unified political authority whose jurisdiction over a clearly marked piece of territory is supreme'.[215] She argues that this model is challenged by the ongoing globalisation. At the same time, however, all these developments of international law and globalisation take place against the backdrop of an ongoing expansion of immigration control policies. Chetail therefore observes that '[p]aradoxically, the doctrine of the Law of Nations was distorted and instrumentalized in order to justify immigration restrictions as a natural consequence of territorial sovereignty'.[216]

The initially dominant internal dimension of sovereignty as a principle governing domestic policies has thus been complemented by an external dimension determined by international law, giving rise to the principle of *sovereign equality*, enshrined in Art. 2(1) and (7) of the UN Charter.[217] In this context, sovereignty is described as 'competence, immunity, or power, and in particular, as the power to make autonomous choices (so-called sovereign autonomy)',[218] which is to be respected by the international community of States. This external dimension of sovereignty implies the existence of the internal dimension, as the sovereign autonomy refers to the (popular) autonomy to make choices which are of internal relevance. While Art. 21(3) UDHR states that '(t)he will of the people shall be the basis of the authority of government', Art. 1 ICCPR provides that 'all peoples have the right of self-determination. By virtue of that right they freely determine

214 See, *inter alia*, Israel de Jésus Butler, *Unravelling Sovereignty: Human Rights Actors and the Structure of International Law* (2007); Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed.), *Sovereignty in Transition* (2003) 3; Anna Gerbrandy and Miroslava Scholten, 'Core Values: Tensions and Balances in the EU Shared Legal Order' in Ton van den Brink, Michiel Luchtman and Miroslava Scholten (eds), *Sovereignty in the Shared Legal Order of the EU* (2015) 9; Jack E. S. Hayward and Rüdiger Wurzel, *European Disunion: Between Sovereignty and Solidarity* (2012). See also Case C-370/12 *Thomas Pringle v Government of Ireland* (EU:C:2012:675), View of AG Kokott, para. 137, declaring sovereignty as a 'basic structural principle of the European Union'.

215 Benhabib, *supra* note 130, at 4.

216 Chetail, *International Migration Law*, *supra* note 73, at 38.

217 Sovereign equality is also referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly, A/RES/2625(XXV), 24 October 1970.

218 Besson, *supra* note 207, at 379.

their political status and freely pursue their economic, social and cultural development.'[219]

In summary, State autonomy with regard to internal affairs is regarded as constitutive for sovereignty. At the same time, States are subject to the collective law-making processes of international law. Thus, human rights and refugee law take up a particular role with a view to sovereignty, as will be further discussed in the following sections.[220]

7.1.2 Sovereignty and the concept of asylum

The principle of sovereignty is strongly interlinked with the territorial concept of asylum. The notion of 'asylum' derives from the Greek term 'asylos', meaning 'inviolable' or 'free from seizure', and originally referred to a place of refuge.[221] The development of nation States, along with the notion of territorial jurisdiction, involved the right of a State to 'grant asylum'. State sovereignty was the precondition for offering protection through asylum, the State being thus able to refuse a request for extradition by the pursuing State.[222] In a prominent article on the right of asylum, Morgenstern discussed the right of asylum as a right of States, deriving directly from the principle of territorial sovereignty.[223] The International Court of Justice (ICJ) reiterated this concept of asylum in the *Asylum Case* of 1950, which concerned a Peruvian revolutionary who had been granted diplomatic asylum in the Colombian Embassy in Lima, Peru.[224] This conception of

219 See also the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, UN General Assembly, A/RES/2625(XXV), 24 October 1970.

220 See further Falk, *supra* note 131; see also Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (2012); see further on the role of human rights and refugee law, below at 7.3.

221 See further Peter Boeles *et al.*, *European Migration Law* (2nd rev. ed., 2014), at 243.

222 See further on the concept of asylum Goodwin-Gill and McAdam, *supra* note 13, Part 2 Chapter 8.

223 See Morgenstern, 'The Right of Asylum', 26 *British Yearbook of International Law* (1949) 327; see also Boed, 'The State of the Right of Asylum in International Law', 5(1) *Duke Journal of Comparative & International Law* (1994) 1; with reference to Morgenstern see den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 107.

224 *Asylum Case (Colombia v. Peru)* (1950) (International Court of Justice) ICJ Rep 266. For an analysis of this case in the context of sovereignty see for instance Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 247 ff.; see further on this case Part 3 Chapter 11.2.1.

asylum can also be found in the above-cited *Prague Airport* case, in which the House of Lords stated that 'over time there came to be recognised a right in sovereign states to give refuge to aliens fleeing from foreign persecution and to refuse to surrender such persons to the authorities of their home states'. This passage of the ruling concludes by stating that 'these rights were not matched by recognition in domestic law of any right in the alien to require admission to the receiving state'.[225] Asylum has ever since strongly been linked to the principle of territorial sovereignty of States.[226]

While the right to grant asylum is still a right of States,[227] the strictly State-centric concept of asylum has changed. The Refugee Convention and the evolution of international human rights law shifted the perspective from the State to the individual, framing an international protection regime with individual claims. Today, the principle of non-refoulement has a direct impact on State sovereignty, allowing for an *implicit* entry right under certain circumstances.[228] As the processing of an asylum claim entails eventually granting at least temporary residence to protection seekers, common EU asylum laws and policies have a direct impact on the question of inclusion and exclusion at the national level and therewith on State sovereignty.

On the one hand, this 'rule of exception' can be seen as an achievement of international law with a view to individual rights of protection seekers in a time when States had started to close their borders. On the other hand, it reflects the change in paradigm with a view to the once predominant rule of an 'entry right' before the expansion of immigration control in the 20th century.[229] The discussion that took place at the Evian Conference in 1938 is a particularly significant example of the political debate surrounding the question of territorial access at that time: despite the new efforts at taking up responsibility for refugee protection at an international level, no State wanted to commit to actually granting access to its territory. The measures taken focused on facilitating travel and resettlement – for example, by

225 *Regina v. Immigration Officer at Prague Airport and Another*, *Ex parte European Roma Rights Centre and Other*, *supra* note 208, para. 12.

226 See UN General Assembly, Declaration on Territorial Asylum, A/RES/2312(XXII), 14 December 1967; and Council of Europe, Declaration of Territorial Asylum, 18 November 1977.

227 See for instance Gil-Bazo, *supra* note 93; Worster, 'The Contemporary International Law Status of the Right to Receive Asylum', 26(4) *International Journal of Refugee Law* (2014) 1. See also Part 2 Chapter 7.3 with further references.

228 On the state of the legal debate see above, Part 1 Chapter 5.1.

229 See above Part 2 Chapter 7.1.1.

issuing identity cards and travel documents – without imposing any kind of obligation on States to admit protection seekers.[230] With this, the international protection framework developed without regard to the question of access to protection, a fact that is still reflected today in the legal documents governing that system, such as the UDHR and the Refugee Convention.[231] As Costello observes, international human rights law 'acknowledges and accommodates States' migration control imperatives'.[232] Referring to the UDHR, Benhabib argues that 'a series of internal contradictions between universal human rights and territorial sovereignty are built into the logic of the most comprehensive international law document in our world'.[233]

On the one hand, these contradictions already lead to a lack of provisions governing access to asylum and therefore to a protection gap.[234] On the other hand, these contradictions trigger a dynamic that re-enforces this gap: one reaction to the constraints international human rights and refugee law impose on national sovereignty is the 'shifting border', as Shachar calls State actions preventing territorial access by 'detaching the border and its migration-control functions from a fixed territorial maker'.[235] Thus, the silence of international and EU law regarding an explicit right to enter a State to seek protection, independent of territorial contact, leads States 'to flex their sovereign muscle through a variety of mechanisms to prevent the undocumented from reaching their borders'.[236] In this way, the constraints on State sovereignty created by international human rights and refugee law actually reinforce the principle of territorial sovereignty.[237] As Shachar argues, 'states retreat to the narrowest and strictest application of the classic Westphalian notion of sovereignty, placing the burden of "getting here" on

230 See further Goodwin-Gill and McAdam, *supra* note 13, at 484, pointing out that 'the answer was thought to lie not so much in protection or in dealing with root causes, as in coordinating involuntary emigration with existing immigration laws and practices, in collaboration with the country of origin'.

231 See also Part 1 Chapter 5.1.

232 Costello, *The Human Rights of Migrants and Refugees in European Law, supra* note 61, at 9.

233 Seyla Benhabib *et al.*, *Another Cosmopolitanism* (2006), at 30.

234 See above on the asylum paradox, Part 1 Chapter 1.

235 Shachar, *supra* note 126, at 4.

236 Jaya Ramji-Nogales, 'Chapter 12 – Constructing Human Rights: State Power and Migrant Silence' in Molly K. Land, Kathryn Rae Libal and Jillian Robin Chambers (eds), *Beyond Borders: The Human Rights of Non-Citizens at Home and Abroad* (2021) 200, at 207.

237 See further on this argument Benhabib, *supra* note 130; Paz, *supra* note 131.

individuals who are already displaced and vulnerable'.[238] The next section concludes this outline of the role of sovereignty by delving into the predominance of sovereignty claims in the context of migration and border control.

7.1.3 Sovereignty claims in migration and border control

As discussed above, sovereignty's link to a concept of power over territory did not always imply the power to exclude aliens.[239] Today, however, the principle of sovereignty is the argumentative basis for controlling and, especially, restricting access to territory.[240] In this sense, Dauvergne argues that 'in the present era of globalisation, control over the movement of people has become the last bastion of sovereignty'.[241]

Within the legal context of the EU, the CJEU's and the ECtHR's jurisprudence reflects such an understanding of immigration control as inherent to State sovereignty.[242] In the *X and X* case, concerning the application for a 'humanitarian visa' to ultimately claim asylum in the EU, the CJEU explicitly stated that there was no applicable provision allowing for such a visa at EU level, as a respective decision falls 'solely within [the jurisdiction] of national law'.[243] In the *M.N.* case, with a similar factual background, the ECtHR concluded that 'an extension of the Convention's scope of application would also have the effect of negating the well-established principle of public international law, recognised by the Court, according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens'.[244] In his discussion of the *M.N.* case and the case *N.D. and N.T.*,[245] Thym

238 Shachar, *supra* note 126, at 59.
239 See above Part 2 Chapter 7.1.1.
240 See Chetail, *International Migration Law, supra* note 73, at 49; see also John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2nd ed., 2018), at 219; while stating that the prerogative of entry control is 'understood as one of the quintessential features of sovereignty', he also points out that this is a rather recent phenomenon.
241 Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times', 67(4) *Modern Law Review* (2004) 588, at 588; see also Benhabib, *supra* note 130, at 5.
242 See below at Part 3 Chapter 11.4 for a more detailed discussion of the decisions of the CJEU and the ECtHR in 'humanitarian visa cases'.
243 *X and X v Belgium*, *supra* note 16, para. 52.
244 *M.N. and Others v. Belgium*, *supra* note 17, para. 124.
245 *N.D. and N.T. v. Spain*, Appl. Nos. 8675/15 and 8697/15, Grand Chamber, Judgement of 13 February 2020 (CE:ECHR:2020:0213JUD000867515).

concludes that 'the conflict between competing claims to State control and human rights underlie core passages of the *ND and NT* judgement'.[246]

This understanding of access restriction as outcome of State sovereignty was also reflected in several previous rulings of the ECtHR proclaiming that States 'have the undeniable sovereign right to control aliens' entry into and residence in their territory'.[247] Following the jurisprudence of the ECtHR, Noll argues that 'the right to control the composition of its population is internationally recognized as being inherent in state sovereignty'.[248] Thus, the cited judicial references to sovereignty imply an end in itself – States may control their borders because they can. Costello refers to this phenomenon as the 'statist entry control assumption', arguing that 'the notion of State's "sovereign" right to exclude sometimes seems to obviate any need for justification of its actions. Here we encounter a version of old-style sovereignty, which elides sovereignty and unfettered State discretion.'[249]

Following this line of thought, this book suggests openly addressing the (implicit) function of access related sovereignty claims by drawing on a principle of *internal responsibility*. The following sections elaborate on this argument by considering sovereignty as responsibility (7.2) and outlining the scope of a principle of internal responsibility (7.3).

7.2 Sovereignty as responsibility

Addressing sovereignty as responsibility is not a novelty in the legal field. One instance of a concept of sovereignty as responsibility is the R2P doctrine.[250] The R2P doctrine allegedly justifies interventions by the international community whenever a State does not secure the human rights of those residing within its territory. As Cohen argues, 'the changing norms of

246 Thym, *supra* note 112, at 592 ff; see also Thym, *supra* note 63, at 130, generally pointing out that 'Theoretically, the abstract notion of sovereignty serves as a proxy for arguments about the value of particularistic self-government'.

247 See, for instance, *Amuur v. France*, Appl. No. 19776/92, Judgement of 25 June 1996 (CE:ECHR:1996:0625JUD001977692), para. 41; see also *Nsona vs. The Netherlands*, Appl. No. 23366/94, Judgement of 28 November 1996, para. 92.

248 Noll, *Negotiating Asylum*, *supra* note 115, at 485.

249 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 10.

250 Roberta Cohen and Francis M. Deng, 'Sovereignty as Responsibility: Building Block for R2P' in Alex J. Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (2016) 74.

the international system seem to be indicative of a new political culture regarding sovereignty that has shifted from one of impunity to one of responsibility and accountability'.[251] This statement, as well as the possibilities for interventions based on the R2P doctrine, focuses on the international dimension of sovereignty and the external dimension of human rights.[252] However, the R2P doctrine also implies an understanding of sovereignty as *internal* responsibility for the protection of human rights within a State's territory. This approach to sovereignty as responsibility ultimately implies a self-understanding of liberal democracies as being respectful of the rule of law and grantors of human rights, providing access to the judicial control of public administration.

This ties the argument of this book to a broader scholarly debate on how references to sovereignty in the context of border and migration control entail an (implicit) argument of having to protect the rights and interests of peoples within a State, including the internal security and order of a State.[253] As Blake and Husain claim, '[i]mmigration control has consistently been held by [...] the European Court to relate to the preservation of the economic well-being of the country, the prevention of disorder or crime, the protection of health and morals, and the protection of rights and freedoms of others'.[254] They further argue 'that immigration control is not of itself a valid end capable of justifying an interfering measure; it is rather the medium through which other legitimate aims are promoted'.[255] Similarly, Goodwin-Gil and McAdam discuss the jurisprudence of the ECtHR with a view to the need of 'striking a balance' between the interests of the respective community and individual rights.[256] Following this line of thought, den Heijer claims that '[b]order controls and other migration enforcement measures [...] translate the needs and interests of Member States, international

251 Cohen, *supra* note 220, at 159.

252 See further below at Part 2 Chapter 8.

253 See further on this argument Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (1998), at 37 and 95; Noll, *Negotiating Asylum*, *supra* note 115, at 79; Gavison, 'Immigration and the Human Rights Discourse: The Universality of Human Rights and the Relevance of States and of Numbers', 43(1) *Israel Law Review* (2010) 7; Tally Kritzman-Amir, 'Community Interests in International Migration and Refugee Law' in Eyal Benvenisti, Georg Nolte and Keren Yalin-Mor (eds), *Community Interests across International Law* (2018) 341, at 343.

254 Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (2003), para. 4.72.

255 *Ibid*.

256 Goodwin-Gill and McAdam, *supra* note 13, at 383.

obligations and general humanitarian traditions into a system of selection and control'.[257] Similarly, Noll argues in his analysis of protection regimes that a 'primary interest for host states is to maintain control over the overall fiscal, social and political costs of protection systems'.[258]

This debate shows how access-related sovereignty claims are tied to a protective purpose, which can be addressed via a principle of internal responsibility. The following section outlines the scope of this internal responsibility as reflecting the normative relationship between a State and its 'internal community'.

7.3 The scope of the internal responsibility

The principle of internal responsibility is grounded in the normative relationship of a State to everyone belonging to its 'internal community', which will be further defined in the following. The responsibility is defined as *internal* and not territorial responsibility, as its point of reference is this normative relationship, and not merely jurisdiction over a specific territory. Above all, this designation allows for capturing the notion of the 'shifting border',[259] describing measures of access restrictions that have long left the territorial sphere.

As set out above, the assessment in this book is based on a broad understanding of the 'State' as a territorial polity with the delegated power to grant access and protection in a designated (supra-)national space.[260] With a view to their prerogative over the question of granting access to territory and ultimate responsibility for border control, the internal responsibility is primarily ascribed to EU Member States and associated States in the Schengen area.[261] However, the complex system of shared and transferred competences in the area of migration and border control requires a multi-level perspective on the principle of internal responsibility in the legal

257 See den Heijer, *Europe and Extraterritorial Asylum*, *supra* note 121, at 165.
258 Noll, *Negotiating Asylum*, *supra* note 115, at 102 ff.
259 Shachar, *supra* note 126.
260 See above Part 1 Chapter 3.1.3.
261 States associated to Schengen are Iceland, Liechtenstein, Norway, and Switzerland; see also the overview of legal sources with further references above Part 1 Chapter 3.2.

context of the EU. In the spirit of the 'transformative political space'[262] of the EU, the principle of internal responsibility can thereby also apply to the EU as territorial polity, particularly with a view to the international dimension of the asylum paradox.[263]

Against this backdrop, the internal responsibility covers the rights and interests of citizens and residents, as well as any person factually present on a State's territory. Together, the subjects of this responsibility are referred to as everyone belonging to the 'internal community' of a State. Constitutive for the internal responsibility is a pre-existing legal bond of the respective person to the State. This pre-existing legal bond can either be grounded in citizenship,[264] a residence permit, or mere factual presence in the territory of a State, triggering the territorial jurisdiction of the respective State with a view to fundamental and human rights. Therefore, the internal responsibility is varied, in the sense of a gradual application dependent on the legal bond of the individual vis-à-vis the State. Depending on the rights in question, the internal responsibility might only extend to citizens, so-called denizens,[265] other residents, or to anyone present in the territory, always depending on the legal and factual context.[266]

In the context of EU law, the notion of (internal) responsibility of EU Member States can be found in Art. 72 TFEU, referring to 'the responsibility incumbent upon Member states with regard to the maintenance of law

262 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 17.

263 See below Part 2 Chapter 9.2 for a discussion of the principle of inter-State responsibility with respect to the EU and its Member States.

264 On the definition of citizenship and its interchangeability with nationality, see GLOBALCIT, *Glossary on Citizenship and Electoral Rights* (2020), available at https://globalcit.eu/glossary/; see also Kristy A. Belton and Jamie C. Y. Liew, 'Chapter 2 – The Unmaking of Citizens: Shifting Borders of Belonging' in Molly K. Land, Kathryn Rae Libal and Jillian Robin Chambers (eds), *Beyond Borders: The Human Rights of Non-Citizens at Home and Abroad* (2021) 21, at 24; see further on different conceptions of citizenship, with a particular focus on the EU, Markus Bayer, Oliver Schwarz and Toralf Stark (eds), *Democratic Citizenship in Flux: Conceptions of Citizenship in the Light of Political and Social Fragmentation* (2021).

265 On the concept of 'denizenship', a quasi-citizenship status, see Bast, 'Denizenship als rechtliche Form der Inklusion in eine Einwanderungsgesellschaft', 33(10) *ZAR* (2013) 353; Neil Walker, 'Denizenship and the Deterritorialization in the EU' (EUI Working Papers LAW No. 2008/08, February 2008).

266 See below at Part 2 Chapter 8.3 on the responsibility for so-called 'margizens', as individuals within a State's territory who have not yet acquired a formal residence status.

and order and the safeguarding of internal security'. As stated in Art. 4(2) TEU, 'essential State functions' include 'ensuring territorial integrity of the State, maintaining law and order and safeguarding national security'. With a view to the supranational dimension, Art. 3 TEU (1) states that the aim of the EU as a whole 'is to promote peace, its values and the well-being of its peoples'. To this end, the EU 'shall offer its citizens an area of freedom, security and justice' (Art. 3(2) TEU).[267]

Read together with EU laws governing access to territory, the aim of safeguarding the internal security and the well-being of peoples is directly linked to border and migration control under EU law. The Schengen Borders Code (para. 6) provides that 'border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations'. In that same sense, the EU Visa Code entails several references to the necessity of assessing security risks to Member States, as for instance in Art. 21(1), (3) (d), 48 (3) (b).[268] As the European Commission states, 'visa policy serves various objectives, in particular preventing irregular immigration, as well as safeguarding public order and security'.[269]

These provisions reflect the link between an *internal* responsibility and border control, which has been elaborated in the previous section. At the same time, they are an outcome of the ongoing securitisation of EU migration and asylum policy, putting a strong focus on migration and border control as primary means to achieve internal security.[270] This securitisation raises the question whether border and migration control can at all contribute to protect 'legitimate aims' such as the internal security, public order, well-being and health. Additionally, constructing migration and asylum along the lines of security issues portrays migrants and asylum seekers as

267 On the twofold relevance of the principle of solidarity, with a view to the internal dimension of the EU on the one side and the external relations of the EU on the other, see below Part 2 Chapter 9.1.2.

268 On migration control as central motivation for visa requirements see Thym, *supra* note 63, at 280.

269 *European Commission – Fact Sheet, Questions and Answers: Adapting the Common EU Visa Policy to New Challenges*, Brussels 14 March 2018, at 1.

270 See further on the securitisation of EU asylum and migration policies, Mitsilegas, Moreno-Lax and Vavoula (eds), *supra* note 127; see also Hurwitz, *supra* note 119, at 44.

security threats.[271] Identifying a principle of internal responsibility behind access-related sovereignty claims does not resolve these issues. Interpreting the principle of sovereignty as principle of internal responsibility does not aim to replace one term (sovereignty) with another (responsibility), to then provide a blanket justification for measures of border and migration control. Neither principle can legitimise any State measure across the board or replace an assessment of legality and proportionality of EU border and migration control.

The argument here is that the principle of internal responsibility can help to avoid the circular reasoning sovereignty claims often entail. As Costello notes, 'when admission decisions come to be taken on the basis of EU law, Member States can no longer rely on ipso facto justifications for their acts qua States. At the very least, the EU adjudicatory context opens up space for reasoned argument, not pre-emptive assertions.'[272] Following this line of thought, this book argues that openly addressing the protective purpose of border and migration control – by drawing on a principle of internal responsibility instead of self-serving claims to sovereignty – can add transparency to the legal discourse by requiring specific justification. Ultimately, this can facilitate the conceptualisation of safe pathways as will be further elaborated in the following.

7.4 Conclusion

This chapter has addressed access-related sovereignty claims from a perspective of responsibility. The chapter started with an outline of the changing notion of sovereignty from a concept of authority over territory to a broader concept of 'self-determination', strongly influenced by political changes in the national context, as well as the developments of international and EU law. Despite its ongoing changes, sovereignty remains the leading principle underlying the laws, jurisprudence and State practice governing control over access to territory. While references to sovereignty commonly imply an 'end in itself', measures of border and migration control are primarily legitimised by the need to safeguard the internal security and order of States. Against this backdrop, this chapter argues for addressing

271 On respective effects safe pathways can have, see below Part 3 Chapter 13.5.1.

272 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 24.

access-related sovereignty claims as claims of an internal responsibility. The assumption is that a principle of internal responsibility can add transparency and structure to the legal discourse. As argued in Chapter 6, responsibility implies an accountability to its subjects, linking responsibility to the notion of protection.[273]

The important debate over whether migration and border control can at all fulfil the purpose of protecting the internal security of a State, as well as the rights and interests of an 'internal community' goes beyond the scope of this book. The aim here is not to deconstruct the existing legal system based on nation States and borders but, rather, to reconstruct its underlying premises. Therefore, the principle of internal responsibility does not serve as blanket justification for measures of border and migration control. On the contrary, the principle of internal responsibility allows one to think of migration control from a collective interest and individual rights perspective. The principle of internal responsibility implies the internal dimension of human rights and avoids the framing of sovereignty and human rights as antagonistic principles, which dominates the legal and political debate on access to territory and protection.[274]

As the internal responsibility is not merely a territorial jurisdiction, the principle allows for capturing the notion of the 'shifting border'. As will be shown, the assumption that the principle of internal responsibility 'travels' wherever State authorities act upon it, strengthens this same argument in favour of the external responsibility for protection seekers not (yet) part of a State's internal community (see Chapter 8). This reasoning is grounded in a liberal internationalist interpretation of the international protection regime, in contrast to a statist or liberal nationalist argument for a paramount responsibility of States for protecting their population.[275] Thus, the principle of internal responsibility is not meant as an overriding concept at the discretion of a single State. Rather, this book argues for setting the principle of internal responsibility into the context of other responsibility principles, namely the external and the inter-State responsibility, which will be developed in the following two chapters.

273 See above at 6.3.

274 See Part 1 Chapter 5.3 on the state of the debate.

275 For an overview of the different approaches see Benhabib and Nathwani, *supra* note 85.

8 External responsibility

This section identifies a principle of external responsibility inherent to the legal regime governing protection in the EU. To this end, the chapter starts with a discussion of human rights and their role as structural principles of the legal regime governing the granting of protection in the EU (8.1). Against this backdrop, the chapter continues with outlining the principle of external responsibility of States for protection seekers not (yet) part of their 'internal community', comparing the legal architecture of the international protection framework to the civil law concept of joint and several liability (8.2). Eventually, the chapter concludes by discussing possible intersections between the principles of internal and external responsibility (8.3).

8.1 Point of departure: human rights as structural principles governing access to protection

This section discusses the role of human rights as structural principles of the legal regime governing access to protection in the EU. To this end, this section starts with a discussion of the universal scope shared by human rights and refugee law, as well as the shared tensions with the principle of territorial sovereignty (8.1.1). This discussion is followed by an outline of key legal provisions governing access to protection in the legal context of the EU, based on international human rights and EU fundamental law (8.1.2).[276]

8.1.1 The universal scope of human rights and refugee law

Human rights are generally contrasted with sovereignty claims when addressing the tensions inherent to the phenomenon described as asylum paradox in this book.[277] The essence of human rights is their universality. They apply, in principle, to all human beings based on their humanity.[278]

276 On the legal sources of this book see Part 1 Chapter 3.2.

277 See above Part 1 Chapter 1 on the asylum paradox and Chapter 5.3 on the scholarly debate regarding the tension between human rights and sovereignty underlying the asylum paradox.

278 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev. ed., 2010), at 210; see further Ben Golder, 'Theorizing Human Rights' in Anne Orford,

Human rights are thus grounded on a 'conception of human dignity'.[279] However, this does not mean that everyone can access human rights everywhere in practice. As succinctly put in the REMAP Study, 'one may distinguish between a justiciable "core" of Human Rights and a non-justiciable "corona" of principles'.[280] Still, the evolution of international human rights law gave rise to an external dimension of universality, in the sense of rights belonging not only to State citizens.[281] Chetail discusses the guarantees provided by international human rights law as the 'founding principles of international migration law'. He structures human rights along the three main areas they govern with a view to migration: 'departure from the country of origin', 'admission into the territory' and, lastly, the 'sojourn therein'.[282] The external dimension of human rights interlinks them with the 'law of co-operation' as enshrined in Art. 1(3) of the UN Charter[283] and sets the ground for the external dimension of the R2P doctrine.[284]

Refugee law has been significantly shaped by human rights law and shares its universal scope.[285] While the concept of asylum is linked to a place of refuge and therewith to a right of States to grant protection, the 1951 Refugee Convention changed this strictly State-centric perspective.[286] The concept of refugeehood relies on the individual and the reasons for seeking protection. There are individual rights arising from refugee status, independent of a formal recognition. This universal scope is underlined by the declaratory nature of refugee status, inscribed in Art. 1A of the Refugee Convention.

Florian Hoffmann and Martin Clarke (eds), *The Oxford Handbook of the Theory of International Law* (2016) 732.

279 Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed., 2013), at 28.

280 Bast, Harbou and Wessels, *supra* note 30, at 27.

281 Chetail, *International Migration Law*, *supra* note 73, at 65 ff., discussing 'international human rights law as the primary source of protection for migrants'.

282 *Ibid.*, at 76 ff.

283 According to Art. 1(3) UN Charter, one of the purposes of the United Nations is 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

284 In contrast to the internal dimension of the R2P doctrine as outlined above, see Part 2 Chapter 7.2.

285 See Schmalz, 'A Counterbalancing Exception: The Refugee Concept as a Normative Idea', *Inter Gentes* 2 (2020) 2, at 17, with further references.

286 On sovereignty and the concept of asylum see above Part 2 Chapter 7.1.2.

In sharing a universal nature, human rights and refugee law also share the tensions with the territorial concept of sovereignty. Lavenex assumes that this tension 'is best reflected in the unsuccessful attempts at implementing a subjective asylum right at the international level'.[287] In his comprehensive analysis of human rights, Donnelly argues that the 'state-centric conception of human rights has deep historical roots and reflects the central role of the sovereign state in modern politics'.[288] Just as human rights must be asserted or at least be enforceable in each individual case to unfold their relevance,[289] an individual needs to be recognised as refugee to benefit from the individual rights set out in the Refugee Convention. However, as Hathaway concluded as early as 1990, 'the current framework of refugee law, even if it were to be fully and universally implemented, is largely inconsistent with the attainment of either humanitarian or human rights ideals on a universal scale'.[290]

The notion of 'humanitarian or human rights ideals' touches upon the philosophical foundations human rights and refugee law share.[291] Benhabib traces these foundations by pointing out that '[c]oncepts such as "the right to universal hospitality", "crimes against humanity", "the right to have rights" (Arendt) are the legacy of Kantian cosmopolitanism'.[292] She concludes that 'as long as territorially bounded states are recognized as the sole legitimate units of negotiation and representation, a tension, and at times even a fatal contradiction, is palpable: the modern state system is caught between sovereignty and hospitality'.[293]At the border or in the territory of a State, the tension between sovereignty and human rights seems to have been resolved in favour of the individual protection seeker – and therewith in favour of the Kantian 'hospitality'.[294] Therefore, non-refoulement can be

287 Lavenex, *supra* note 131, at 29.

288 Donnelly, *supra* note 279, at 33.

289 For a detailed discussion of regional jurisprudence related to access to protection in the EU see Schmalz, 'Zur Reichweite von Menschenrechtspflichten: Zugang zu Schutz an den Grenzen Europas', 28(5) *Newsletter Menschenrechte* (2019) 367.

290 Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *supra* note 132, at 144.

291 For comprehensive analysis of the different dimensions of 'humanitarianism' and its relevance for the granting of protection in Europe see Liv Feijen, *The Evolution of Humanitarian Protection in European law and Practice* (2021).

292 Benhabib *et al.*, *supra* note 233, at 24.

293 *Ibid.*, at 31.

294 See Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (3rd ed., 1917), at 137: 'hospitality signifies the claim of a stranger entering foreign territory to be treated by

seen as a rule of 'exception', inherent to the concept of refugee.[295] In the extraterritorial context, however, the debate is reignited again and again. Drawing on Kant, Gammeltoft-Hansen distinguishes 'between the *sein* and the *sollen* of refugee and human rights law, between human rights codified as positive international law and human rights as a universal normative ideal'.[296] Against the backdrop of this legal-philosophical scope of human rights, the next section outlines the human rights basis of access to protection in the EU.

8.1.2 Key human rights provisions governing access to protection in the EU

As outlined in Part 1, the granting of protection under EU law is built on the pillars of international human rights and refugee law.[297] This book takes an integrated approach to these bodies of law, discussing refugee protection as a form of human rights protection.[298] The Refugee Convention is thus considered a human rights treaty.[299] With respect to protection under EU law, this book shares the approach of 'human rights pluralism' put forward by Costello in addressing the 'overlapping EU-ECHR human rights systems'[300] and the additional relevance of international human rights and refugee law.

The 'respect for human rights' is one of the founding values of the Union (see Art. 2 TEU) and is seen as 'one of the main prerequisites for

its owner without hostility. The latter can send him away, if this can be done without causing his death.'

295 Schmalz, 'A Counterbalancing Exception', *supra* note 297; see also Feijen, *supra* note 299, at 7 ff.

296 Gammeltoft-Hansen, *Access to Asylum*, *supra* note 22, at 24.

297 See Part 1 Chapter 3.2.

298 See further Chetail, 'Moving Towards an Integrated Approach of Refugee Protection and Human Rights Law', *supra* note 76; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 19; see also Edwards, 'Human Rights, Refugees, and The Right "To Enjoy" Asylum', 17(2) *International Journal of Refugee Law* (2005) 293, at 297 ff; Hathaway (ed.), *Reconceiving International Refugee Law*, *supra* note 83. For an overview of the development of refugee law between humanitarianism, human rights and State interest see Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *supra* note 132.

299 Sharing this approach see Bast, Harbou and Wessels, *supra* note 30, at 23.

300 Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 42.

membership of the European Union, a basic principle informing all its activities'.[301] Thus, the universality of human rights guides the *external* relations of the EU (see Art. 3(5) TEU and Art. 21(1) TEU). With a view to the granting of protection, Art. 78(1) TFEU sets the benchmark, calling on the institutions to develop common asylum policies 'ensuring compliance with the principle of non-refoulement' and prescribing that legislation 'must be in accordance' with international refugee law, and other relevant treaties.

Key legal provisions of the international and European legal framework governing access to protection are:

- the right to leave, as enshrined in Art. 13(2) UDHR, Art. 12(2) ICCPR, Art. 10 CRC, and Art. 2(2) of Protocol No. 4 ECHR;
- the prohibition of expulsion or return ('non-refoulement'), as guaranteed by Art. 33(1) Refugee Convention, and expressed in human rights prohibiting the exposure of anyone to torture or inhumane treatment, such as Art. 3 ECHR, Art. 4 CFR and Art. 19(2) CFR, as well as Art. 3 CAT, and 7 ICCPR;[302]
- the prohibition of collective expulsion, as enshrined in Art. 4 Protocol No. 4 ECHR and Art. 19(1) CFR;
- the right to seek asylum, as enshrined in Art. 14 UDHR and Art. 18 CRF, entailing the right to access a fair and non-discriminatory asylum procedure;
- the right to an effective legal remedy and fair trial in case of an alleged breach of fundamental human rights, deriving from Art. 13 ECHR and Art. 47 CFR;
- acquired rights, as enshrined *inter alia* in the Refugee Convention, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR);[303]
- positive rights, deriving from human rights law, such as Art. 3 ECHR and Art. 4 CFR.

301 The European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond. Communication from the Commission to the Council and the European Parliament. COM (95) 567 final, 22 November 1995, para. 3.

302 For a discussion see Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 176 ff.; see also Tan, *International Cooperation on Refugees*, *supra* note 98, at 79 ff.

303 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, at 3.

These norms are an integral part of international protection framework, setting the legal ground for protection responsibilities in the EU. The legal framework of the CEAS ultimately seeks to ensure the effective exercise of the right to seek asylum.[304] As stated by AG Cruz Villalón in his opinion in the case *Abdullahi*,[305] 'the essence of the fundamental right to asylum guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union is ensured upon entry into the European Union'.[306] Against this backdrop, the next section identifies a principle of external responsibility as inherent to the legal framework governing access to protection in the EU.

8.2 Human rights as basis of an external responsibility

This section argues that the legal framework governing access to protection in the EU, which is based on international human rights and refugee law, can be framed along the lines of a principle of external responsibility of States for individuals not yet part of their internal community. This responsibility principle is explicitly defined as *external* and not as extraterritorial as it concerns the legal relationship between a State and a protection seeking individual. In the territory of a State, the principle of external responsibility starts to intersect with the principle of internal responsibility.[307] Just as argued regarding the principle of internal responsibility,[308] the external responsibility is a broad principle, covering a wide range of rights, partly triggering State obligations, which are varied depending on the individual circumstances of the case as well as the legal and geographical context. The point of reference of the external responsibility is the normative relationship between a State and a protection seeker not (yet) part of its 'internal community'. Thereby, this book continues to adopt a broad understanding of the State.[309]

The previous chapter argued that the principle of internal responsibility could add transparency to the legal discourse on access to protection and –

304 See also Case C-394/12 *Shamso Abdullahi v Bundesasylamt* (EU:C:2013:473), Opinion of AG Cruz Villalón, para. 40.
305 Judgement of 10 December 2013, *Shamso Abdullahi v Bundesasylamt*, C-394/12 (EU:C:2013:813).
306 See Opinion of AG Cruz Villalón, *supra* note 304, para. 42.
307 See below Part 2 Chapter 8.3.
308 See above Part 2 Chapter 7.3.
309 For a definition see Part 1 Chapter 3.1.3.

specifically with a view to the purpose of this book – to the assessment of safe pathways.[310] This chapter argues that the principle of external responsibility is of value as it captures the different dimensions of human rights and refugee law. On the one hand, the principle of external responsibility captures the vertical dimension (individual vis-à-vis the State) with a view to the legal position of individual protection seekers as subjects of this responsibility. On the other hand, the principle of external responsibility is entrenched within the inter-State responsibility, as it is based on an understanding of human rights and refugee law as legal system assuming a 'joint' responsibility of States.[311]

Against this backdrop, this chapter argues that the international protection regime, with human rights and refugee law at its core, can be compared to the civil law concept of joint and several liability.[312] This legal concept can be traced back to the Roman law concept of an *obligatio in solidum*,[313] which is nowadays codified in several civil law jurisdictions under varying terms ('Gesamtschuld' in German law,[314] 'Correalität' in Austrian law[315]). Some of these legal terms reflect how the modern use of the term 'solidarity' can be traced back to this civil law concept in Roman law ('Solidarschuld'/'solidarietá'/'solidarité' in Swiss law,[316] 'solidarité entre les débiteurs' in French law,[317] and 'slidarietá' or 'l'obligazione in solido' in Italian law[318]). Common features are the existence of several debtors for one debt, whereby each debtor is individually liable for the entire obligation. The creditor is entitled to request the settlement of the debt from any of the debtors. Once one debtor has fulfilled the obligation, all other debtors are discharged.

310 See above Part 2 Chapter 7.4.

311 On the principle of inter-State responsibility, which governs the relationship between States based on this 'joint' external responsibility, see below Part 2 Chapter 9.

312 For a brief reference to the concept of joint and several liability ('Gesamtschuld') with regard to the question of a *moral* right to asylum, see Funke, 'Das Flüchtlingsrecht zwischen Menschenrecht, Hilfspflicht und Verantwortung', 72(11) *Juristenzeitung* (2017) 533, at 537.

313 Anja Steiner, *Die Römischen Solidarobligationen: Eine Neubesichtigung unter aktionsrechtlichen Aspekten* (2009).

314 Cf. sec. 421 of the German Civil Code *Bürgerliches Gesetzbuch (BGB).*

315 Cf. sec. 891 of the Austrian Civil Code *Allgemeines bürgerliches Gesetzbuch.*

316 Cf. Art. 143 located in the subsection titled "Die Solidarität" (the solidarity) of the Swiss Code of Obligations *Obligationenrecht (OR).*

317 Cf. Art. 1313 of the French *Code Civil.*

318 Cf. Art. 1292 of the Italian *Codice Civile.*

Applying this concept as theoretical construct to the international protection regime draws the following picture: States party to the Refugee Convention and relevant human rights treaties have consensually agreed at international level to undertake a joint responsibility for refugee and human rights protection. This responsibility can be regarded as the legal 'debt' owed by several different States (as 'debtors') to the protection-seeking individual (as 'creditor'). While all signatory States are, in principle, responsible for granting international protection, a protection seeker can, in principle, only claim protection once. Within the legal system of the EU, this logic is immanent to the Dublin system regulating the Member State responsible for assessing the asylum application,[319] and to the concept of 'first country of asylum'.[320] *How* protection can be claimed – that is, whether respective protection *obligations* are triggered or not – depends on the respective legal provisions, their scope of application and the individual context of each case.

8.3 The scope of the external responsibility in the territorial context

As outlined in Chapter 7 in relation to the internal responsibility, and in the previous section in relation to the external responsibility, both principles can unfold in the territorial as well as the extraterritorial context. The territorial context marks the beginning of an intersection of the external and the internal responsibility. The legal condition of protection seekers who have reached the territory of a State of refuge and applied for asylum is exemplary of this intersection. On the one hand, there are the legal *obligations* a State has towards asylum seekers, which can be seen as an outcome of the external responsibility. On the other hand, there are internal protection obligations, which might already apply – for instance, providing for a minimum subsistence level independent of legal status, based on EU fundamental law and Member State constitutions. The situation of asylum seekers reflects a situation of legal marginalisation with a view to

319 The 'Dublin system' refers to the regime of responsibility allocation, currently governed by the Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation).

320 The (discretionary) concept of first country of asylum is enshrined in Art. 35 APD.

the range of individual rights, such as the right to family reunification, long-term residency or, ultimately, the right to naturalisation. The recognition of a protection status marks a shift in responsibilities and the moment from which the internal responsibility prevails. All circumstances and State practices preventing or delaying a shift of responsibilities perpetuate the legal marginalisation, and there can be a continuing lack of access to protection, even after a protection seeker has reached State territory.

An example is the situation of asylum seekers, who fall under the legal mechanism of the Dublin system.[321] In this context the situation of protection seekers on the Greek islands is particularly striking: while respective individuals have already reached EU territory, they are far from reaching protection and, additionally, they have not reached safety.[322] There is a lack of access to fair asylum procedures, which constitutes a breach of the obligations stemming from the external responsibility.[323] Additionally, the continuum of human rights violations constitutes a breach of protection obligations stemming from the internal responsibility of the EU and its Member States to uphold human rights on EU territory.[324] The situation of protection seekers on the Greek islands exemplifies a failure of the EU and its Member States to do justice to both the external and the internal responsibility. This example illustrates how the responsibility principles may overlap in certain contexts.

321 For a discussion of this situation as an example of a transfer of jurisdiction see Bast, Harbou and Wessels, *supra* note 30, 40 ff.

322 On the inhumane conditions and ensuing human rights violations see Equal Rights Beyond Borders, *The Lived Reality of Deterrence Measures: Inhumane Camps at Europe's External Borders* (2019); Nora Markard *et al.*, *No State of Exception at the EU External Borders: Expert Opinion for MEP Erik Marquardt* (2020).

323 On cases before the ECtHR to claim violations of human rights due to living conditions in the EU hotspot camps, see Equal Rights Beyond Borders, https://equal-rights.org/en/litigation/european-court-of-human-rights/.

324 On the violation of Art. 3 ECHR due to deficiencies in asylum procedures, detention and living conditions in Greece see ECtHR, *MSS v. Belgium and Greece*, Appl. No. 30696/09, Grand Chamber, Judgement of 21 January 2011 (CE:ECHR:2011:0121JUD003069609); on the violation of Art. 4 CFR see CJEU, Judgement of 21 December 2011, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* Joined Cases C-411/10 and C-493/10 (EU:C:2011:865) ECR I-13905; for a discussion of these decisions see Costello, *The Human Rights of Migrants and Refugees in European Law*, *supra* note 61, at 262 ff. and 265 ff.

8.4 Conclusion

Overall, this chapter has argued that there is an external responsibility of States inherent to the principle of (universal) human rights and the legal concept of the refugee. To establish the principle of external responsibility, this chapter drew a comparison to the civil law concept of joint and several liability, which is denoted under the notion of 'solidarity' in several civil law jurisdictions. However, the European as well as the international legal framework governing protection lack a crucial element of joint and several liability schemes: a system of joint and several *compensations* among the debtors. This leads to the international dimension of the asylum paradox and therewith to the last principle in question, the principle of inter-State responsibility. The following chapter will discuss this principle, taking the principle of solidarity as a starting point.

9 Inter-State responsibility

The issue of access to protection concerns not only the relationship between protection seekers and States, but also the relationship between States, as part of an international community. The asylum paradox takes place in a supranational and international setting, with numerous States and millions of protection seekers worldwide. With a view to the complex system of shared responsibilities in the context of access to protection under EU law, this book takes a broad approach to the notion of 'State' as point of departure.[325] With regard to the international protection regime and the inter-State dimension in the focus of this chapter, the EU is seen as a unified polity. Each EU Member State engaging in the admission of protection seekers can represent the EU at international level. The focus of this chapter therefore lies on the relationship of the EU and the international community of States at international level and not on the relationship between Member States within the EU.

Against this backdrop, this chapter introduces the third principle of the responsibility framework: the principle of inter-State responsibility. The chapter starts with a discussion of the principle of solidarity as structural principle of the legal order governing the relationship between States and the international community with a view to the granting of protection (9.1),

325 See above Part 1 Chapter 3.1.3.

then draws on the principle of inter-State responsibility (9.2) and, finally, discusses specific proposals for responsibility- and burden-sharing arrangements as means to act upon the principle of inter-State responsibility (9.3).

9.1 Point of departure: solidarity as structural principle of the international protection framework

This section outlines the role of solidarity as structural principle of the legal regime governing the granting of protection. On the one hand, solidarity is relevant at international level as the principle governing the relationship between States (9.1.1). On the other hand, there is the European dimension, within which solidarity plays a role in the relationship between EU Member States (9.1.2). With respect to the focus of this chapter on the international dimension of the inter-State responsibility, and thus solidarity, this section focuses on the international legal context, only briefly addressing the principle of solidarity among EU Member States.

9.1.1 The principle of solidarity at international level

The principle of solidarity is seen as structural principle of international law.[326] Despite the abundant use of the term, however, there is no uniform definition of 'solidarity' at international level.[327] Solidarity is described as 'essentially contested', since 'States agree on the desirability in the abstract but disagree on what it means in practice.[328] More than 350 years ago, Vattel described solidarity as a moral obligation in the relationship between States, grounded on the principle of humanity.[329] Solidarity is discussed as reflecting the transformation of international law 'into a value based

326 Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (2010).

327 See Bauder and Juffs, '"Solidarity" in the Migration and Refugee Literature: Analysis of a Concept', 46(1) *Journal of Ethnic and Migration Studies* (2020) 46, which develops a typology of scholarly approaches to the notion of solidarity.

328 See Thym, *supra* note 63, at 355.

329 Emer de Vattel, *Le Droit des Gens ou Principes de la Souveraineté* (Préliminaires ss. 1–16, Livre II, Chapitre I, ss. 11–20, 1758, reprint Geneva, 1958).

international legal order'[330] and described as a 'constituent element of the concept of justice'.[331] This connotation is reflected in several resolutions of the UN General Assembly defining solidarity as 'a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most'.[332] In the context of refugee law, solidarity is often directly linked with international cooperation as well as responsibility- and burden-sharing, as will be further outlined in the following.

While solidarity is explicitly mentioned in the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (OAU Convention),[333] the Refugee Convention contains no explicit reference to solidarity, instead referring to 'international co-operation',[334] as enshrined in Art. 55 and 56 of the UN Charter. International cooperation can be acted upon by engaging in burden- and responsibility-sharing as objectives or forms of such cooperation.[335] The Refugee Convention is therefore seen as an 'ex-

330 Rüdiger Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' in Pierre M. Dupuy *et al.* (eds), *Völkerrecht als Weltordnung: Festschrift für Christian Tomuschat* (2006) 1087, at 1087.

331 Karel Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections' in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (2010) 3, at 7.

332 See UN General Assembly, Res. 56/151 of 19 December 2001 and Res. 57/213 of 18 December 2002.

333 Art. II (4) OAU Convention prescribes: 'Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.'

334 The Preamble of the Refugee Convention, para. 4, states: 'Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.'

335 For a detailed discussion of the principle of international co-operation in the refugee context see Türk and Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', 28(4) *International Journal of Refugee Law* (2016) 656; see also Dowd and McAdam, *supra* note 196. For a critical distinction between international co-operation and solidarity see Laurence Boisson de Chazournes, 'Responsibility to Protect: Reflecting Solidarity?' in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (2010) 93.

pression of international solidarity'[336] and the UNHCR's Executive Committee has repeatedly made reference to solidarity along with *responsibility-* and *burden-sharing* in its Conclusions.[337] The principle of solidarity is also explicitly mentioned in the 1967 UN Declaration on Territorial Asylum[338] as well as in a number of draft conventions on territorial asylum. A reference to 'international solidarity' and 'effective responsibility and burden-sharing among all states' can further be found in the Preamble of the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees.[339]

The common connection between solidarity and responsibility has also been referred to by the Council of Europe. In its Resolution (67)14 on Asylum to Persons in Danger of Persecution[340] the Council says: 'Where difficulties arise for a member State in consequence of its action in accordance with the above recommendations, Governments of other member States should, in a spirit of European solidarity and of common responsibility in this field, consider individually, or in co-operation, particularly in the framework of the Council of Europe, appropriate measures in order to overcome such difficulties.'

A recent expression of an international commitment to responsibility- and burden-sharing is the 'New York Declaration for Refugees and Migrants' (NYD),[341] adopted by the UN General Assembly in 2016, which will

336 Kimminich, 'Die Genfer Flüchtlingskonvention als Ausdruck globaler Solidarität', 29(3) *Archiv des Völkerrechts* (1991) 261.

337 See for instance EXCOM Conclusion No. 79 (XLVII) 1996, 'General Conclusion on Protection, Burden-Sharing and International Solidarity'; see also UN High Commissioner for Refugees (UNHCR), *Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees*, 7 September 1998, A/AC.96/904. For a discussion of these documents see Noll, *Negotiating Asylum*, *supra* note 115, at 279 ff.

338 UN General Assembly, Declaration on Territorial Asylum, A/RES/2312(XXII), 14 December 1967.

339 UN High Commissioner for Refugees (UNHCR), Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, 16 January 2002, para. 8: 'Stressing that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international co-operation in a spirit of solidarity and effective responsibility and burden-sharing among all States.'

340 Council of Europe: Committee of Ministers, Resolution (67) 14: Asylum to Persons in Danger of Persecution, 29 June 1967, 14 (1967).

341 UN General Assembly, 'New York Declaration for Refugees and Migrants: Resolution adopted by the General Assembly', A/RES/71/1, 3 October 2016.

be further discussed below.[342] Overall, however, there is no legally binding framework imposing specific obligations on the basis of solidarity or responsibility-sharing.[343] As Hurwitz concludes, 'States have generally been reluctant to accept substantial obligations based on the principle of solidarity'.[344] This is a major difference between the principle of solidarity at international level and the principle of solidarity at EU level, as will be briefly discussed in the next section.

9.1.2 The principle of solidarity in the legal context of the EU

This section sketches the role of the principle of solidarity in the legal context of the EU. With regards to the assessment of safe pathways, this outline is relevant in two ways. First, the principle of solidarity is a principle guiding the external policies of the Union, and is thus relevant to the inter-State relationship at international level. To this end, the EU is seen as a unified polity, with shared competencies in the areas of granting access to territory and protection.[345] Second, the principle of solidarity holds a firm place in the relationship *between* EU Member States. While this second aspect affects the internal stability of the Union, and thus the *internal* dimension of responsibility discussed above,[346] the normative force attributed to solidarity in this relationship is worth mentioning here.

342 See below Part 2, Chapter 9.3.

343 For a discussion of soft and hard law instruments affirming the principle of solidarity see Türk and Garlick, *supra* note 335, at 661 ff.; see also Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility-sharing Fulfil the Promise of the 1967 Protocol?', 29(2) *International Journal of Refugee Law* (2017) 201; Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited', 21(3) *International Journal of Refugee Law* (2009) 387, on UNHCR's Convention Plus Initiative dedicated to the creation of international binding agreements on responsibility-sharing.

344 Hurwitz, *supra* note 119, at 140.

345 See further above Part 1 Chapter 3.1.3 and 3.2.

346 See above Part 2 Chapter 7.

In the legal context of the EU, solidarity is seen as a 'fundamental value underpinning European integration'.[347] The Lisbon Treaty[348] refers to solidarity as one of the founding values of the Union, which shall guide the Union's actions on the international scene (see Art. 1a TEU, as well as the 'external actions' in Art. 10A(1) TEU). Furthermore, Art. 3(5) TEU states that the EU shall contribute to 'solidarity and mutual respect among peoples' in its external relations (see also Art. 21(1) TEU).

Art. 4(3) TEU provides that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. Most importantly, there is a 'solidarity clause' enshrined in Art. 222 TFEU and the notion can also be found in the Preamble of the Charter of Fundamental Rights[349] as well as in Chapter IV of the Charter ('Solidarity'). After all, the principle of solidarity frames the policies of the Union within the common area of freedom, security, and justice (see Art. 67(2) TFEU) and therewith the relationship *between Member States* in the area of asylum and migration law.[350] Here again, solidarity is linked to responsibility-sharing. Art. 80 TFEU refers to both, solidarity *and* responsibility-sharing, stating that '[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States'.[351] The CJEU has even ascribed a

347 Sangiovanni, 'Solidarity in the European Union', 33(2) Oxford Journal of Legal Studies (2013) 213, at 213; see further on solidarity in the EU legal context, Veronica Federico and Christian Lahusen (eds), *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (2018); Jürgen Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (2018) 114; Jürgen Bast, 'Solidarität im europäischen Einwanderungs- und Asylrecht' in Stefan Kadelbach (ed.), *Solidarität als Europäisches Rechtsprinzip?* (vol 32, 2014) 19.

348 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

349 European Charter of Fundamental Rights, Preamble para. 2: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.'

350 Art. 67(2) TFEU: 'It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.'

351 See also *Policies on Border Checks, Asylum and Immigration* (Chapter 2), Art. 63b of the Lisbon Treaty: 'The policies of the Union set out in this Chapter and their

binding nature to the principle of solidarity between Member States. In a ruling concerning contested relocation decisions of the European Council in 2015,[352] the Court stated that there are legal obligations (of solidarity) that can follow from the principle of solidarity.[353] It is not possible to draw direct conclusions from the legal nature of the principle of solidarity in the EU legal context to the international level. However, this ruling exemplifies the normative force the principle can come to entail despite the 'vagueness' generally ascribed to it.

9.2 The principle of inter-State responsibility

Against the backdrop of the previous discussion of the principle of solidarity and the interchangeable use of solidarity and responsibility-sharing in the international context, this section adds the principle of inter-State responsibility to the 'responsibility triad' developed in the course of this book. This section argues that the notion of inter-State responsibility is more specific than solidarity as it captures the commitment States have taken up for refugee protection at the international level. As discussed previously, the term 'responsibility' implies having an obligation to someone or something and being accountable in a specific context.[354] The inter-State responsibility draws on the (external) *responsibility* owed (in principle) jointly by all States that have committed to the international protection framework.[355] Therefore, the principle of external responsibility and the principle of inter-State responsibility are strongly interlinked.

Solidarity and responsibility-sharing can be seen as an *expression* of an existing inter-State responsibility and remain relevant to the question of how States should act to do justice to the inter-State responsibility. As Morano-Foadi puts it, 'solidarity is inextricably linked with responsibility.

implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.'

352 European Union, Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015, L 248/80.

353 Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union* (2017) (EU:C:2017:631), para. 253, 291.

354 See above Part 2 Chapter 6.3.

355 See above Part 2 Chapter 8.2. See also Dowd and McAdam, *supra* note 196, at 869, pointing out that 'responsibility-sharing relates to the recognition that refugee protection is a global responsibility'.

Solidarity gives rise to responsibility and is a desired consequence of responsibility'.[356]

The last principle to delimit from inter-State responsibility, solidarity and responsibility-sharing is 'burden-sharing'.[357] Milner refers to 'burden-sharing' as 'the principle through which the diverse costs of granting asylum assumed by the host state are more equitably divided among a greater number of states'.[358] Fonteyne sees the principle of burden-sharing as unquestionably 'governing refugee policy at UN level'.[359] Since the use of the term 'burdens' in the context of protection is controversial, 'burden-sharing' is often replaced by the term 'responsibility-sharing'.[360] Overall, burden-sharing can be regarded as the *necessary practical consequence* of a sharing of responsibility. In this sense, Hathaway and Neve refer to responsibility-sharing as a principle governing the provision of protection, while they relate burden-sharing to the costs of meeting protection needs.[361]

As soon as a State acts upon its *external* responsibility – e.g., by admitting protection seekers – the *internal* responsibility is triggered. Acting upon the principle of *inter-State* responsibility can, for instance, help to alleviate administrative and financial 'burdens' affecting the internal order following from the admission of protection seekers. As Bast highlights, there is a connection between solidarity and efficiency with regard to both refugee protection as well as State interests.[362]

Chapter 8 drew an analogy between the international protection regime and the civil law concept of joint and several liability.[363] As pointed out, some civil law jurisdictions use literally the term 'solidarity' or similar

356 Morano-Foadi, 'Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures', 19(3) *European Journal of Migration and Law* (2017) 223, at 223.

357 For an overview of definitions see Dowd and McAdam, *supra* note 196, at 869, note 28 and 29.

358 James Milner, *Refugees, the State and the Politics of Asylum in Africa* (2009), at 39.

359 Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees', 8(1) *Australian Year Book of International Law* (1983) 162, at 181.

360 Türk and Garlick, *supra* note 335, at 664 ff.; see also Dowd and McAdam, *supra* note 196, at 869 ff.

361 Hathaway and Neve, 'Making International Refugee Law Relevant again: A Proposal for Collectivized and Solution-Oriented Protection', 10 *Harvard Human Rights Journal* (1997) 115, at 144 ff.

362 Bast, 'Solidarität im europäischen Einwanderungs- und Asylrecht', *supra* note 347, at 23.

363 See Part 2 Chapter 8.2.

expressions to denominate this concept of liability ('Solidarschuld'/'solidarietá'/'solidarité' in Swiss law,[364] 'solidarité entre les débiteurs' in French law[365] and 'solidarietá' or 'l'obligazione in solido' in Italian law[366]). This is not by coincidence, as both the civil law concept and the term 'solidarity' can be traced back to Roman law (*obligatio in solidum*). While the civil law concept of solidarity foresees a system of internal compensation between debtors, such a compensation mechanism is missing in the international framework governing protection. The principle of solidarity plays an important role in this context. At present, the international protection regime implies an allocation of responsibility due to geographical proximity. This might in some cases follow the logic of 'special solidarity bounds' discussed by Kritzman-Amir, pointing out that 'neighboring countries generally tend to have some sort of special solidarity bonds among them or to be particularly responsible for each others' situation'.[367] Recent examples in the legal context of the EU are the laws and policies that emerged as response to the war in Ukraine as a country on the European continent.[368]

However, legal and political reactions of countries or regions to a specific crisis do not solve the lack of a responsibility allocation mechanism at international level. As Paz notes, the 'outcome is normatively arbitrary from the perspective of both the individual non-national and the state'.[369] The necessary negotiation of individual protection needs and interests, as well as national resources and capacities, is replaced by arbitrary rules of geographical proximity – or, as Gibney describes it, a 'tyranny of geography'.[370] The next section will delve into this issue by addressing proposals for responsibility-sharing arrangements with a view to refugee protection.

364 Cf. Art. 143 located in the subsection titled 'Die Solidarität' (the solidarity) of the Swiss Code of Obligations *Obligationenrecht (OR)*.

365 Cf. Art. 1313 of the French *Code Civil*.

366 Cf. Art. 1292 of the Italian *Codice Civile*.

367 Kritzman-Amir, 'Not in My Backyard', *supra* note 196, at 373; see also Funke, *supra* note 312, on the requirement of proximity with regard to a moral responsibility for refugees.

368 On the different measures undertaken based on EU solidarity with Ukraine, see https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/.

369 Paz, *supra* note 131, at 9.

370 Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (2004), at 195.

9.3 Acting upon a principle of inter-State responsibility: responsibility-sharing arrangements at international level

This section discusses possibilities of acting upon the principle of inter-State responsibility, to set the scene for the assessment of safe pathways in Part 3. To this end, this section starts with identifying three main approaches to responsibility-sharing at international level[371] as setting the course in the discussion (9.3.1). Against the backdrop of this categorisation, the following sub-section discusses different scholarly proposals for responsibility-sharing schemes (9.3.2). The section concludes with a brief outline of the NYD with the GCR and the GCM as examples of soft law promoting a 'differentiated approach' to responsibility-sharing at international level (9.3.3).

9.3.1 Three main approaches: 'common responsibility', 'common but differentiated responsibility' and 'emergency solidarity'

Addressing the question how States could act upon a principle of inter-State responsibility opens a vast field of discussions.[372] Coming back to the analogy of the civil law concept of joint and several liability, there are two possibilities of sharing the responsibility ('debt') owed due to the inter-State responsibility: sharing responsibility through 'stepping in', by admitting protection seekers and offering protection, or sharing responsibility through compensatory mechanisms, such as financial contributions. Safe pathways fall into the first category. However, the following discussion shows that there are several ways to approach the implementation of safe pathways, which can lead to different effects on the inter-State responsibility.

Three approaches set the course: First, there are approaches tackling the 'collective action problem' pointed out in the current system, by implementing safe pathways in a *predictable* manner and thereby facilitating the use of maximum capacities and resources of States. This chapter will refer to this first category as 'common responsibility-sharing'. The second category is similar to the first one, but with a crucial difference: this category captures

371 With a view to the scope of this book on safe pathways to protection under EU law, this section will not discuss the 'Dublin-System' as responsibility-sharing mechanism for conducting asylum procedures under EU law, regulated by the Dublin-III Regulation (Regulation (EU) 604/2013).

372 See Dowd and McAdam, *supra* note 196, for an overview of different options.

approaches promoting a 'differentiated' sharing of common responsibility, put forward by various scholars under the notion of 'common but differentiated responsibility', as will be further discussed below. This approach is likely to have the greatest potential to do justice to the inter-State responsibility.

The first two categories stand in contrast to approaches promoting singular *ad hoc* admissions in emergency situations, referred to as acts of 'emergency solidarity' in the following.

9.3.2 Proposals for responsibility-sharing schemes: from the 'Comprehensive Plan of Action' to 'Regional Disembarkation Platforms'

Proposals for allocating effective responsibility-sharing schemes at international level, e.g. based on a distributive key, have long been debated among scholars.[373] In their proposal, Hans and Suhrke outline the advantages of a system in which protection is primarily provided within the regions of origin, while States outside these regions would mainly contribute through fiscal burden-sharing.[374] In a later work, Suhrke describes refugee protection as a global 'public good', seeing the current refugee protection system as characterised by a collective action failure, comparing the distributive situation to a prisoner's dilemma.[375] In their joint contribution in 1997, Hathaway and Neve call for a 'collectivised' protection based on a 'common but differentiated responsibility', depending on the capacities of States but still focusing on 'temporary protection', if possible close to the home regions of refugees.[376] A similar proposal was put forward by Hathaway in 2007.[377] Even if these later proposals are somewhat more differentiated with

373 For early proposals see Fonteyne, *supra* note 359.

374 Hans and Suhrke, *supra* note 196, at 83.

375 For harsh criticism in this regard see Suhrke, 'Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action', 11(4) *Journal of Refugee Studies* (1998) 396; for similar approaches see Thielemann and Dewan, 'The Myths of Free-Riding: Refugee Protection and Implicit Burden-Sharing', 29(2) *West European Politics* (2006) 351; Noll, 'Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field', 16(3) *Journal of Refugee Studies* (2001) 236.

376 Hathaway and Neve, *supra* note 361.

377 Hathaway, 'Why Refugee Law Still Matters', 8(1) *Melbourne Journal of International Law* (2007) 89; for a critical discussion see Noll, 'Why Refugees Still Matter: A Response to James Hathaway', 18 *Melbourne Journal of International Law* (2007) 536.

a view to different capacities of States, they still leave the primary responsibility for providing protection and shelter to economically disadvantaged States in the regions of origin.[378]

A prominent EU proposal for tackling the issue of responsibility-sharing at international level is the concept of 'regional disembarkation arrangements', also referred to as 'regional disembarkation platforms' (RDP).[379] The idea foresees a transfer of individuals who have been rescued at sea to countries in the regions, from which potential protection claims will then be processed; eventually, protection seekers could be resettled on a voluntary basis. Similar concepts, such as the Australian 'Pacific Solution', raise more issues than they solve. The 'Pacific Solution' involved the transfer of protection seekers intercepted at sea to offshore processing centres on Nauru and Manus Island in Papua New Guinea, which have been criticised, *inter alia*, for being *de facto* detention centres.[380] In contrast to the 'Pacific Solution', it must be taken into account that individuals intercepted at sea by a Member State of the EU, by a vessel under its flag, fall under that Member State's jurisdiction, with the full application of the ECHR.[381]

One historic example of international responsibility-sharing, which is largely regarded as having been successful, is the Comprehensive Plan of Action for Indochinese Refugees (CPA).[382] The CPA was a multilateral

378 See Anker, Fitzpatrick and Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', 11 *Harvard Human Rights Journal* (1998) 295; *Harvard Human Rights Journal* (1999) 385.

379 See European Commission, 'Managing Migration: Commission Expands on Disembarkation and Controlled Centre Concepts', Press release, 24 July 2018, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4629; for a critical assessment see Ayse B. Akal and Maria G. Jumbert, 'The EU and Offshore Asylum Processing: Why Looking to Australia Is Not a Way Forward' (PRIO Policy Brief, 07/2021).

380 With a view to legal issues raised by the 'Pacific Solution' see Neha Prasad, 'Lessons from Australia's Pacific Solution', *Forced Migration Review* (Online) (2021), available at https://www.fmreview.org/externalisation/prasad; Karin F. Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific' (RSC Working Paper No. 36, Oxford October 2006); O'Sullivan, 'The Ethics of Resettlement: Australia and the Asia-Pacific region', 20(2) *International Journal of Human Rights* (2016) 241; see also Amnesty International, *Australia-Pacific: Offending Human Dignity – The 'Pacific Solution'* (24 August 2002), available at www.amnesty.org/en/documents/asa12/009/2002/en/.

381 See *Hirsi Jamaa and Others v. Italy*, *supra* note 116; for a comprehensive assessment of this issue see Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (2016).

382 See Türk and Garlick, *supra* note 335, at 667.

framework implemented by UNHCR from 1989 to 1997 to address the Vietnam 'boat people' crisis – the situation of thousands of protection seekers from Vietnam, who were displaced in the regions of Southeast Asia, suffering push-backs, detentions and non-admissions. The CPA involved assistance with status-determination procedures, resettlement and repatriation.[383]

With reference to the CPA in his 'modest proposal' for burden-sharing, Schuck argues that the advantages of 'proportional burden-sharing' lie in the predictability of risks (in the sense of a 'refugee crisis insurance') and the potential these arrangements bring for a 'maximization of resources available for protection'.[384] Similarly, Noll refers to the insurance rationale and assumes that regional burden-sharing schemes have a higher chance of succeeding than global ones.[385] He argues that if 'a collective of States shares the task of protection, peak costs will be avoided, while existing resources will be fully exploited'.[386] Thus, as pointed out by Dowd and McAdam, a 'common but differentiated responsibility' takes different capacities and resources of States into account.[387]

Arguing in favour of market-based burden-sharing mechanisms, Thielemann proposes a combination of policy harmonisation and quota-based initiatives.[388] The motivation of States thus plays a crucial role.[389] Thielemann sees the 'insurance rationale' as being one of the motives for burden-sharing arrangements.[390] He therefore asks whether burden-sharing arrangements are 'the result of instrumental co-operation to overcome col-

383 For a critical discussion of the CPA see Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck', 17(3) *Journal of Refugee Studies* (2004) 319; see also Hurwitz, *supra* note 119, at 158 ff.

384 Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 22 Yale Journal of International Law (1997) 243, at 270 ff.

385 Noll, *Negotiating Asylum*, *supra* note 115, at 267. For an overview on regional burden-sharing schemes see Türk and Garlick, *supra* note 335, at 665 ff.

386 Noll, *Negotiating Asylum*, *supra* note 115, at 265 ff.

387 Dowd and McAdam, *supra* note 196, at 885.

388 Eiko R. Thielemann, 'Towards Refugee Burden-Sharing in the European Union: State Interests and Policy Options' (2005).

389 See Dowd and McAdam, *supra* note 196, at 883 ff for an overview of the discussion on why states engage in responsibility-sharing.

390 Thielemann, 'Between Interests and Norms: Burden-Sharing in the European Union', 16(3) *Journal of Refugee Studies* (2003) 253, at 254.

lective action problems' or rather 'norm-guided actions based on emerging notions of cross-border solidarity'.[391]

With a view to the specifics of implementation and apportioning of responsibility within a differentiated responsibility-sharing scheme, the admission capacity of a State is decisive. Kritzman-Amir proposes following the same logic as for the implementation of a relative or progressive taxation system.[392] Wall suggests adapting the concept of a 'framework convention', developed by international environmental lawyers, to the context of international refugee protection.[393] A framework convention establishes general (legally binding) obligations, leaving further details to subsequent agreements or national legislation.[394] This concept resembles the legal nature of EU directives.

9.3.3 The New York Declaration for Refugees and Migrants and the UN Global Compacts of 2018

This section turns to the 2016 New York Declaration (NYD)[395] and the UN Global Compacts of 2018 as examples of soft law promoting a 'common but differentiated' approach to responsibility-sharing at international level. The NYD states in para. 68: 'States commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the different capacities and resources among States.' Annex I of the NYD contains the 'Comprehensive refugee response framework' (CRRF), providing the basis for the GCR,[396] developed by UNHCR and affirmed by the UN General Assembly in 2018. Among the suggested 'solutions' are resettlement and 'complementary pathways for admission to third countries, facilitating

391 *Ibid*.
392 Kritzman-Amir, 'Not in My Backyard', *supra* note 196, at 373; for further thoughts on applying the principle of progressive taxation on the distribution mechanism of the EU relocation scheme see Bejan, 'The "East/West" Divide and Europe's Relocation System for Asylum Seekers', 9(12) Journal of Social Policy (2016) 9.
393 Wall, *supra* note 343.
394 See Economic Commission for Europe, Committee on Housing and Land Management, Seventy-Second Session, Geneva 3, and 4 October 2011, Informal notice 5, *Framework Convention Concept,* Note by the secretariat, at 1, available at https://unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf.
395 UN General Assembly, 'New York Declaration', *supra* note 341.
396 UN General Assembly, 'Global Compact on Refugees', *supra* note 74.

safe access to protection'.[397] Thus, so-called 'complementary pathways'[398] play a crucial role. The latter include family reunification or scholarship programmes, which are specifically designed for or applied to protection seekers.

A similar objective of 'enhancing the availability and flexibility of pathways for regular migration' can be found in the GCM,[399] which is based on Annex II of the NYD and was adopted in the same year as the GCR. With a view to safe pathways, it draws on, among others, State actions such as 'humanitarian visas' and 'private sponsorships'.[400] Therefore, the GCM has the potential to address the situation of protection seekers who do not fall under the 'refugee' definition of the Refugee Convention.[401] Even though the discussions on 'fair' sharing of responsibility and 'global solutions' have not taken root in practice,[402] the GCM and the GCR constitute important international affirmations on the international responsibility of States for protecting the human rights of migrants and refugees worldwide.

9.4 Conclusion

This chapter has addressed the asylum paradox from an international perspective, to identify the principle of inter-State responsibility in the legal relationship between States at international level – vis-à-vis each other as well as vis-à-vis the international community as a whole. The chapter started with a discussion of the role of solidarity as structural principle in the international framework governing protection. It then argued that the principle of inter-State responsibility allows for capturing more specifically the *responsibility* States have based on the legal bond the international protection framework creates between them. Thus, the chapter pointed out that solidarity remains the normative basis of this responsibility, consider-

397 *Ibid*., para. 90 ff.
398 See Part 1 Chapter 3.1.2 for a delimitation of this term.
399 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', *supra* note 75; see objective 5.
400 *Ibid*., para. 21 (g).
401 See further, Bast, Endres de Oliveira, Wessels, 'Enhancing the Rights of Protection-seeking Migrants through the Global Compact for Migration: the Case of EU Asylum Policy', *International Journal of Refugee Law* (accepted for publication in 2024).
402 For a critical view see Schmalz, 'Verantwortungsteilung im Flüchtlingsschutz', *supra* note 196.

ing the interchangeable use of 'solidarity' and 'responsibility-sharing' in the international context.

With States and the international community as its subjects, the inter-State responsibility can be a guarantor for both, the internal as well as the external responsibility. The inter-State responsibility can unfold its value in situations where the external responsibility of a State conflicts with its internal responsibility – for instance, when a State with limited resources is hosting a proportionally high number of protection seekers.

Drawing on Chapter 8, this chapter argued that the 'responsibility bond' the international protection regime creates between all signatory States follows the logic of the civil law concept of joint and several liability. However, it is missing a mechanism of responsibility-sharing or compensation. Thus, the chapter outlined some of the scholarly proposals and practical examples of responsibility-sharing arrangements, which point to two important *qualities* of responsibility-sharing arrangements: the *predictability* these arrangements can provide (drawing on the 'insurance rationale') and the extent to which they *consider the different resources and capacities* of host States. Overall, there are two main *modalities* to share responsibility: through financial compensation, or through 'stepping in' by admitting protection seekers. Safe pathways to protection fall into this last category. Thus, the evaluation of the effectiveness of safe pathways with a view to *predictability* and *consideration of different resources* of States, depends on the overall approach they stand for: responsibility-sharing based on 'common responsibility' or on a 'common but differentiated responsibility', or whether they are merely acts of 'emergency solidarity'. In Part 3, these three categories will guide the assessment of safe pathways in light of the inter-State responsibility.

10 Conclusion Part 2: the responsibility framework as analytical assessment tool

This chapter has three objectives: first, it seeks to briefly summarise the findings of Chapters 7 to 9, which reconstructed the asylum paradox according to three responsibility principles (10.1). In a second step, the chapter outlines the three functions of the 'responsibility framework' as tool for the analysis and assessment of safe pathways to protection (10.2). The chapter closes with a discussion of the strengths and limits of this theoretical approach (10.3).

10.1 The triad of responsibility principles underlying the asylum paradox

The aim of Part 2 was to reconstruct the underlying premises of the asylum paradox by drawing on responsibility principles. Chapter 7 identified the principle of internal responsibility of States for the protection of the 'internal community'. Drawing on a broad understanding of the 'State' as territorial polity, the notion of 'internal community' captures everyone with an existing legal bond to a State. While this may include citizens, residents as well as individuals who are factually present in a State's territory, the obligations stemming from the internal responsibility vary depending on legal link and the context. Chapter 8 identified a principle of external responsibility of States for protection seekers not yet part of a State's internal community. Against the backdrop of Chapter 7, Chapter 8 concluded that the EU legal framework governing access to territory and protection focuses predominantly on the internal responsibility. Chapter 9 addressed the asylum paradox with respect to its inter-State dimension, outlining the principle of inter-State responsibility.

All three responsibility principles are strongly interlinked. This interrelatedness emphasises their nature as structural principles, laying down essential elements of the legal regime governing access to territory and protection in the EU. As internal peace and security are a precondition for human rights within a State's territory as well as a State's ability to fulfill its external responsibility, a State cannot act upon its *external* responsibility towards protection seekers, without respecting its *internal* responsibility. When considering that States have responsibilities towards each other, due to a joint responsibility they have towards protection seekers, the principle of inter-State responsibility becomes a direct consequence of the principle of external responsibility and a precondition for both, the external and the internal responsibility. Together, these three principles define a field of legality and tensions: the 'responsibility framework'.

10.2 The three functions of the responsibility framework

Three functions may be attributed to the responsibility framework within the course of this work: an analytical function (discussed at 10.2.1), a heuristic function (10.2.2) and a normative function (10.2.3).

10.2.1 The analytical function: unpacking safe pathways through the responsibility lens

First, the responsibility framework has an analytical function, allowing to structure the analysis of safe pathways according to the triad of responsibility principles. Thus, each principle implies certain assessment standards with a view to the three main issues framing access to protection: first, *who* is granted protection through the pathway (beneficiaries); second, *how* access to protection is specifically regulated (admission procedure); and, last, *what* is the content of protection to be achieved (protection status upon arrival). This section outlines respective considerations guiding the assessment of safe pathways with a view to the internal (10.2.1.1), the external (10.2.1.2) and the inter-State responsibility (10.2.1.3).

Apart from these preliminary considerations, which can already be attributed to one responsibility principle or the other, the assessment will follow an inductive approach. This will allow to consider further aspects of implementation of safe pathways, which can be attributed to the rights and interests of the subjects of the different responsibility principles. Thus, the assessment will allow to reveal trade-offs following from a focus on one responsibility principle or the other.

10.2.1.1 Assessment standards following from the internal responsibility

The principle of internal responsibility implies flexibility and discretion regarding the choice of *beneficiaries*, thus considering existing ties to the State (e.g., family ties) as well as specific State interests (referred to as 'utilitarian' criteria). Establishing a quota adds to the predictability of safe pathways, which is of benefit with a view to the preparation of administrative structures. With a view to the *procedures*, this principle implies the need for entry control and therefore for a visa procedure with security and health screenings of applicants. Here again, the principle of internal responsibility implies *discretion and flexibility* with a view to whether and how to implement safe pathways in the first place. Eventually, the principle of internal responsibility implies discretion with a view to the *status* granted upon arrival.

10.2.1.2 Assessment standards following from the external responsibility

The principle of external responsibility implies a broad scope of *beneficiaries*, with a focus on protection needs. The latter should be the basis of the *status* granted upon arrival. A *procedure* in line with the principle of external responsibility would have to be aligned with human rights standards, to be fair and not discriminatory, offering effective legal remedies in case fundamental rights are at risk. Individual access to these procedures is a factor particularly enhancing the principle of external responsibility.

Lastly the *additionality* and *complementarity* of safe pathways are crucial with a view to the principle of external responsibility.[403] These terms are used interchangeably in the legal and political discourse to describe the need for safe pathways in *addition* and not as alternative to territorial asylum, as well as the need for different pathways to *complement* each other to realise their maximum potential. For instance, if a person could be admitted through family reunification due to existing family ties to a specific State, this person should not be admitted through a resettlement scheme, to leave the latter 'open' for protection seekers without any family ties. This book will refer to these requirements as *additional* to territorial asylum on the one hand and *complementary* to other pathways on the other.

10.2.1.3 Assessment standards following from the inter-State responsibility

The principle of inter-State responsibility implies considering the approach to responsibility-sharing reflected in the pathway. As outlined in Chapter 9, the 'common but differentiated approach' is most in line with the principle of inter-State responsibility. Applying this approach to the choice of *beneficiaries* calls for considering existing reception capacities in first States of refuge. This can imply a focus on beneficiaries with special needs (e.g., for medical care). The most crucial issue would be the nature of the scheme as permanent or *ad hoc* (emergency) scheme, as well as the quantitative scope of a pathway, that is the scope of the admission quota in case there is one. Admissions that depend on an element of reciprocity – that is, any form of cooperation as condition for an admission – would not enhance the principle of inter-State responsibility.

403 On the terms 'complementarity' and 'additionality' see further Noll, Fagerlund and Liebaut, *supra* note 49, at 42.

Regarding the *procedure*, all issues concerning reception in the region are relevant to this principle of inter-State responsibility, including the legal status of protection seekers during the admissions and issues of safe departure.

The *protection status* granted upon arrival can have an impact on the inter-State responsibility if it is of short duration and provides a weak legal position. On the one hand, protection seekers without a long-term perspective remain a concern for the entire international community. Within the legal context of the EU a weak legal status could encourage secondary movements, which diminishes the predictability of an admission. On the other hand, a weak legal status impacts upon secondary access rights, such as family reunification. This can affect the situation of protection seekers (as family members) who are still in regions of conflict. This last issue relates back to the issue of beneficiaries, implying a joint admission of family members with a view to this principle.

10.2.2 The heuristic function of the responsibility framework: revealing tensions and trade-offs

The responsibility framework has a heuristic function, as it helps to reveal and predict potential tensions and trade-offs based on the analysis. Trade-offs exist between different scopes or effects of implementation measures that generally cannot be achieved on a practical – not necessarily legal – level. While trade-offs are particularly relevant from a policy perspective, they also allow for tracing certain patterns of implementation and reflecting on legal assumptions with regards to the effect of safe pathways on responsibility principles. Key trade-offs are

- flexible and utilitarian admission criteria vs. a focus on protection considerations (concerning *beneficiaries*);
- permanent schemes vs. *ad hoc* schemes; and
- individual access with rights and guarantees vs. State discretion (concerning the *procedures*);
- access vs. rights (concerning the *status*).

For instance, applying utilitarian criteria with a view to the *beneficiaries* might not lead to an admission of protection seekers with the most urgent need for protection. In terms of the inter-State responsibility, this might have a detrimental effect in the event that the respective capacities of first States of refuge are not considered. The (flexible) implementation of

a pathway as *ad hoc* scheme can impact on the overall *predictability* of admissions, which impacts on all three responsibility principles.

Furthermore, flexibility of States with a view to the status granted upon arrival is not necessarily compatible with a choice of status solely based on protection considerations. While refugee status might be the strongest and most appropriate depending on the individual case, it might not be the status granted in an admission procedure. The result might be a trade-off between access and status rights after arrival, potentially leading to further issues.

Ultimately, the most crucial trade-off regards the incompatibility of the discretion and flexibility of States regarding beneficiaries and procedures on the one hand, and ensuring individual claims with procedural safeguards on the other. If anyone would have to be admitted solely on the basis of an individual claim and protection considerations, there would be no room for State discretion.

How this is to be evaluated from a normative perspective depends on the general approach taken to asylum – that is, whether asylum is seen as a discretionary right of States or instead as a right of the individual vis-à-vis a State, stemming from the international commitment of all States to human rights and refugee protection. However, there is also the evaluation regarding the asylum paradox on which this book focuses. This book argues that there is an imbalance of responsibility principles, leading to a protection gap. A pathway offering an individual claim would make a significant difference in this regard. As argued in the previous chapters, the current legal framework and State practice governing access to protection show a predominant focus on migration control and the prevention of access. Implementing safe pathways offering individual access to protection would mean placing some weight on the other side of the scale, having a significant normative effect on the asylum paradox. Against this backdrop, the next section will identify key considerations for the assessment, pointing to the normative function of the responsibility framework.

10.2.3 The normative function of the responsibility framework: key considerations for the assessment

Finally, the responsibility framework has a normative function. The previous outline showed how considering each principle in the implementation of safe pathways necessarily leads to tensions and trade-offs. The assessment of safe pathways to protection in Part 3 will allow conclusions with

regard to the priorities the respective pathway or method of implementation reflects. This again allows for drawing conclusions about the effect of the respective pathway – or method of implementation – on the responsibility principles and therefore on the asylum paradox. There are three key considerations that will guide the assessment in this regard: whether there is a focus of safe pathways on protection or rather on migration control, which could lead to deterrent effects (10.2.3.1); whether there is, in contrast, a focus on individual access to protection, including procedural rights and guarantees (10.2.3.2); and, finally, whether the pathway reflects a common but differentiated approach to responsibility-sharing (10.2.3.3).

10.2.3.1 Migration control and deterrence

Chapter 7 and 8 outlined how the current system governing access to territory and protection has a primary focus on the internal responsibility, in several instances neglecting the external responsibility. On the one hand, the internal responsibility calls for a regulation of entry in the form of visa procedures and the predictability of admissions. On the other hand, a predominant focus on the element of migration control, securitisation or even (direct or indirect) deterrence of protection seekers following from the implementation of safe pathways will be considered as perpetuating or even exacerbating the asylum paradox. Such a focus would also affect the relation of safe pathways to territorial access to asylum.

10.2.3.2 Individual access and procedural safeguards

While there is no explicit right to access a specific State to seek protection under international or EU law, a dynamic interpretation of human rights obligations in the extraterritorial context would express a strong commitment to the principle of external responsibility. Safe pathways or methods of implementation promoting the application of individual human rights in the extraterritorial context – e.g., by granting procedural rights and foreseeing individual claims – are therefore considered to enhance the principle of external responsibility. A pathway offering a permanent option of extraterritorial access to protection would directly address the existing protection gap. With a view to the imbalance of responsibility principles manifested in the asylum paradox, such pathways or methods of implemen-

tation are therefore considered to have a significant normative effect on the current asylum system, if offered *in addition* to and not as a replacement of territorial asylum. Given the various situations of displacement worldwide, the principle of external responsibility implies a complementary approach to the implementation of different pathways.

10.2.3.3 Common but differentiated responsibility

Chapter 9 argued that the international protection regime has two essential deficiencies with a view to the principle of inter-State responsibility. Firstly, the regime implies an arbitrary allocation of responsibility based on geographical proximity. Secondly, the regime has been compared to the civil law concept of joint and several liability, with the main difference that the regime lacks a mechanism of compensation. Safe pathways or methods of implementation influencing the allocation of responsibility are therefore considered as enhancing the inter-State responsibility. The assessment in Part 3 will be guided by identifying the respective approach to responsibility-sharing reflected in the pathway ('common responsibility', 'common but differentiated responsibility' and 'emergency solidarity'). Overall, a complementarity of safe pathways to address different situations of protection needs and host States enhances the principle of inter-State responsibility.

10.3 The strengths and limits of a responsibility-based approach

This section seeks to reflect on the strengths and limits of a theoretical approach based on responsibility principles. The assumption is that analysing and assessing safe pathways according to responsibility principles adds a structure to legal argumentation, potentially facilitating a balanced approach to the question of access to protection. However, this lends neither the theoretical approach nor the respective conclusions normative neutrality. The value of a principle-based approach can be its downside: principles are even more open to interpretation than norms of positive law. Depending on the political and legal perspective, their content can vary. The scope this study applies to each principle can certainly be contested. The first controversial issue is whether States can at all do justice to an internal responsibility by controlling access to their territories. Similarly,

the broad scope of the principle of external responsibility can be subject to controversies.

However, acknowledging that the chosen theoretical approach is not normatively neutral does not diminish its value with a view to its analytical and heuristic function. Reconstructing the asylum paradox by drawing on responsibility principles and using the findings to structure the analysis and assessment of safe pathways to protection implies a State-centric perspective. This approach differs from the dominant scholarly debate in two ways: first, with a view to the nature of the principles underlying the asylum paradox, and, second, with a view to the nature of their relation to each other.

To start with the first aspect: in the scholarly debate on the asylum paradox the dominant line of argumentation revolves around *sovereignty* on the one hand and *human rights* on the other. This book argues that the antagonistic framing of sovereignty and human rights can lead to a stalemate – the State claims sovereignty, the individual claims rights. Addressing the asylum paradox with principles of responsibility enables a change in perspective, as each responsibility is of State – and thus of collective – concern. Furthermore, this book argues that the principle of sovereignty most often leads to a self-serving and circular reasoning – the State controls borders because it has the power to do so. The principle of internal responsibility adds transparency to the legal discourse, by specifying a purpose of border and migration control. This, in turn, can add transparency to the debate on the legitimacy of respective measures. In contrast to references to human rights, the principle of external responsibility addresses the position of the individual as rights holder, as well as the collective nature of the responsibility and therewith the inter-State dimension inherent to the international protection system.

To continue with the second aspect: the relation of sovereignty and human rights is mostly addressed as 'tension' or 'conflict' in the academic debate. By replacing the scholarly debate on sovereignty and human rights with responsibility principles, one could argue that the asylum paradox is the result of a *tension* or *conflict* of States regarding their responsibilities towards different subjects – their 'internal community' on the one hand and protection seekers as external to this community on the other. However, this book argues that neither the notion of 'tension' nor that of 'conflict' appropriately captures the asylum paradox. The current legal framework governing protection has a significant protection gap, which is enhanced by a multi-layered system of access prevention. Thus, the legal framework gov-

erning access to protection, respective State practice and recent jurisprudence show a predominant focus on the internal responsibility. This book therefore addresses the asylum paradox as the result of an *imbalance* among the different responsibility principles. Against the backdrop of this image of an 'imbalance', Part 3 examines how safe pathways to protection weigh in the balance.