Schriften zum Migrationsrecht 45

Pauline Endres de Oliveira

Safe Access to Asylum in Europe

Normative assessment of safe pathways to protection in the legal context of the European Union

Nomos

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'I wouldn't have been able to travel to Switzerland on my own.
The possibility to seek asylum at the Swiss embassy saved my life.'
Statement of a Somali refugee,
published by the European Council on Refugees
in Exiles (ECRE) in 2011

Preface

This book was defended as PhD thesis at the Faculty of Law of the University of Giessen in May 2022. The idea for the thesis was born in 2012, when I worked as a migration and asylum lawyer in Berlin. I remember my first case of a Syrian woman, resident in Germany, asking me to help her family members to obtain visas to leave Syria after the outbreak of the Syrian Civil War in 2011. My client stressed that she would be willing to pay for everything, all travel and living expenses of her relatives. I remember explaining that money was not the problem – the issue was the law. Her family members – her elderly mother and adult siblings – did not qualify for family reunification. The exceptional provision of humanitarian admission under Section 22 of the German Residence Act did not apply, as all Syrians were said to be in the same situation of danger and distress. There was no humanitarian admission program at the time and resettlement, as I was told by UNHCR, did not apply to Syrians – their situation was not protracted (yet). Nevertheless, I supported the family with their claims for humanitarian visas at the German embassy in Beirut. I remember sharing their fears the day they crossed the border from Syria to Lebanon, to submit their visa applications in person. I accompanied every bureaucratic step on the way, witnessing all the administrative hurdles of the visa procedure. But it was only when Germany launched its *ad hoc* humanitarian admission programs that the family was granted visas – based on a private sponsorship scheme. This scheme was one of several *ad hoc* humanitarian admission schemes implemented at *Länder* level from 2013 onwards in Germany, granting access to over 21,000 Syrians fleeing the war. Additionally, Germany set up *ad hoc* humanitarian admission schemes at federal level from 2013 to 2015, with more than 21,000 beneficiaries. By the time of implementation, I had begun working as consultant for UNHCR, where I responded to legal queries from Syrian relatives living in Germany. All of them wanted to know how their family members in Syria could safely reach the EU. I constantly repeated that the options were limited, that UNHCR did not have the power to decide, that States have the sole decision-making authority. By 2016, the number of around 42,000 beneficiaries of the *ad hoc* humanitarian admission schemes in Germany contrasted starkly with the

number of people estimated to have been displaced due to the Syrian civil war by then: 13.5 million.

Now, at the end of 2023, more than ten years after I first had the idea for my thesis, the war in Syria has not come to an end, but most of the humanitarian admission schemes have. Meanwhile, the war in Ukraine has led to the largest refugee crisis in Europe since the Second World War. While the European Union took effective legal measures to offer protection seekers from Ukraine a visa-free entry option and temporary protection status, the majority of the over 108 million people UNHCR declares to be displaced worldwide by the end of 2022 are still in their home countries or regions of origin. There is a political struggle at EU and national level over how to deal with the continuous need for evacuation of thousands of Afghans, whose lives are threatened since the Taliban takeover in 2021. Humanitarian admission programs and other safe pathways are the only way the majority of protection seekers worldwide can reach protection in the EU without risking their lives once more. My practical experiences in the field have raised several questions with regard to the implementation of safe pathways to protection, which I address in this book. My main research interest, however, lies in the relevance of safe pathways with a view to what I describe as the asylum paradox: the paradoxical interplay between the granting of territorial protection by States on the one hand, and the prevention of access to territory through measures of border and migration control on the other.

Acknowledgements

Writing this book has been a privilege I owe to the support of several people and institutions. First and foremost, I want to thank my supervisor, Professor Jürgen Bast from the Justus Liebig University Giessen, for his constant support at every step of the way. When I approached him with the idea for my thesis, he asked why I wanted to focus on safe pathways and advised me to remember my motivation whenever I faced difficulties or challenges along the way. In the following years, Professor Bast was always approachable and supportive, offering insightful advice and constructive critique. Whenever I faced a challenge, I remembered his words. I am also particularly thankful to Professor Cathryn Costello for being the second reviewer of the thesis. Professor Costello offered invaluable feedback and advice during my stay at the Refugee Studies Centre in Oxford in 2016. Her work has been a great inspiration during the time of writing. Another great source of support was the group of researchers at the Justus Liebig University. Our regular research seminars have always been an inspiration and very valuable to me. Special thanks go to Rhea Nachtigall, who joined forces with me in Berlin during the last years, constantly exchanging drafts and thoughts with me. Valuable comments and advice were also provided by Dr Dana Schmalz.

Writing and publishing this book has not only taken time, but also required financial resources. I am therefore particularly grateful to the German Research Foundation (Deutsche Forschungsgemeinschaft) for a publication grant. I am further thankful for the scholarship granted by the Heinrich Böll Foundation, which gave me time and freedom for my research and allowed me to spend invaluable time researching abroad. My research stays at the Refugee Studies Centre in Oxford, the University of Copenhagen and the Danish Institute of Human Rights provided me with new insights on the legal and practical implications of safe pathways. Seminars in Oxford, at the Raoul Wallenberg Institute in Lund and the University of Aarhus have been a great source of inspiration. I had the honour to exchange thoughts with outstanding experts in the field. I am particularly thankful for the feedback of Professor Gregor Noll, Professor Jens Vedsted-Hansen and Professor Thomas Gammeltoft-Hansen. Special thanks to Dr Nikolas Feith Tan, who has continuously supported my work.

I would also like to thank Professor Violeta Moreno-Lax from Queen Mary University of London for inspiration and feedback.

I owe the idea for this book to my practical work in the field of asylum law. I therefore want to thank all my former colleagues at the law firm, UNHCR and Amnesty International Germany, as well as all my colleagues from the Network of Migration Law. Their daily commitment to the rights of protection seekers is a constant source of motivation and inspiration to me.

Finally, I want to thank my family and friends for their love and support during the years of writing my dissertation. Special thanks to my parents and my sister, for their constant encouragement. I am also particularly thankful for the help my parents-in-law provided with childcare during the pandemic. Noah and Elias, thank you for always making me smile. Most of all, I am endlessly grateful to my husband David for his tireless support and for always having my back.

Abbreviations

AG	Advocate General
APD	EU Asylum Procedures Directive
ARAP	Active Refugee Admission Policies
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ATCR	Annual Tripartite Consultations on Resettlement
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BVOR	Blended Visa Office Referred
CAT	Convention against Torture
CEAS	Common European Asylum System
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CPA	Comprehensive Plan of Action
CRC	Convention on the Rights of the Child
CRRF	Comprehensive refugee response framework
e.g.	for example
EC	European Communities
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees in Exiles
ECtHR	European Court of Human Rights
ed/eds	editor/editors
EMN	European Migration Network
ERN	European Resettlement Network
EU	European Union
ff	and the following pages

GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GRSI	Global Refugee Sponsorship Initiative
HAP	humanitarian admission program
IA	Immigration Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICORN	International Cities of Refuge Network
IDP	internally displaced people
IRCC	Immigration, Refugees, and Citizenship Canada
JAS	Joint Assistance Sponsorship
LTV	limited territorial validity
n	footnote
NYD	New York Declaration for Refugees and Migrants
NGO	non-governmental organisation
OAS	Organization of American States
OAU	Organization of African Unity
PEP	Protected Entry Procedure
OR	Obligationenrecht (Swiss Code of Obligations)
QD	EU Qualification Directive
R2P	Responsibility to Protect
RDP	regional disembarkation platform
SUR	Strategic Use of Resettlement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights

UN	United Nations
UN GA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
VHAS	Voluntary Humanitarian Admission Scheme
vol	volume

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Part 1: Introduction

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

1 The asylum paradox

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

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

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

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

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

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

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

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

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

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

9 See Art. 1A Refugee Convention.

10 See further Part 1 Chapter 5.1.

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

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

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

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

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

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

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

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

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

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

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

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

20 See further Part 3 Chapter II.3.2.

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

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

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

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

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

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

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

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

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

27 See further Part 3 Chapter II.4.1.

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

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

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

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

2 Aim and research questions

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

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

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

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

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

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

To this end, the first research question is:

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

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

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

Against this backdrop, the second research question is:

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

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

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

The two main research questions are guided by two hypotheses:

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

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

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

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

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

3 Scope of the book

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

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

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

3.1.1 Protection seekers

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

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

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

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

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

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

40 See Chapter 12.3.1.

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

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

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

3.1.2 Safe pathways to protection

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

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

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

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

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

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

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

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

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

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

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

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

Complementary pathways are defined by UNHCR as

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

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

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

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

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

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

54 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

3.1.3 The notion of 'State'

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

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

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

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

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

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

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

3.2 Legal sources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Structure and methodology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Legal context and state of research

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

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

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

86 See above Part 1 Chapter 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

113 See Part 3 Chapter 11.4.

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

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

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

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

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

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

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

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

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

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

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

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

5.3 The relation of sovereignty and human rights in refugee law

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

123 *Ibid*., Chapter 6.
124 Moreno-Lax, *Accessing Asylum in Europe*, *supra* note 42.
125 David FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (2019), at 160–252.
126 Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (2020), at 55.
127 For an overview, see Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020).

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

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

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

129 Shachar, *supra* note 126.

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

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

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

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

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

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

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

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

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

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

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

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

5.4 Studies of safe pathways to protection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

11 The asylum visa

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

11.1 Definition: clarifying the term 'asylum visa'

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

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

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

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

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

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

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

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

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

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

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

11.2 Background: the role of embassies in offering protection

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

11.2.1 Diplomatic asylum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

428 *Ibid*., 110.

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

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

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

11.2.2 Historic precedents of 'protective passports' in Europe

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

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

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

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

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

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

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

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

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

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

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

437 See above Part 2 Chapter 7.1.1.

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

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

440 *Ibid*., at 4.

441 *Ibid*.

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

443 *Ibid*.

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

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

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

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

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

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

11.3.1 EU visa regulations with impact on protection seekers

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

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

449 The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990, OJ 2000 L 239/19.

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

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

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

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

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

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

11.3.2 The role of carrier sanctions on access to protection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11.4.1 A short note on extraterritorial jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

492 See further Wibault, *supra* note 481.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11.5 Access through an 'asylum visa' at EU level

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

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

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

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

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

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

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

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

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

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

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

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

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

11.5.1 'Who': protection seekers

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

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

11.5.2 'How': asylum visa procedures

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

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

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

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

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

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

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

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

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

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

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

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

11.6.1 External responsibility

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

530 See Part 2 Chapter 10.2.

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

11.6.1.1 Beneficiaries: 'anyone anywhere' under a severe human rights risk

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

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

531 See further on the principle of external responsibility in the context of the situation upon arrival, below at Part 3 Chapter 11.6.1.3.

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

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

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

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

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

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

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

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

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

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

539 See further on this notion Part 2 Chapter 10.2.1.

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

11.6.1.2 Asylum visa procedures with individual rights and guarantees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

554 See Part 1 Chapter 5.1.

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

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

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

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

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

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

11.6.1.3 Content of protection: access to national asylum procedures

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

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

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

11.6.2 Internal responsibility

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

11.6.2.1 Beneficiaries: no margin of discretion

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

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

11.6.2.2 Asylum visa procedures: migration control with limits

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

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

569 Ray, *supra* note 404, at 1255.

570 Noll, Fagerlund and Liebaut, *supra* note 49, at 83.

571 LIBE Report, *supra* note 409, at 12.

572 Meena Fernandes and Brittni Geny, 'Annex II: The Added Value of EU Legislation on Humanitarian Visas – Economic Aspects' in Wouter van Ballegooij and Cecilia Navarra, *Humanitarian Visas: European Added Value Assessment Accompanying the European Parliament's Legislative Own-Initiative Report (Rapporteur: Juan Fernando López Aguilar)* (2018), at 162 ff.

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

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

11.6.2.3 Content of protection: access to the national asylum procedure

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

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

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

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

11.6.3 Inter-State responsibility

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

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

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

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

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

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

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

11.6.3.2 Asylum visa procedures: paradigm change in responsibility allocation and issues of international cooperation

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

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

11.6.3.3 Content of protection: the relevance of a long-term perspective

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

580 See above at Part 3 Chapter 11.2.1 for a discussion of these issues with a view to the concept of diplomatic asylum.

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

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

11.7 Tensions and trade-offs raised by asylum visa schemes

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

11.7.1 Safe access to embassies and physical safety during the procedures

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

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

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

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

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

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

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

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

11.7.2 Legal access to the procedures and legal safeguards

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

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

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

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

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

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

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

11.7.3 The 'floodgate' argument

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

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

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

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

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

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

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

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

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

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

11.7.5 Interim conclusion: the asylum visa as human rights tool

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

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

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

11.8 Conclusion: the asylum visa as paradigm shift

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

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

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

600 See Part 2 Chapter 10.2.3.

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

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

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

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

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

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

12 Resettlement

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

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

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

12.1 Defining resettlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12.2 Background

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

12.2.1 Resettlement at international level

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

611 See above Part 1 Chapter 3.1.1.

612 See below Part 3 Chapter 12.4.

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

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

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

614 On the CPA as responsibility- and burden-sharing arrangement, see Part 2 Chapter 9.3.2.
615 See O'Sullivan, *supra* note 380, at 254.
616 See Susan Kneebone and Audrey Macklin, 'Resettlement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 1080, at 1087.
617 *Ibid*., at 1098.
618 Labman, *Crossing Law's Borders*, *supra* note 157, at 27.
619 See Part 2 Chapter 9.3.3 on the NYD and the GCR.
620 UNHCR, *Resettlement Handbook*, *supra* note 52, at 3.
621 UNHCR, High Commissioner's Forum, 'Multilateral Framework of Understandings on Resettlement', FORUM/2004/6, 16 September 2004.
622 See further Hurwitz, *supra* note 119, at 151.
623 See the statistic provided by UNHCR, *Resettlement Data Finder*, available at https://rsq.unhcr.org/en/#9Hgc.

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

12.2.2 Resettlement in the EU

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

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

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

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

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

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

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

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

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

630 *Ibid*.

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

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

633 On relocation see above, Part 1 Chapter 3.1.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

12.3 Access through resettlement

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

12.3.1 'Who': 'resettled refugees'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12.3.2 'How': resettlement procedures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12.4.1 External responsibility

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

12.4.1.1 Beneficiaries of resettlement: from vulnerability to IDPs

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

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

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

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

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

656 See Welfens and Bekyol, *supra* note 537.
657 Lewis Turner, 'Who will resettle single Syrian men?' (2017), at 30.
658 Turner, 'Are Syrian Men Vulnerable Too? Gendering The Syria Refugee Response', *supra* note 537.

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

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

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

659 *Ibid.*

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

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

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

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

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

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

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

12.4.1.2 Resettlement procedures: from one 'gatekeeper' to another

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

664 See further Part 1 Chapter 5.2.
665 For a critical discussion see de Boer and Zieck, *supra* note 628.
666 European Commission, 'Resettlement Framework Proposal', *supra* note 604, at 7.
667 At the end of 2022, UNHCR counted 62.5 million internally displaced of a total 108.4 million forcibly displaced worldwide; see https://www.unhcr.org/figures-at-a-glance.html.
668 See further Labman, *Crossing Law's Borders*, *supra* note 157, at 24 ff, discussing the 'exilic bias' of both the Refugee Convention and the UNHCR Statute; see also *ibid*., at 29 with further references.

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

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

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

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

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

671 See above, Part 3 Chapter 11.4.

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

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

674 *Ibid*., para. 116.

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

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

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

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

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

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

12.4.1.3 Content of protection: no uniform resettlement status

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

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

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

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

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

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

12.4.2 Internal responsibility

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

12.4.2.1 Utilitarian admission criteria and links to migration control

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

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

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

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

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

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

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

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

12.4.2.2 Flexible procedures and discretionary status

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

12.4.3 Inter-State responsibility

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

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

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

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

693 See above Part 3 Chapter 11.6.1.2. and 11.7.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

12.4.3.2 Content of protection: predictability

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

12.5 Tensions and trade-offs raised by resettlement

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

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

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

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

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

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

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

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

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

708 Kneebone and Macklin, *supra* note 616, at 1091.
709 This issue is further discussed regarding the relation of resettlement and territorial asylum, below at Part 3 Chapter 12.5.2, as well as with respect to the notions of 'good' refugee and 'bad' asylum seeker below at Part 3 Chapter 13.5.1.
710 Noll, *Negotiating Asylum*, *supra* note 115, at 14, uses the term 'filters' for 'all legal devices explicitly or implicitly connected with the regulation of the personal and material scope of extraterritorial protection'.
711 UNHCR, *Resettlement Handbook*, *supra* note 52, at 70.
712 Tatjana Baraulina and Maria Bitterwolf, 'Resettlement in Germany: What Is the Programme for Particularly Vulnerable Refugees Accomplishing?' (BAMF Brief Analysis, 2018), at 3.
713 *Ibid*., at 10 ff.
714 See further on additional admission criteria Part 3 Chapter 13.4.1.
715 van Selm, 'Refugee Resettlement', *supra* note 648, at 514.

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

12.5.2 Resettlement and territorial asylum

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

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

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

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

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

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

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

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

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

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

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

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

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

729 See Part 2 Chapter 7.1.2.

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

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

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

13 Ad hoc *humanitarian admission*

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

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

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

13.1 Defining *ad hoc* humanitarian admission

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

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

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

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

734 See Part 3 Chapter 11 on the asylum visa.
735 For an overview see Foblets and Leboeuf (eds), *supra* note 48.
736 European Resettlement Network (ERN), 'Humanitarian Admission Programmes in Europe: Expanding Complementary Pathways of Admission for Persons in Need of International Protection' (March 2018), at 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13.2 Background

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

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

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

745 See below Part 3 Chapter 14.

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

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

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

13.3 Access through *ad hoc* humanitarian admission

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

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

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

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

750 See above at Part 3 Chapter 12.2.2.

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

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

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

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

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

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

754 *Ibid*.

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

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

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

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

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

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

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

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

759 See above at 3 Chapter 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13.4.1 External responsibility

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

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

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

772 See Part 3 Chapter 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

788 See Part 3 Chapter 12.4.1.2.

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

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

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

13.4.1.3 Content of protection: access vs. rights

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

13.4.2 Internal responsibility: State discretion at peak

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

812 See Part 3 Chapter 9.2.

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

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

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

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

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

13.5.3 Access vs. rights

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

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

817 See further Part 3 Chapter 14.5.2 on complementarity.

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

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

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

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

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

819 See Part 2 Chapter 7.

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

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

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

Overall, *ad hoc* schemes offer States the widest margin of discretion, thereby particularly reflecting the principle of internal responsibility. With a view to the inter-State responsibility, they express an overall approach of 'emergency solidarity'. While *ad hoc* humanitarian admission schemes can be crucial to mitigating the effects of an acute situation of crisis, their exceptional character means they have a limited normative effect on the asylum paradox. The EU–Turkey Statement added elements of 'conditionality' and deterrence to humanitarian admission, making admissions dependent on cooperation in migration control. As argued in relation to the proposals for a resettlement regulation at EU level, humanitarian admission focused on migration control and deterrence exacerbates the asylum paradox.

14 Sponsorship schemes

This chapter addresses 'sponsorship schemes' as safe pathways depending on civil society and community engagement in the form of private funding and integration support. After further delimiting the term 'sponsorship schemes' (14.1), this chapter will provide background information for the assessment, by drawing on country examples (14.2.), to then outline key features of sponsorship schemes as safe pathways (14.3). Eventually the chapter analyses and assesses sponsorship schemes in the light of the responsibility framework (14.4), to outline tensions and trade-offs (14.5)

and draw conclusions on the effects of this pathway on the asylum paradox (14.6).

14.1 Defining sponsorship schemes

The categorical distinction of safe pathways to protection is not always clear-cut. Different schemes can overlap regarding beneficiaries, stakeholders or implementation requirements – as, for instance, the role of family ties in the admission. The specific characteristic of 'sponsorship schemes' lies in the active participation of civil society in the admission of protection seekers, by providing financial and (or) integration support.

Against this backdrop, this chapter defines sponsorship schemes as *ad hoc* or permanent humanitarian admission schemes that make the admission of protection seekers *dependent* on a (mostly) financial commitment of civil society members as 'sponsors' in the receiving States. Such sponsorship schemes can be set up as individual pathways or quota-based schemes.

In contrast to safe pathways assessed thus far, the existence of a responsibility link to a non-governmental sponsor, such as an individual, group of people or community organisation in the respective host State is the main requirement for the admission to occur in the first place. The 'responsibility transfer' is therefore the defining feature of this pathway.[821]

As stated in a 2015 study of private sponsorship in the EU, sponsorship schemes can take numerous forms and finding a common definition is

> 'complicated by the fact that individuals and civil-society groups already help resettled refugees, and do so in a myriad of ways that reflect their own motivations and capacities – and the degree to which the state provides public assistance'.[822]

Various schemes exist under different terms, ranging from 'private sponsorship programs' to 'community(-based) sponsorship' and 'humanitarian

821 See also European Commission, *Study on the Feasibility and Added Value of Sponsorship Schemes as a Possible Pathway to Safe Channels for Admission to the EU, including Resettlement – Final Report* (2018) ('*Sponsorship Feasibility Study*'); Ekaterina Y. Krivenko, 'Hospitality and Sovereignty: What Can We Learn from the Canadian Private Sponsorship of Refugees Program', 24(3) *International Journal of Refugee Law* (2012) 579, at 594.

822 Judith Kumin, *Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the European Union* (2015), at 3.

corridors'.[823] Therefore, the umbrella term 'complementary' or 'alternative' pathways is often used to indicate how this pathway can complement other pathways, such as resettlement, as well as territorial asylum.[824] Complementarity can even be considered to be a second defining feature of sponsorship schemes, as they would otherwise merely be setting a further requirement in another (different) scheme, such as resettlement.[825] However, a feasibility study of sponsorship schemes undertaken on behalf of the European Commission in 2018 (hereafter the 'Sponsorship Feasibility Study'), found that complementarity has become 'less central to the definition of sponsorship'.[826]

In addition to the necessary responsibility transfer to private actors as key feature, and the complementarity of sponsorship schemes as additional feature, there is a third feature pointed out in definitions of sponsorship schemes: the option for sponsors to suggest, or 'name', protection seekers to be selected for an admission (so called 'naming').[827] However, the option of 'naming' is not part of every scheme but, rather, more of a modality of the responsibility transfer.[828]

The terms 'private' and 'community-based' serve to distinguish the incentive power of civil society from merely government-led admission schemes. Referring to 'community' or 'community-based' schemes indicates the responsibility of communities (and cities) in the admission, not merely through political pressure of municipal governments but also through active (mainly financial) contributions of the respective citizens (or organisations) in the admission process. This must be distinguished from so-called 'sanctuary cities', 'solidarity cities' or 'cities of refuge'. These terms refer to

823 For a recent overview see Tan, 'Community Sponsorship in Europe: Taking Stock, Policy Transfer and What the Future Might Hold', 3 Frontiers in Human Dynamics (2021) article 564084.

824 See Part 1 Chapter 3.1.2. for a detailed delimitation of the term 'complementary pathway'. For a discussion of the concepts of additionality and complementarity of safe pathways see Part 2 Chapter 10.2.1.2.

825 Susan Fratzke, 'Engaging Communities in Refugee Protection: The Potential of Private Sponsorship in Europe' (MPI Europe Policy Brief Issue 9, 2017), at 3, identifying 'three core elements' of sponsorship schemes (responsibility transfer, 'naming' and complementarity).

826 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 41.

827 Kumin, *supra* note 822, at 3; see also Fratzke, *supra* note 825, at 3.

828 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 74 ff, outlining different areas of responsibility of sponsors, including the identification of beneficiaries.

cities and municipalities, mostly in the legal context of the USA, Canada or the UK, taking up an active role in migration and human rights policies with respect to irregular migrants.[829] Cities and communities have also taken up an important political role with a view to the inter-EU relocation of individuals in distress at sea or in precarious situations in Greek refugee camps.[830] While these examples also involve cities and communities playing a role in creating political pressure as well as a hospitable environment for the admission, they must be distinguished from sponsorship schemes as defined in this chapter.

Against the backdrop of this delimitation, the next section will briefly draw on the background of sponsorship schemes at international and EU level.

14.2 Background

This section sketches the background of sponsorship schemes at international and EU level to set the scene for the outline of key features of sponsorship schemes, as well as their subsequent analysis and assessment in the light of the responsibility framework. Political recommendations to integrate sponsorship schemes are increasing at international and EU level, accompanied by observations of a growing interest among civil society in taking up responsibility for the admission and integration of protection seekers.[831] The following outline of different sponsorship schemes puts a focus on the Canadian model as the most prominent sponsorship scheme worldwide (14.2.1), and then briefly outlines the implementation of sponsorship schemes in the legal context of the EU (14.2.2).

829 For an overview see Harald Bauder, *Sanctuary Cities: Policies and Practices in International Perspective* (2016), available at https://solidarity-city.eu/app/uploads/2017/06/Bauder-2016-International_Migration-Early-View.pdf; Heuser, *supra* note 161; see also the research project of Helene Heuser, 'Cities of Refuge', information available at www.jura.uni-hamburg.de/en/lehrprojekte/law-clinics/refugee-law-clinic/forschungsprojekt-staedte-der-zuflucht.html.

830 For a delimitation of relocation and safe pathways to protection in the focus of this book see above Part 1 Chapter 3.1.2.

831 See for instance Kumin, *supra* note 822, at 8, referring to the 'Save me' campaign, which in four years 'achieved 51 City Council decisions in favour of refugee resettlement in Germany' as well as the International Cities of Refuge Network (ICORN) at global level, coordinating temporary refuge of artists and writers in need of protection.

14.2.1 International perspective: the Canadian private sponsorship scheme as a role model

With its NYD of 2016, the UN called upon states to 'consider making available or expanding, including by encouraging private sector engagement and action as a supplementary measure, resettlement opportunities and complementary pathways for admission of refugees'.[832] The declaration paved the way for the GCR of November 2018, pointing out that

> [t]he three-year strategy on resettlement […] will also include complementary pathways for admission, with a view to increasing significantly their availability and predictability. Contributions will be sought from States, with the support of relevant stakeholders […] to establish private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes promoted through the Global Refugee Sponsorship Initiative'.[833]

The latter is an initiative led by, among others, the Government of Canada, as the most experienced country in private sponsorship worldwide, to encourage and inspire States to engage in sponsorship schemes as complementary pathways to protection.[834]

As the Canadian model serves as role model for sponsorship schemes, it deserves closer attention. It was introduced in 1978 following the passage of the 1976 Immigration Act[835] and is firmly integrated into Canadian immigration law via Section 13(2) Immigration and Refugee Protection Act, which reads as follows:

> 'A group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province, and an unincorporated organization or association under federal or provincial law, or any combination of them may, subject to the regulations, sponsor a Convention refugee or a person in similar circumstances.'

832 UN General Assembly, 'New York Declaration', *supra* note 341; see further on the NYD above Part 2 Chapter 9.3.3.
833 UN General Assembly, 'Global Compact on Refugees', *supra* note 74, para. 95.
834 Labman, *Crossing Law's Borders*, *supra* note 157, at 81.
835 Immigration Act, 1976–77, c 52, s l, (IA).

Sponsorship schemes complement the national governmental resettlement scheme as safe pathway to protection in Canada.[836] Generally, beneficiaries must meet the criteria of the Refugee Convention or else be in a 'refugee-like situation', which is similar to the concept of subsidiary protection in the EU. While IDPs were included in the program until 2011, they have not been part of the group of beneficiaries since.[837]

There are various models of admission schemes. Sponsors can name specific individuals for an admission, who they then fully sponsor; there is the so-called 'Blended Visa Office Referred (BVOR) Program', as well as the 'Joint Assistance Sponsorship (JAS)' programs, whereby sponsors provide non-financial support.[838] Within the BVOR Program, sponsors can name beneficiaries from a database of those preselected by the government agency Immigration, Refugees, and Citizenship Canada (IRCC) and the UNHCR.[839] Beneficiaries of all schemes must undertake security and medical checks prior to their admission. Upon arrival, they are granted permanent residency in Canada.

In contrast to the Canadian example, the admission of protection seekers based on sponsorship schemes is a relatively recent phenomenon in the legal context of the EU, which will be addressed in the following.

14.2.2 Sponsorship schemes in the legal context of the EU

Since 2013, some EU Member States as well as Switzerland have developed and implemented different forms of sponsorship schemes at national level, mostly as a reaction to the Syrian and Iraqi refugee crises and, from 2015 onwards, as response to the increase in asylum applications on EU territory.[840]

At EU level, the European Commission takes an active part in promoting this pathway. While the European Agenda on Migration of 2015 encouraged Member States to make use of 'other legal avenues available to persons in

836 See further Shauna Labman and Geoffrey Cameron, 'Introduction: Refugee Sponsorship: An Evolving Framework for Refugee Resettlement' in Shauna Labman and Geoffrey Cameron (eds), *Strangers to Neighbours: Refugee Sponsorship in Context* (2020) 3.

837 Krivenko, *supra* note 821, at 592.

838 See further Labman, *Crossing Law's Borders*, *supra* note 157, at 85 ff.

839 *Ibid*., at 86.

840 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 32 ff. and at 42.

need of protection, including private/non-governmental sponsorships',[841] the European Commission included calls to 'explore ways to establish private sponsorship schemes where the settlement and integration support for persons in need of protection, including its related costs, can be provided by private groups of civil society organisations', *inter alia* in its communication of 2017.[842] Still, there is neither a legal basis nor uniform practice of a sponsorship scheme at EU level. To overcome this regulatory gap, the Sponsorship Feasibility Study outlines 'a maximalist option' for the EU to take legislative action based on Art. 78(2)(d) TFEU. Such instrument would set out the

> 'role of the sponsor in referrals; The nature of sponsor's obligations; The maximum duration of the sponsors' obligations (e.g. 5 years) in an agreement signed by sponsors with national authorities or specified in national legislation; Monitoring and evaluation provisions of the schemes throughout their implementation by national authorities.'[843]

To explore this option EASO could coordinate a pilot project.[844]

Meanwhile, there are several Member States that have, or have had, sponsorship schemes in place. Prominent examples are the 'humanitarian corridors' in Italy,[845] the '*visa au titre de l'asile*' granted by France,[846] or the German *ad hoc* humanitarian admission schemes for protection seekers fleeing Syria (illustrating the potential overlap between different pathways).[847] Most of the existing national sponsorship schemes have been responses to calls from civil society. They first emerged as forms of extended family reunification schemes in Germany, Ireland and Switzerland.

841 European Commission, 'A European Agenda on Migration', COM(2015) 240 final, 13 May 2015, at 5.

842 See European Commission, 'Communication on the Delivery of the European Agenda on Migration', COM(2017)558, 27 September 2017, at 19.

843 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 9 ff.

844 *Ibid*., at 33.

845 See Bianchini, *supra* note 743.

846 While the French government stresses that asylum can only be claimed in the territory or at the border of France, there are visas granted in exceptional cases, which generally require some sort of civil society support; see the information provided by the French government, available at www.ofpra.gouv.fr/fr/asile/la-procedure-de-demande-d-asile/demander-l-asile-de-l-etranger.

847 See Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470.

According to the Sponsorship Feasibility Study, sponsorship schemes in Europe can be divided into four main categories:

- so called 'humanitarian corridors', put in place by Belgium, Italy and France, based on Memorandums of Understanding between faith-based civil society organisations and government authorities, facilitating access to the national asylum system upon arrival;
- schemes based on financial commitments to facilitate extended family reunification with a view to relatives in need of protection, implemented for instance by Germany and Ireland;
- so called 'community-based sponsorship', implemented by the UK and Portugal, foreseeing the matching of persons in need of international protection with local and community organisations, which support their integration after arrival; and, lastly,
- *ad hoc* schemes specifically aiming at an admission of Christians, implemented by the Czech Republic, Slovak Republic and Poland, based on partnerships with religious organisations.[848]

The German *ad hoc* sponsorship schemes at *Länder* level are the largest and most studied sponsorship schemes in the EU.[849] In contrast to other country examples, German sponsorship schemes are based on a specific legal framework at national level.[850] Initiated based on extensive engagement with civil society, including relatives of Syrians already living in Germany, regional sponsorship schemes were launched by 15 of the 16 federal *Länder* from 2013 onwards.[851] While the schemes facilitated access of more than 20,000 individuals fleeing the conflict in Syria, they raised controversies regarding the selection of beneficiaries, the status granted upon arrival and the scope of the financial commitment of sponsors.[852] In 2019, Germany launched a pilot program at federal level called 'NesT' (short for *Neustart*

848 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 45, for a figure indicating the type of private sponsorship scheme and number of individuals admitted in the EU by October 2018.

849 *Ibid*., at 43, with a comparison of the German sponsorship schemes with other country examples.

850 Admissions are based on Section 23(1) Residence Act and an according 'Admission Ordonnance' (*Aufnahmeanordnung*).

851 See further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 207 ff.

852 *Ibid*.

im Team, 'new start in a team'),[853] a 'hybrid' scheme, comprising elements of private sponsorship and government-led resettlement.[854]

While the German and the Irish schemes emerged in 2013 and 2014, most of the other schemes were launched from 2015 onwards, a time in which the number of asylum applications on EU territory had reached a historical peak.[855]

Overall, the number of entry visas granted under private sponsorship from 2013 to 2018 in the EU and Switzerland sat at around 31,690 and can be counted in addition to admissions under government-led resettlement schemes.[856] These numbers show how sponsorship schemes have developed as a significant *complementary* pathway to protection in Europe since 2013. The next section will draw on these examples to outline common features of sponsorship schemes as basis for the analysis and assessment of this pathway in the light of the responsibility framework.

14.3 Access through sponsorship schemes

There are common features of sponsorship schemes which will be outlined in the following to set the basis for the subsequent assessment. Here again, the focus lies on beneficiaries ('who', 14.3.1), admission procedures ('how', 14.3.2), and the content of protection granted upon arrival ('what', 14.3.3).

14.3.1 'Who': beneficiaries of sponsorship schemes

The selection of beneficiaries varies among the existing sponsorship schemes. The Sponsorship Feasibility Study found that most of the schemes in the EU legal context had 'nationality from a certain third country' as main eligibility criterion. This is a consequence of the evolution of these

853 See the information provided by the Federal Office for Migration and Refugees, available at https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/ResettlementRelocation/Resettlement/resettlement-node.html.

854 See further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 214 ff.

855 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 42 ff., with a timeline of the implementation of sponsorship schemes (Figure 3).

856 *Ibid*., at 45, pointing out that the number of actual arrivals is not known and that '[c]omparisons between sponsorship and resettlement numbers should, however, be drawn carefully because of discrepancies in how they are counted'.

schemes as a response to the conflicts in Syria and Iraq. The second criterion was vulnerability, and only third was the need for protection.[857] The exclusion criteria applied in sponsorship schemes generally matches common security considerations applied within visa procedures.

The issue of beneficiaries is closely linked to the responsibilities of sponsors throughout the procedure. Some schemes are based on the above-mentioned 'naming system', whereby sponsors can identify specific individuals for an admission. Other schemes rely on the so-called 'matching system', whereby certain stakeholders, such as UNHCR or national NGOs, match sponsors with pre-selected beneficiaries, sometimes, but not always, in collaboration with State institutions.[858]

Eligibility criteria for being a sponsor vary widely among the existing schemes. Generally, individuals and groups of people can be sponsors, as well as NGOs, including faith-based organisations, churches, academic institutions and corporations.[859] In the EU, the duration of the sponsor's financial responsibilities 'generally varies from 90 days to a maximum of five years, with most requiring between one and two years'.[860]

14.3.2 'How': sponsorship procedures

In 2018, the Sponsorship Feasibility Study identified five common stages of sponsorship schemes in the EU, including a 'setting up phase' for the respective policy-framework; a pre-departure phase; a transfer and departure phase; a post-arrival and integration phase; and a monitoring and evaluation phase.[861]

The pre-departure phase of sponsorship schemes entails a *selection process* involving different actors and initiated by individuals or third parties, and then a *visa procedure* to issue travel documents to selected beneficiaries. Even though civil society plays a key role in sponsorship schemes, the State remains responsible for setting up a policy or even legal framework allowing for the respective schemes to be set up, thereby determining the eligibility of sponsors and beneficiaries.

States also determine the scope of the responsibility transfer. As mentioned above, there is a focus on the choice of beneficiaries, either

857 *Ibid*., at 56 ff.
858 See above, Part 3 Chapter 14.1.
859 Kumin, *supra* note 822, at 7.
860 European Commissio, *Sponsorship Feasibility Study*, *supra* note 821, at 8.
861 *Ibid*., at 48 (Figure 6).

through identification via 'naming-systems' or through active participation in 'matching-systems' (as the sponsors must agree). Additionally, sponsors can be responsible for bearing the travel costs of selected beneficiaries. Despite this elementary transfer of responsibility for some parts of the procedure, the State plays the most active part throughout the admission process: selected individuals must enter the respective State with a visa and therefore undertake a visa procedure conducted by the respective State representation at their present location, mostly entailing identity and security screenings as well as medical checks.

An important procedural difference between existing sponsorship schemes lies in the assessment of the protection status: while some schemes foresee the granting of a national protection status upon arrival, most of the schemes in EU Member States assessed in 2018 grant access to a national asylum procedure upon arrival. Some Member States based the visas granted on Art. 25(1) Visa Code. As the CJEU ruled in 2017 that there is no provision in EU law foreseeing the granting of a visa to access a national asylum procedure,[862] the Sponsorship Feasibility Study pointed out that '[a]ccording to current EU law, visas issued to persons who intend to obtain international protection or another long-term protection status in the EU must only be based on national legislation'.[863]

The visa determines the status upon arrival and thus the legal situation of beneficiaries. While none of the analysed sponsorship schemes foresee specific rights or legal remedies during the pre-departure phase, the post-arrival phase, considered in the following, is framed by the legal provisions applicable to protection seekers in the EU.

14.3.3 'What': status upon arrival

To draw a picture of the post-arrival situation of beneficiaries, the following outline will focus on the status granted upon arrival as well as the scope of responsibility possibly transferred to the sponsors.

With a view to the status and a respective residence permit, the Canadian 'role model' generally foresees granting beneficiaries permanent residency upon arrival, leading to a strong legal position.[864] In the EU, the status

862 See *X and X v Belgium*, *supra* note 16. For a discussion of this decision see Part 3 Chapter 11.4.
863 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 70.
864 See above at Part 3 Chapter 14.2.

varies from Member State to Member State and even from scheme to scheme.[865] Most of the schemes grant access to the national asylum procedure upon arrival, and some foresee directly granting a national protection status. In contrast to the Canadian model, none of the schemes foresees the granting of permanent residency. The only way to achieve a better status than the status (directly) granted through the scheme therefore lies in applying for asylum (if not already foreseen by the scheme), which occurred primarily in Ireland and Germany.[866] In Germany, another reason for beneficiaries to apply for asylum lay in the duration of financial guarantees provided by the sponsors. In the first months of implementing sponsorship schemes for protection seekers from Syria in 2013, financial guarantees of relatives in Germany were *unlimited* with a view to their scope (e.g., including costs for healthcare) and duration. As a result, numerous beneficiaries of sponsorship schemes applied for asylum upon arrival, hoping that a change in status would allow them to access social benefits without the State having recourse against their sponsors (typically their relatives). However, the Federal Administrative Court ruled that the sponsors remained financially responsible, even after a change of status.[867] Eventually, Germany adjusted the duration of the financial guarantees to a maximum of five years and released sponsors from having to cover healthcare.[868] In the subsequent hybrid public–private scheme 'NesT' of 2019 the financial commitment of sponsors was limited to provide the net cost of housing for a period of two years. Additionally, beneficiaries are granted the status of resettled refugees and thus a status almost as strong as Convention refugee status in Germany.[869]

If beneficiaries apply for asylum, either as intended by the scheme or based on a personal decision upon arrival, they are considered as asylum seekers under EU law. In this case, all relevant provisions from the CEAS apply.[870]

865 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 65.
866 *Ibid*.; see with a view to Germany Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 207 ff.
867 See Bundesverwaltungsgericht 1 C10.16, Judgement of 26 January 2017 (DE:BVerwG:2017:260117U1C10.16.0).
868 Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 208.
869 *Ibid*., at 214.
870 See Part 1 Chapter 3.2. on legal sources.

While another important area of private responsibility lies in integration support – e.g., in facilitating access to social services, language courses and the job market – the State remains primarily responsible for covering these needs; the same applies in the event that sponsors fail to comply with their initial commitment.[871]

14.4 Analysis of sponsorship schemes in the light of the responsibility framework

This section assesses the key elements of sponsorship schemes ('who', 'how' and 'what') in the light of the responsibility framework. As Fratzke points out, '[p]roponents of sponsorship cite several benefits it may offer refugees, policymakers, and sponsoring communities',[872] from offering 'additional pathways to protection' and allowing for an '[i]mproved refugee labour market integration and self-sufficiency' to providing civil society with a 'sense of ownership of refugee protection efforts'.[873] The following assessment will help to structure and evaluate these assumptions according to the principles of external (14.4.1), internal (14.4.2) and inter-State responsibility (14.4.3). In order to avoid redundancies in the discussion, the assessment will focus on the special features of sponsorship schemes that differ from the other safe pathways evaluated so far.

14.4.1 External responsibility

The following section shows how different methods of implementation can enhance or narrow the effect of a scheme on the principle of external responsibility. After addressing the issue of beneficiaries (14.4.1.1), the assessment will turn to the admission procedures (14.4.1.2) and conclude with an assessment of the content of protection (14.4.1.3).

871 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 8.
872 Fratzke, *supra* note 825, at 4.
873 *Ibid*., at 5.

14.4.1.1 Beneficiaries: the 'close tie' requirement as a key consideration

While the principle of external responsibility calls for a prioritisation of protection needs,[874] most of the existing sponsorship schemes focus on other factors in the selection process, such as nationality, religious affiliation, or family ties to the receiving State. The inherent risk of discrimination when focusing on eligibility criteria that are not protection-related is pointed out in the Sponsorship Feasibility Study, which notes that '[r]ather than increasing admission places for persons needing protection broadly, sponsorship schemes in Eastern Europe aimed to provide admission for a specific group of people, namely Syrian or Iraqi Christians'.[875] Apart from a risk of discrimination, there is the issue of complementarity, which can be limited by the requirement of 'family ties' as an eligibility criterion.[876] Examples are the German sponsorship schemes at *Länder* level, which were put in place instead of rigorously applying or extending options of family reunification.[877]

Nonetheless, the option for sponsors to 'name' protection seekers for admission and thereby to actively participate in the implementation of safe pathways significantly enhances the principle of external responsibility. The 'naming' system shifts the 'definitional power'[878] States usually hold in government-led schemes to civil society. Thus, a potential 'gatekeeper' role of sponsors as third parties in access to the admission schemes depends on their relationship to the respective protection seekers. If sponsors are relatives, they can facilitate access to the schemes in the first place. However, focusing on beneficiaries who are, for instance, protection seekers belonging to a particular religion (such as Christians), sponsored by religious organisations, indirectly excludes other protection seekers. These schemes do not only raise issues of potential discrimination, as pointed out above, but sponsors also function as 'gatekeepers' regarding protection seekers who do not belong to the specific group.

The (direct) exclusion criteria applied within the existing sponsorship schemes match the exclusion criteria in visa procedures, primarily based

874 See further Part 2 Chapter 10.2.
875 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 35.
876 On the 'close-ties' requirement see also above at Part 3 Chapter 13.5.2. On complementarity in sponsorship schemes see below at Part 3 Chapter 14.5.2.
877 For a critical discussion see Tometten, *supra* note 406.
878 Scheinert, *supra* note 748, at 131.

on security concerns. None of the existing schemes entail exclusion criteria unrelated to security issues, focusing solely on migration control, such as an exclusion based on a previous irregular entry or stay in the EU (as, for instance, suggested in the Resettlement Framework Proposal).[879] Nor do existing examples of sponsorship schemes foresee making admissions dependent on migration cooperation with third countries. This is a result of the special nature of the schemes based on a cooperation with civil society. With respect to the principle of external responsibility this is a crucial difference to *ad hoc* admissions following the 'EU–Turkey Statement' as well as to the Resettlement Framework Proposal of 2016.[880]

14.4.1.2 Admission procedures: enhancing agency

In all safe pathways assessed thus far, the State plays the leading role in the procedures. Although sponsorship schemes rely on a transfer of responsibility to civil society, the above outline has shown that the State retains the leading role here as well. This has implications for two aspects that are important for the principle of external responsibility: the non-existence of a uniform approach foreseeing procedural rights throughout the admission process, and options to directly apply for an admission under a sponsorship scheme. The latter, however, depends on the scheme and the level of involvement of civil society. Compared to resettlement and *ad hoc* admission programs, the involvement of civil society can facilitate access to independent information and legal assistance as well as, possibly, legal remedies. Overall, the participation of civil society in admission procedures has the potential to enhance the agency of protection seekers and thereby significantly improve their legal condition.

In her analysis of Canadian private sponsorship schemes, Krivenko criticises 'long processing delays and high refusal rates'.[881] The processing time can be more than three years, creating a risk of significantly affecting the situation of the sponsors and the protection seekers to be sponsored. Thus, 'there are complaints from both sides', the sponsors and the govern-

879 For an assessment of this proposal see above Part 3 Chapter 12.
880 See above Part 3 Chapter 13 for an assessment of this *ad hoc* humanitarian admission scheme and Chapter 12 for an assessment of the Resettlement Framework Proposal.
881 Krivenko, *supra* note 821, at 594.

ments.[882] Similar issues are pointed out by Labman in her assessment of sponsorship schemes.[883] Besides issues arising due to the use of the schemes as means to facilitate access of extended family members, there were conflicts over the responsibility of sponsors for healthcare costs.[884] There were similar problems in sponsorship schemes in Germany, as will be discussed in the next section.

14.4.1.3 Content of protection: issues of status and responsibility transfer

The legal situation of beneficiaries differs widely, depending *inter alia* on whether beneficiaries are immediately granted a residence permit or whether they must apply for asylum upon arrival. Comparing the practice of EU Member States shows that, on the one hand, the direct granting of a status – as, for instance, foreseen by the German sponsorship schemes – is favourable regarding immediate access to the job market and social inclusion. However, the national status granted to beneficiaries of German sponsorship schemes is overall weaker than the international protection status potentially granted through a national asylum procedure, and less favourable than the status granted to resettled refugees. Here again, there is a 'trade-off' between access and rights, as discussed in the previous chapter.[885] The new 'NesT' programme seems to pick up on important issues in the sense of 'lessons learned', granting beneficiaries a stronger status and focusing on the sponsor's responsibility in providing adequate accommodation, which, according to the EU Feasibility Study of 2018 'was considered as one of the main benefits of implementing sponsorship schemes by national authorities and civil society organisations alike'.[886]

Regarding the involvement of sponsors, two aspects are crucial in the post-arrival situation: the scope of financial commitment and the post-arrival support sponsors usually provide. The scope of financial commitment raises the greatest controversies and affects both the principle of external

882 *Ibid*., at 595.
883 Labman, 'Private Sponsorship: Complementary or Conflicting Interests?', 32(2) *Refuge – Canada's Journal on Refugees* (2016) 67, at 69.
884 *Ibid*.
885 See further on this issue with a view to *ad hoc* humanitarian admission above Part 3 Chapter 13.5.3.
886 European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 8.

and of internal responsibility.[887] Overall, the main issue arises when the 'responsibility transfer' amounts to an undue transfer of 'burdens'.

The post arrival support represents one of the greatest advantages of sponsorship schemes with respect to the principle of external responsibility. International case studies point to the various benefits and positive effects sponsorship schemes can have in enhancing the agency of protection seekers by facilitating the learning of the local language and providing faster access to the job market and social networks.[888] There are studies stressing the fact that civil society is in a better position to offer post-arrival and integration support than State institutions may be.[889] While resettlement and other humanitarian admission schemes might include such support upon arrival, it is an *integral part* of sponsorship schemes and thus a major benefit with respect to the principles of external and internal responsibility.

14.4.2 Internal responsibility

This section assesses the effects of sponsorship schemes on the principle of internal responsibility with a view to beneficiaries (14.4.2.1), admission procedures (14.4.2.2) and the content of protection (14.4.2.3).

14.4.2.1 Beneficiaries: limited State discretion for more social acceptance

In private sponsorship schemes, in particular under the 'naming model', the State's discretion is limited compared to resettlement and other humanitarian admission schemes.[890] Nonetheless, the State remains responsible for making the final admission decision, thereby expressing its sovereignty with a view to the question of access to territory.

887 See below at Part 3 Chapter 14.5.1.

888 With regard to the international context see Kumin, *supra* note 822, at 20, with further references; see also European Commission, *Sponsorship Feasibility Study*, *supra* note 821, at 37, referring to international examples. For the EU legal context, however, more research and data would be necessary in this regard, see Tan, 'Community Sponsorship in Europe', *supra* note 823, at 7.

889 van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US', 4(2) Journal of International Migration and Integration (2003) 157, at 173; see also Krivenko, *supra* note 821, at 599.

890 See above Part 3 Chapters 12 and 13.

Finally, sponsorship schemes may affect the social acceptance of humanitarian admissions, due to the involvement of civil society members as well as the requirement of ties to the respective State. This effect is more related to the strengthening of civil society as an active part of the reception systems than to the categorization of the respective beneficiaries as 'good' refugees instead of 'bad' asylum seekers.[891] This difference from other humanitarian admission schemes makes sponsorship schemes a particularly valuable instrument for promoting the principle of internal responsibility without having a detrimental effect on the principle of external responsibility.

14.4.2.2 Admission procedures: civil society as an internal driving force

With respect to the procedure, the flexibility and procedural framework of sponsorship schemes are relevant to the effect of this pathway on the principle of internal responsibility. Sponsorship schemes rely on the engagement of civil society. Most of the schemes in the EU were found not to be implemented in permanent legal frameworks at national level.[892] Some sponsorship schemes are tied into government-led resettlement schemes, thereby benefitting from the existing 'resettlement infrastructure'.[893] The requirement of 'close ties' to the receiving State, which is often an integral part of the schemes, makes the option of EU-wide sponsorship schemes with a 'distribution key' irrelevant. Nonetheless, a harmonisation of minimum standards for the procedure and the status granted upon arrival could enhance the internal stability of the Union in this respect. To further facilitate the implementation of sponsorship schemes for States, studies suggest 'piecemeal approaches'[894] (or 'incremental approaches'[895]), foreseeing small-scale regional pilot programs that may then be adapted at national or EU level.

While the granting of procedural rights is not specifically foreseen, it is not only a factor benefitting the individual protection seeker, thereby taking

891 For a discussion of this issue see Part 3 Chapter 13.5.1.
892 See above at Part 3 Chapter 14.3.2.
893 A national example is the German pilot program 'NesT'; see further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 214 ff.
894 Tan, 'Community Sponsorship in Europe', *supra* note 823, at 6.
895 Fratzke, *supra* note 825, at 10.

up recourses from the respective States; procedural rights can also help guarantee that the respective schemes actually reach beneficiaries, thereby helping to reduce human smuggling.

Visa procedures are part of every pathway assessed in this book. Their inherent identity, security and health checks serve to safeguard public security and health. A difference between sponsorship schemes and other pathways lies in the fact that the checks of a potential beneficiary's identity can be facilitated through the personal (family) links the individual might have to the receiving State in cases where the sponsors are family members.

As outlined above, the State remains primarily responsible before the arrival of beneficiaries; after arrival, the sponsors' involvement becomes more important. However, the involvement of civil society is crucial in the establishment of the schemes, often serving as the main incentive for receiving States to engage in (complementary) humanitarian admissions in the first place.

14.4.2.3 Content of protection: the leading role of sponsors in the post-arrival phase

The two main areas regarding the content of protection affecting the principle of internal responsibility are the status granted upon arrival and the involvement of sponsors in the post-arrival phase.

As outlined above, the status granted to beneficiaries of existing sponsorship programs varies from State to State. While Canada grants a permanent status, some EU Member States rely on the outcome of the territorial asylum procedure or grant a national humanitarian status upon arrival. Consequently, there can be a trade-off between access and rights. As discussed with a view to *ad hoc* admission schemes,[896] this can, however, not only narrow the effect of the pathway on the principle of external responsibility but also negatively affect the principle of internal responsibility, since neglecting individual rights and interests can have detrimental consequences for the States as well.[897]

Although the State remains responsible as 'safety net' in case the relationship between the sponsor and the beneficiary breaks down after arrival, the responsibility transfer foreseen by sponsorship schemes regarding the post-

896 See above at Part 3 Chapter 13.5.3.
897 See further below at Part 3 Chapter 14.5.1.

arrival situation is a major benefit for the receiving States. Admission costs are reduced, either through direct financial contributions and the provision of housing, or through the everyday support provided by sponsors. This may benefit the integration capacities of beneficiaries, who are then more likely to be financially independent.[898] Overall, the broad involvement of civil society can strengthen the social acceptance of admissions, again benefitting the internal order and well-being of the receiving State.

14.4.3 Inter-State responsibility: the scope of 'solidarity bonds'

At first sight the principle of inter-State responsibility does not seem to be greatly affected by sponsorship schemes unless their numerical impact is significant. However, the main feature of these schemes – the 'responsibility transfer' to civil society – invites some further reflections on the effect sponsorship schemes may have on the principle of inter-State responsibility. Even more than the 'close tie' requirement discussed in the previous chapter,[899] the responsibility transfer creates a bond between the protection seeker and the receiving State (with its civil society). With respect to the principle of inter-State responsibility, the argument brought forward in the Feasibility Study (on PEPs) of 2002 – namely, that these 'solidarity bonds'[900] may be seen as expression of a concept of (international) responsibility – is even more relevant here.[901]

Thus, the issue of complementarity plays a central role.[902] The principle of inter-State responsibility implies sharing a responsibility for *protection* – and not a responsibility for safeguarding (extended) family unity. Whenever sponsors are family members of protection seekers abroad, their commitment to the 'responsibility transfer' is likely not to be an expression of a (general) commitment to 'protection' but, rather, a commitment to the specific protection of their relatives, deriving from family ties and personal bonds. With respect to the principle of inter-State responsibility, it would

898 However, as pointed out above, more research providing evidence in the EU context would be necessary here, see above Part 3 Chapter 14.4.1.3.

899 See above Part 3 Chapter 13.5.2.

900 See Kritzman-Amir, 'Not in My Backyard', *supra* note 196, at 373, using this term with a view to the current (implicit) geographical allocation of international responsibility, thereby referring to the 'solidarity bond' countries in regions of conflicts might have with protection seekers from neighbouring countries.

901 Noll, Fagerlund and Liebaut, *supra* note 49, at 74.

902 See further below Part 3 Chapter 14.5.2.

therefore be crucial to offer sponsorship schemes that rely not only on the commitment of family members as sponsors but also on the commitment of various civil society members based on a general commitment to engage in protection.

Finally, the focus of sponsorship schemes on the existence of 'responsibility bonds' between protection seekers and civil society leads to an absence of elements requiring reciprocity at inter-State level. None of the existing examples of sponsorship schemes showed a focus on migration control or admissions depending on migration cooperation with third States. This is in line with an 'unconditional' approach to responsibility-sharing, in favour of the principle of inter-State responsibility.

14.5 Tensions and trade-offs raised by sponsorship schemes

This section discusses the tensions and trade-offs raised by sponsorship schemes, focusing on two key issues: the tension between 'unduly burdening' and empowering sponsors on the one hand (14.5.1) and the issue of complementarity on the other (14.5.2).

14.5.1 Between 'undue burdens' and empowerment of civil society

The responsibility transfer to the sponsors is the main feature of sponsorship schemes, and at the same time the most controversial issue. The main criticism concerns the scope of financial guarantees, as no other area of responsibility transfer may have similar detrimental effects on the sponsor or the relationship between sponsors and beneficiaries. While financial commitments can lead to an undue burden, a responsibility transfer with a view to the selection process, such as foreseen by the option of 'naming', may empower civil society members and protection seekers alike.

The requirement of providing financial guarantees can impact on family relationships as it bears the risk of putting sponsors in situations of great emotional duress, eventually overstraining their financial capacities to facilitate the safe arrival of their relatives.[903] Even if the State provides a 'safety net' in case the sponsor fails to comply with the financial commitment,

903 On this issue see Labman, 'Private Sponsorship', *supra* note 883, at 67; Schwarz, *supra* note 405, at 4.

the recourse a State may take against relatives can still impact on family relationships. The two solutions to this dilemma are a reasonable scope of financial guarantees on the one hand, as well as allowing for anyone (not just family members) to act as sponsors on the other. The scope of the financial commitment could, for instance, be adjusted to the economic situation of sponsors as well as the duration of the temporary residence permit. This way, sponsors would not have to commit themselves longer than the State is (initially) willing to commit itself to an admission.[904]

Overall, the relation between the sponsors and the State is the main area of tension in sponsorship schemes. This is interesting with regard to the approach taken to the principle of internal responsibility in this book. In her analysis of the Canadian private sponsorship schemes in the light of Derrida's notion of unconditional hospitality and sovereignty, Krivenko argues that through the active participation of civil society, 'international law will finally become a tool with which human rights, as a promise of protection for all, without regard to citizenship or place of residence, can be fulfilled'.[905] Krivenko goes even as far as concluding that the involvement of sponsors 'is not just a way for the government to attract additional financial support for its obligations [...] it reveals itself as a tool for individuals to become active subjects of international law, able to fulfil international obligations in the area of refugee and human rights protection'.[906] While this conclusion stems from an analysis based on a concept of human rights protection beyond State sovereignty, it tackles the issue of agency within civil society. This in turn is a strong legitimisation for a modern democratic understanding of sovereignty, which is based on the will of the people, strengthens the internal stability of a State and thus promotes the principle of internal responsibility as defined in Part 2.[907]

However, such a conclusion goes very far, seeing civil society in a major position of responsibility, potentially leading to new forms of sovereignty. Existing sponsorship schemes do not fulfil this promise. As has been shown in the above outline, the State remains primarily responsible by creating a policy and legal framework allowing for the admission of respective

904 For instance, while Germany grants temporary residence permits to beneficiaries with durations of one to two years, financial guarantees last five years, see further Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470, at 207 f.

905 Krivenko, *supra* note 821, at 602.

906 *Ibid*.

907 See above Part 2 Chapter 7.

beneficiaries. Furthermore, the State functions as 'safety net', whenever the relationship between sponsors and beneficiaries ends or in case sponsors are not able to bear the financial commitment any longer. This ultimate responsibility is an important aspect: a complete transfer of responsibility to civil society would significantly impact upon the principle of internal responsibility, which entails the safeguarding of public security, well-being and order. The control States retain of the selection process allows them to be prepared for the arrival of protection seekers with different needs and adjust administrative structures accordingly, doing justice to the principle of internal responsibility.

At the same time, however, the distribution of responsibilities between the State and civil society causes tensions. With a view to the Canadian sponsorship schemes, Krivenko[908] and Labman[909] observe these tensions in all stages of the procedures. Thus, both interpretations of the dynamics of Canadian private sponsorship schemes focus on the State and civil society as two opposing sides, battling over sovereignty claims. In this book, the principle of internal responsibility has been set out as more than just a claim of sovereignty over territory. The principle is used as theoretical construct to describe the aim of safeguarding the rights and interests of the 'internal community' of a State. Overall, the 'responsibility transfer' in sponsorship schemes can empower civil society and foster the social acceptance of safe pathways. While the tensions discussed by Krivenko and Labman do play a role and potentially affect the principle of internal responsibility, they are not a result of the responsibility transfer as such (the '*if*') but, rather, of its scope and implementation in practice (the '*how*'). Here, complementarity plays a crucial role in mitigating some of these tensions, as will be discussed in the following.

14.5.2 The relevance of complementarity in sponsorship schemes

An emerging issue of sponsorship schemes (e.g., in Canada and Germany)[910] is a correlation between the setting up of sponsorship schemes

908 Krivenko, *supra* note 821.

909 Labman, 'Private Sponsorship', *supra* note 883.

910 For the Canadian program see Krivenko, *supra* note 821; Labman, 'Private Sponsorship', *supra* note 883; for Germany see Endres de Oliveira, 'Chapter 5: Humanitarian Admission to Germany', *supra* note 470; Tometten, *supra* note 406; Schwarz, *supra* note 405.

and decreasing numbers of government resettlement and fewer options for (extended) family reunification.[911] With respect to the principles of external and inter-State responsibility, complementarity is relevant in this context. Complementarity may be compromised, on the one hand, by policies that aim at replacing existing pathways, such as replacing a national resettlement scheme with a sponsorship scheme; and, on the other hand, by the setting up of sponsorship schemes that *officially* complement other pathways but *effectively* narrow the quotas of the latter.

To avoid a detrimental effect on the principles of external and inter-State responsibility the requirement of complementarity cannot only be a formal one. Instead, it must be assessed which role – effectively complementary or not – sponsorship schemes play within the existing legal or policy framework. Family members may therefore be provided with options of (extended) family reunification, to keep sponsorship schemes open to protection seekers with no other access option. This would also imply broadening the spectrum of sponsors to all members of civil society. The latter may have a positive impact on the principle of internal responsibility. On the one hand, this could mitigate some of the negative effects arising due to a responsibility transfer to relatives of protection seekers. On the other hand, it would place the social support for the admission of protection seekers on a broader basis.

14.6 Conclusion: sharing responsibility – not burdens

This chapter started with a discussion of the role and the overall development of sponsorship schemes as an increasingly prominent pathway to protection worldwide and in the legal context of the EU. Sponsorship schemes have a long tradition and are well-established in Canada. In the EU, they have gained particular attention since 2013. Sponsorship programs are currently attracting particular interest from both governments and civil society. The involvement of private actors in the admission of protection seekers promises to facilitate the governmental decision to set up safe pathways and strengthens the democratic legitimacy of admissions. Sponsorship schemes can empower members of civil society in the provision of protection, an area of law exclusively dominated by the state.

911 On this issue see Labman, *Crossing Law's Borders*, *supra* note 157, at 123.

Despite the key characteristic being the 'transfer of responsibility' to private actors, the State retains a crucial role throughout the procedures. It remains solely responsible for the setting up of admission schemes (the 'if') and largely responsible for several aspects of the implementation (the 'how'). While civil society can play an active role in the selection of beneficiaries in the pre-departure phase (through 'naming'), the focus of the responsibility transfer lies in the post-arrival phase of sponsorship schemes. Here, civil society takes up responsibility by providing financial and integration support to beneficiaries. Overall, the most active part of civil society does not concern the admission itself, but the situation *after arrival*. This last aspect promises to have positive effects on the situation of beneficiaries and societies in the receiving States, thereby benefitting both the principle of internal and external responsibility.

However, there are also political stalemates in which cities or municipalities express their willingness to actively admit people seeking protection on the basis of a broad civil society commitment, but are hindered by the fact that the final sovereign decision on admission is made by the state. In addition, some of the existing sponsorship programs have met with harsh criticism, as they are seen as an attempt to outsource responsibility for protection to civil society. Some schemes have led to serious issues for sponsors, beneficiaries and States alike, including situations of duress and financial constraints on sponsors, a weak legal status of beneficiaries and excessive strain on administrative structures. This book argues that there are four key considerations that can mitigate some of the negative effects sponsorship schemes may have on the different responsibility principles, thereby leading to an overall positive normative effect on the asylum paradox:

- aligning the status of beneficiaries to protection needs;
- placing the responsibility transfer on a broad public basis;
- ensuring complementarity of the schemes, especially with respect to options of family reunification; and, lastly,
- not to overstretch the financial capacities of private sponsors, as this could have an indirect impact on the State (with its social "safety net")

The overall picture of sponsorship schemes shows a strong dynamic of reciprocity: while the State sets up safe pathways based on a commitment of civil society members to actively contribute to admissions, the main responsibility in terms of the procedure and the safety net upon arrival is borne by the State. This, in turn, facilitates the decision of sponsors to

participate in respective schemes in the first place. This dynamic and the driving force of civil society as a motor for the implementation of safe pathways also shows in the fact that most existing sponsorship schemes are not limited in relation to their duration and not all are based on quotas. The involvement of civil society has a particularly positive effect on the principles of external and inter-State responsibility: so far, sponsorship schemes referred to in this chapter only entail exclusion criteria that are linked to serious security threats, and there are no requirements of 'reciprocity' with a view to the inter-State level. Thus, sponsorship schemes show great potential to strike a balance between the three principles of responsibility, as long as the focus of responsibility transfer lies on empowerment and not *burdens*.

15 Conclusion Part 3

This chapter seeks to summarise the findings of Part 3 in a brief overall conclusion (15.1) and provide an outline of key issues which were identified to set the course for the assessment of safe pathways to protection (15.2).[912]

15.1 Overall conclusion

The aim of Part 3 was to answer the overall research question regarding the normative effect of safe pathways on the asylum paradox, in particular the potential for safe pathways to bridge the protection gap inherent to the current system governing access to protection in the EU. The assessment in Part 3 was based on a theoretical (principle-based) approach. The aim was not to conduct a feasibility study by going into all the details of implementation. Instead, Part 3 structured safe pathways to protection according to principles of responsibility. The analysis in Part 3 confirms the hypothesis that the *normative* effect of safe pathways on the asylum paradox varies depending on the outline of the pathway and the details of implementation. Based on the assumption that the asylum paradox reflects an imbalance of three responsibility principles, the analysis was structured according to the responsibility framework outlined in Chapter 10. Thus, the assessment focused on an evaluation of the normative impact of safe pathways on

912 For a detailed outline of the findings of each Chapter see Part 4 Chapter 16.

each responsibility principle, allowing for conclusions with a view to the (potential) effects on the asylum paradox.

While all pathways in the analysis can offer access to territory, and therefore primary safety, the asylum visa shows fundamental differences with a view to its *normative* effect on the responsibility principles and thereby on the asylum paradox. Legally implementing a permanent asylum visa scheme with individual rights and guarantees would strengthen the individual right to seek asylum and change the current protection paradigm, which is grounded in territorial access to protection and an allocation of responsibility on the sole basis of geographical proximity. The current legal framework and State practice governing access to territory and protection reflect a predominant focus on migration control and thus on the principle of internal responsibility. Looking at the decisions of the CJEU and the ECtHR in the two 'asylum visa' cases through the lens of the responsibility framework reflects this distorted picture: both Courts emphasised aspects related to the internal responsibility and demonstrated a very restrictive understanding of the legal norms expressing the external responsibility. Additionally, they did not even consider elements of an inter-State responsibility. Both decisions therefore perpetuate the asylum paradox.

This book argues that a dynamic and progressive interpretation of extraterritorial human rights *obligations* would not lead to new responsibilities that would otherwise not exist. Rather, a progressive interpretation of the relevant norms on jurisdiction would mean placing some weight on the other side of the scale. In practical terms this means legally implementing a permanent asylum visa scheme at EU level, as well as other permanent safe pathways *complementing* an asylum visa scheme. Thus, the relation of safe pathways to territorial access to asylum is key (*additionality*). Safe pathways with a focus on migration control, leading to (direct or indirect) deterrent effects can exacerbate the imbalance of responsibility principles manifested in the asylum paradox.

15.2 Key issues setting the course in the assessment

The analysis and assessment of safe pathways to protection was based on the responsibility framework, which served three functions: first, an analytical function, structuring the different elements of implementation according to the responsibility principles; second, a heuristic function, revealing

and predicting tensions and trade-offs depending on the implementation; and, third, a normative function for the evaluation of the potential effects safe pathways can have on the asylum paradox. Chapter 10 established key factors to be considered in the assessment with a view to the normative effect on the asylum paradox: aspects of implementation pointing to a predominant focus on migration control, with potential deterrent effects; aspects promoting the application of individual rights in the extraterritorial context; and aspects providing alternatives to the allocation of responsibility at international level, promoting a 'common but differentiated' approach to responsibility-sharing.[913] Chapter 10 also made predictions with a view to tensions and trade-offs that could arise when considering one responsibility principle or the other.

Building on these *pre-established* considerations and predictions for the assessment of safe pathways, the analysis and assessment in Part 3 confirmed the areas of tension and trade-offs set out in Chapter 10 and added some additional considerations regarding the issue of access and safety, as well as the complementarity of safe pathways to each other. This section therefore concludes with an outline of the following key issues, which set the course in the assessment: the issue of access to and safety during the procedures of safe pathways (15.2.1); their implementation as permanent or *ad hoc* schemes (15.2.2); the outline of safe pathways as individual access routes or quota-based admission schemes (15.2.3); the distinction between access to territory and access to rights (15.2.4); the relation of safe pathways to territorial asylum (15.2.5); and, finally, the complementarity of safe pathways to each other (15.2.6).

15.2.1 Safe access to safe pathways

Two crucial factors determining the effect of safe pathways with a view to the individual seeking protection (and thus the principle of external responsibility), as well as the overall normative relevance of safe pathways regarding the asylum paradox, are *access* and *safety*. The notions of access and safety capture both *de facto* access and physical safety, as well as legal access to the procedure and legal safeguards. The assessment identified the following key factors as having an impact on access and safety:

913 See Part 2 Chapter 10.1.

1. Accessibility of the procedure, including
   - availability and accessibility of impartial information on the existence of the pathway and the details of the procedure;
   - the *de facto* accessibility of the agents conducting the procedures (e.g., embassies, consulates or UNHCR), either personally or through online applications;
   - the legal possibility of directly approaching a State with a protection claim – while non-State actors involved in the selection process can facilitate access to procedures, they also risk functioning as 'gatekeepers';
   - complementarity of different pathways, ensuring that each pathway stays accessible for those with no other choice. This means, for instance, admitting family members through (extended) family reunification instead of humanitarian admission schemes.
2. Physical safety during the procedures, including the issues of:
   - *if, where* and *how* protection seekers are accommodated during the procedures, and tackling issues of international cooperation;
   - considering special needs;
   - the optional availability of online applications, to avoid potentially dangerous journeys to State embassies or consulates;
   - medical checks;
   - safe departure to the host State, again affecting international cooperation.
3. Legal safety, including issues of:
   - procedural safeguards;
   - legal assistance;
   - non-discrimination;
   - family unity;
   - best interest of the child;
   - transparency of the procedures (reasons for rejection);
   - options of legal remedies and judicial review. Here, again, the level of involvement of third parties is crucial: vis-à-vis non-State actors, protection seekers do not have the same rights and legal options to challenge a negative decision.
4. Ensuring physical and legal safety leads to the issue of the legal status of individuals during the procedures. Here, again, there is a particular need for international cooperation, as the procedures take place in third countries.
5. Independent monitoring mechanisms.

This is not an exhaustive list. However, the way States answer these questions when implementing safe pathways reflects on all three principles of responsibility. This concerns the principle of *external responsibility*, since all these issues are crucial with a view to securing access and safety for protection seekers and the overall availability of safe pathways as an alternative to an irregular arrival. The issues affect the principle of *internal responsibility* by implying recourse to a range of financial, personal and administrative resources as well as limits regarding State discretion in the implementation. At the same time, taking these aspects into account strengthens the legitimacy of the pathway, ensures that safe pathways reach those most in need and aligns State policy with the goal of safeguarding human rights. Finally, these issues concern the *inter-State responsibility*, as the procedures of safe pathways – preliminary or not – necessarily take place in a third State, requiring international cooperation. Additionally, the more effective safe pathways are, the greater their contribution to international responsibility-sharing and thus their impact on the principle of inter-State responsibility. Depending on the priorities States set regarding the responsibility principles, the normative effect of the pathway on the asylum paradox varies. Finally, so called *'in-country' processing* – that is, admissions directly from home States – adds another layer of complexity to all the issues mentioned above, again affecting all three principles of responsibility.[914]

15.2.2 Permanent schemes vs. *ad hoc* schemes

The implementation of safe pathways as permanent schemes or *ad hoc* schemes impacts on all three principles of responsibility. *Ad hoc* schemes offer more flexibility for receiving States; however, they also diminish the predictability of admissions to the detriment of the principle of internal responsibility. With regards to the inter-State responsibility, *ad hoc* schemes can be seen as acts of 'emergency solidarity' rather than an approach of 'common but differentiated' responsibility-sharing or long-term commitment to protection. While they might be necessary in times of imminent crisis, they have a limited effect on the asylum paradox.[915]

914 For a discussion of these issues with respect to the asylum visa see above Part 3 Chapter 11.6.1 and Chapter 11.6.2.

915 See above Part 3 Chapter 13.5.4.

15.2.3 State discretion vs. individual rights

As outlined in Chapter 10, considering aspects in favour of one responsibility principle or the other leads to tensions and trade-offs. With regard to the effect of safe pathways on the asylum paradox, there is a fundamental difference between pathways offering an individual access route, with individual rights and guarantees, or voluntary government-led programs, mostly based on quotas and of a temporary nature. The asylum visa is the only pathway considered in this book that offers the possibility of approaching a State representation extraterritorially and seeking protection independent of existing government-led admission schemes, quotas or belonging to a specific group of beneficiaries.

While the asylum visa strengthens the scope of the individual right to seek asylum, resettlement and *ad hoc* humanitarian admission programs focus on the right of States to grant protection – if and how they want to. There is no individual claim, no option of judicial appeal and the status granted upon arrival varies significantly among Member States, often leading to a trade-off between access and rights.[916]

The assessment of resettlement and *ad hoc* humanitarian admission schemes showed that the voluntary nature of these pathways does not imply the granting of individual rights and guarantees during the procedures. This book argues that this assumption may be challenged depending on the circumstances of the case and the legal grounds applicable, thereby drawing on the few cases of appeals against discrimination in resettlement procedures or the rejection of humanitarian visas in a German *ad hoc* emergency evacuation scheme.[917] However, even if the legal 'gatekeepers' can be overcome (which mainly depends on the issue of extraterritorial jurisdiction or applicability of EU law), the lack of transparency in the selection process from the perspective of the protection seeker functions as *de facto* 'gatekeeper' for the enforcement of individual rights.[918] Overall, resettlement and *ad hoc* humanitarian admission schemes reflect an understanding of asylum as a right of States, without individual claims attached. Just like the current legal framework governing access to protection in the EU, some of the examples of safe pathways addressed in this book show a strong focus on the principle of internal responsibility. Moreover, there are

916 See below at Part 3 Chapter 15.2.4.
917 See above Part 3 Chapter 12.4.1.2. and Chapter 13.4.1.2.
918 See above Part 3 Chapter 12.4.1.2 and Chapter 13.4.1.2.

methods of implementation which bear the risk of safe pathways functioning as 'deterrence in disguise', thereby exacerbating instead of countering the imbalance of responsibilities leading to the asylum paradox.[919]

15.2.4 Access vs. rights

All pathways analysed in this book offer a method to access EU territory, avoiding the dangers of irregular flight routes. Thus, all the pathways have the potential to immediately bridge the protection gap with a view to safe *access to territory* for every person who individually benefits from the respective pathway. However, the analysis identified substantial differences between the legal status of beneficiaries before and after arrival, and thus *access to rights*, depending on the pathway. Providing refugee status upon arrival is not mandatory, even under resettlement procedures.[920] Depending on the pathway and its respective national legal framework, the status granted after arrival can differ substantially. This might affect the right to family reunification, the right to be granted a refugee passport, or prospects for long-term residency.

By drawing on the case of Germany in Chapters 13 and 14, the book discussed how there can be a 'trade-off' between access and rights when implementing *ad hoc* humanitarian admission and sponsorship schemes. For instance, individuals with similar backgrounds and reasons for fleeing Syria are granted different resident permits depending on how they arrived in Germany – through resettlement, an *ad hoc* humanitarian admission scheme (with or without the requirement of a financial guarantee by a sponsor) or irregularly. Applying a 'flexible status' upon arrival, not necessarily matching protection needs, has an impact on the principle of external responsibility. However, Chapter 14 also identified negative effects with a view to the principle of internal responsibility. The example of Germany showed that individuals who were granted a comparatively weak residence status after an admission through a sponsorship scheme applied for asylum after arrival to achieve a change in status. This dynamic can place a strain on administrative capacities and impact on the principles of both external and internal responsibility. Still, safe pathways go hand in hand with a trade-off between access and rights. As has been outlined in the previous

919 See further below Part 3 Chapter 15.2.5.
920 See Part 3 Chapter 12.

section, this trade-off is not limited to the question of status upon arrival. It can be traced back to the extraterritorial context.[921]

The trade-off between access and rights seems to be an inevitable consequence of the attempt to reconcile the principles of internal and external responsibility in governmental admission schemes. While the granting of procedural rights reflects a commitment to the principle of external responsibility, it also takes up internal State resources and may narrow a State's discretion in the admission process. However, granting procedural guarantees can also foster the principle of internal responsibility. For instance, providing protection seekers with (access to) adequate information and legal assistance can ensure that the schemes benefit those most in need. It also helps combat human smuggling, a genuine national and EU interest.

Ultimately, there is a two-sidedness to upholding human rights: safeguarding procedural guarantees not only enhances the position of the protection seeker, and thus the principle of external responsibility, but also has an internal dimension, affecting the principle of internal responsibility. This becomes evident in the LIBE Report on humanitarian visas, in which the aim of upholding human rights is tied to the self-understanding of the Union and every Member State.[922]

15.2.5 Safe pathways and territorial asylum: the 'fig leaf' and the 'queue jumpers'

The key factor for determining the normative effect of safe pathways on the asylum paradox is the relation of a pathway to territorial asylum (additionality). The relation to territorial asylum affects the situation of protection seekers who do not benefit from safe pathways to protection – either because available pathways are scarce, or difficult to access (*de facto* or legally)[923] – or protection seekers who have been rejected after attempting to enter a State irregularly or attempting to be admitted through a safe pathway. Finally, this issue can also affect beneficiaries of safe pathways who enter a national asylum procedure after arrival, to improve their residence status based on a specific pathway.[924]

921 See below at Part 3 Chapter 15.2.3.
922 LIBE Report, *supra* note 409, Explanatory Statement – Justification for the Proposal.
923 See above Part 3 Chapter 15.2.1.
924 See above Part 3 Chapter 15.2.4.

A safe pathway aiming at generally replacing the individual right to seek asylum in the territory or the border of a State would risk violating the principle of non-refoulement.[925] It is therefore crucial to offer safe pathways *in addition* to the option of seeking territorial asylum upon (irregular) arrival. None of the pathways assessed in this book foresees directly preventing or replacing the option of seeking territorial protection upon irregular arrival. However, there are modes of implementation that can still have deterrent effects. Two key issues in this regard are addressed with reference to the images of the 'fig leaf'[926] and the 'queue jumpers'[927] in the following.

If States draw on the implementation of safe pathways to legitimise restrictive asylum policies and 'migration deals' with third States, ultimately leading to further access restrictions, safe pathways degrade into a 'fig leaf' for the *de facto* restriction of access to territorial asylum. While being a tool for granting protection, safe pathways can thereby exacerbate the asylum paradox through the 'back door'.[928]

The same goes for proposals drawing on the implementation of safe pathways to *legally* restrict individual access to territorial asylum – e.g., by precluding access for individuals who have previously entered a State irregularly, have been rejected in an admission procedure, or have not made use of a (hypothetically) existing pathway ('queue jumpers').[929] Such an approach links the notion of abuse to the denial of a protection claim or procedural rights. A recent example of such legal reasoning in the context of access to protection is the ruling of the ECtHR in the case *N.D. and N.T.*, denying procedural rights due to, *inter alia*, prior misconduct of the applicants.[930]

15.2.6 Complementarity of safe pathways

Finally, the issue of complementarity of safe pathways impacts on all three responsibility principles. All the analysed pathways address different situ-

925 On the scope of international human rights and the principle of non-refoulement see Part 1 Chapter 5.1.
926 See Thym, *supra* note 112 on this image.
927 See Kneebone and Macklin, *supra* note 616, at 1091 on this image.
928 See Part 3 Chapter 12.5.2 for a discussion of this issue with regard to the Resettlement Framework Proposal of 2016 at EU level.
929 See Part 3 Chapter 12. On the issue of 'good' refugees vs. 'bad' asylum seekers see Part 3 Chapter 13.5.1.
930 See Part 3 Chapter 11.4.3.

ations of protection seekers and host States. While the asylum visa is a pathway particularly promoting the right to an individual procedure, many protection seekers might not qualify for an admission through an asylum visa scheme. The high threshold of non-refoulement and the hurdles of individual visa procedures can have excluding effects. For instance, protection seekers in the focus of resettlement would most likely not qualify for an asylum visa. Overall, asylum visa schemes offer less predictability for States and most likely do not provide a measure to cope with the vast number of protection seekers worldwide. This limits the effect of asylum visas on the principle of external and inter-State responsibility.[931] Sponsorship schemes, on the other hand, are only accessible to protection seekers who have a sponsor in a specific receiving State.[932] Overall, a complementarity of safe pathways is necessary to consider the variety of protection needs and State concerns. For different pathways to be effective overall, complementarity would also have to guide each admission decision to ensure that every pathway reaches its full potential.

931 See Part 3 Chapter 11.6.4 for a discussion of the limits of the asylum visa.

932 See Part 3 Chapter 14 on sponsorship schemes, with a particular focus on 'complementarity' see Part 3 Chapter 14.5.2. On the 'close-tie' requirement see Part 3 Chapter 13.5.2.

Part 4: Outcomes and outlook

This book has engaged in a normative analysis and assessment of safe pathways to protection in the context of EU law. The assessment challenges the assumption that safe pathways are *per se* a solution to the asylum paradox – that is, the paradoxical interplay between the territorial concept of asylum and the prevention of access to territory through border and migration control.

This last part has two objectives. The first is to provide an overview of the findings. To this end, Chapter 16 revisits the main findings of the assessment and answers the research questions, while Chapter 17 provides a list of key findings. The second objective consists of providing an outlook and thereby pointing to areas for further research in Chapter 18.

16 Summary of findings

This chapter provides a summary of the findings with a view to the research questions set out in Part 1 (Chapter 2). Against the backdrop of the asylum paradox (see Chapter 1), the two main research questions were:

1. What are the normative principles underlying the asylum paradox?
2. What are the normative effects of safe pathways to protection on these principles, and therewith on the asylum paradox?

In essence, Part 2 of this book answered the first research question by reconstructing the principles underlying the asylum paradox and confirming the hypothesis that the paradox reflects an imbalance of responsibility principles. The analysis in Part 3 answered the second research question and confirms the hypothesis that the *normative* effect of safe pathways on the asylum paradox varies depending on the outline of the pathway and the details of implementation. Overall, the book identifies fundamental normative differences between the pathways regarding their potential to mitigate or even overcome the imbalance of responsibility principles manifested in the asylum paradox.

While Chapter 17 provides a list of the key findings, the following sections provide summaries of the findings of each chapter, structured accord-

ing to the three preceding parts: the asylum paradox as point of departure (16.1), the responsibility framework as theoretical foundation (16.2) and the analysis and assessment of safe pathways (16.3).

16.1 Point of departure: the asylum paradox and established definitions

Part 1 set the scene by describing the asylum paradox (Chapter 1). The asylum paradox can be identified in the laws governing international protection, which provide a 'right to leave any country', a 'right to seek asylum' and protection statuses with individual rights and guarantees. At the same time, the law is silent in view of an 'entry right' to seek protection in a specific State. The asylum paradox can further be identified in State practice. On the one hand, EU Member States grant protection to a protection seeker who has managed to reach EU territory (and meets protection grounds). On the other hand, these same States prevent access to territory, thereby increasingly extraterritorialising their (legal) borders. Against this backdrop, Chapter 2 outlined two main research questions: what are the normative principles underlying the asylum paradox, and what effects can safe pathways have on these principles, and therefore on the asylum paradox?

Chapter 3 pointed to relevant definitions and delimitations in its outline of the scope of the book. In particular, it defined 'protection seekers' as third country nationals in need of or seeking any kind of human rights protection. Thus, the term 'protection seeker' is broader than the legal term 'refugee' or the term 'asylum seeker'. 'Safe pathways to protection' are visa procedures granting safe and regulated access to State territory to individuals in need of protection, based on an individual protection claim or on quota-based admission programs, with the ultimate objective of providing a protection status after arrival. Finally, it defined the 'State' as a territorial polity with the delegated power to grant access to protection in a designated (supra-)national space.

Chapter 4 sketched the structure and the methodological approach of the book, which served as the basis for a more comprehensive elaboration of the methodology in Chapter 6.

Chapter 5 outlined the legal context and state of research the book builds upon, drawing two main conclusions: first, that the scholarly focus lies on access *prevention*; and, second, that the asylum paradox is primarily discussed as a tension between the territorial principle of sovereignty and the

universal principle of human rights protection. As will be further outlined in the following, this book chooses a different approach.

16.2 Theoretical foundation: the responsibility triad as basis of a responsibility framework

Part 2 of this book concluded that the asylum paradox reflects not merely a tension, but rather an *imbalance* of responsibility principles (see Chapter 10). To come to this conclusion, Part 2 reconstructed the asylum paradox according to three principles of responsibility – the *internal*, the *external* and the *inter-State responsibility* (Chapters 7 to 9). This triad of responsibility principles was derived from sovereignty, human rights and solidarity as structural principles of the legal regime governing access to territory and protection in the EU.

Chapter 7 discussed the *internal responsibility* of States for protecting the rights of everyone part of their 'internal community'. This principle was derived from sovereignty as structural principle in the legal context of access to territory. Chapter 7 defined the 'internal community' as a term capturing everyone who has a pre-existing legal bond to a State based on citizenship, denizenship, any other kind of residence status, or mere legal presence in a State's territory. The responsibility is referred to as *internal* and not *territorial* as its point of reference is the normative relationship between the State and everyone belonging to the 'internal community'. Therefore, the *internal* responsibility captures the notion of the 'shifting border'. In contrast to the principle of sovereignty, the principle of internal responsibility is not self-evident. It reflects the responsibility for the protection of the rights and interests of a community. On the one hand, the principle of internal responsibility allows for a collective perspective on measures of migration and border control; on the other hand, it can add transparency to the legal discourse by capturing a purpose.

Chapter 8 concerned the *external responsibility* States have for the protection of individuals not yet part of their 'internal community'. The chapter started with a discussion of human rights as structural principles of the legal order on access to protection. As with internal responsibility, external responsibility varies depending on the circumstances of the individual case and the geographical context. The point of reference is the normative relationship between a State and a protection seeker not (yet) part of its internal community. Chapter 8 compared the international protection regime

to the civil law concept of joint and several liability. Thus, the commitment to human rights and refugee protection can be compared to the 'debt' owed collectively to protection seekers by all State Parties to respective human rights treaties.

Finally, Chapter 9 concerned the inter-State responsibility, which governs the relationship of States towards each other, based on solidarity and responsibility-sharing. The focus of this chapter was on a discussion of proposals addressing the main shortcoming of the current system governing the inter-State responsibility: the lack of fair and effective responsibility-sharing mechanisms. Chapter 9 discussed three approaches to responsibility-sharing, which set the course for the assessment: 'common responsibility', 'common but differentiated responsibility' and 'emergency solidarity'.

Based on the responsibility triad, Chapter 10 outlined a normative field to structure the analysis and assessment of safe pathways: a responsibility framework. The responsibility framework functions at a meta-level, based on an understanding of responsibility as a *principle*, in contrast to 'obligations' or 'duties' as *legal imperatives* enshrined in positive law, or 'accountability' as the *attribution* of responsibilities to a specific State. Chapter 10 concluded that the current legal framework governing access to protection in the EU has a predominant focus on States' internal responsibility for their 'internal community', creating an imbalance in relation to the external responsibility and the inter-State responsibility. The result of this imbalance is the asylum paradox.

Finally, Chapter 10 outlined the three functions of the responsibility framework. First, it functions as analytical tool, allowing the different elements of implementation of safe pathways to be structured according to the responsibility principles. Second, it serves as a heuristic, which can reveal and predict tensions and trade-offs, depending on the outline and implementation. Finally, the framework has a normative function regarding the evaluation of the potential effects safe pathways can have on the asylum paradox. The analytical function allowed for outlining aspects of implementation of safe pathways that would correspond more with one principle or the other. The heuristic function allowed for predictions of tensions and trade-offs potentially arising due to a focus on one principle or the other. The normative function allowed for delimiting three key considerations to guide the assessment of safe pathways with respect to its potential effect on the asylum paradox: aspects of implementation pointing to a primary focus on migration control, leading to (direct or indirect) deterrent effects; aspects promoting the consideration of individual rights

in the extraterritorial context; and aspects providing alternatives to the current allocation of responsibility at international level, against the backdrop of the three approaches to responsibility-sharing: 'common responsibility', 'common but differentiated responsibility', and 'emergency solidarity'.

16.3 Analysis and assessment of safe pathways to protection

Part 3 engaged in an analysis of safe pathways to protection, with the aim of assessing the normative effects safe pathways to protection can have on the asylum paradox. Thus, Part 3 relied on the responsibility framework to structure the analysis of the following safe pathways to protection: asylum visas, resettlement, *ad hoc* humanitarian admission schemes and sponsorship schemes. At first sight, safe pathways seem to target the heart of the access dilemma, having great potential to counter the imbalance manifested in the asylum paradox. Safe pathways offer access to territory and protection, expressing a commitment to the principle of external responsibility. At the same time, they accommodate the principle of internal responsibility by allowing States to control entry to their territories, apply security screenings and prepare administrative structures for the arrival of protection seekers. At international level, safe pathways can work as instruments of solidarity and responsibility-sharing, in line with the principle of inter-State responsibility.

However, the assessment in Part 3 confirmed the hypothesis that the impact of safe pathways on the asylum paradox depends on the pathway and the details of its implementation. Chapter 15 concluded that there are fundamental normative differences between the asylum visa as individual pathway with procedural rights and guarantees and the other pathways in the assessment. Chapter 15 identified six key issues setting the course for the assessment, as they impact on all three principles of responsibility: the issue of how to facilitate *access to* and *safety during* the procedures (both *de facto* and legally); the difference between permanent and *ad hoc* schemes; the difference between discretionary schemes and procedures based on individual rights; the distinction between access to *territory* and access to *rights*; and, most importantly, the relation of safe pathways to territorial asylum (*additionality*), and the relation of safe pathways to each other (*complementarity*).

16.3.1 The asylum visa

Chapter 11 addressed the option of granting an 'asylum visa' as an application for a visa to access the national asylum procedure in the EU. While some Member States grant 'humanitarian visas' qualifying as 'asylum visas' in exceptional cases, there is no permanent asylum visa scheme at national or EU level providing access to an individual procedure. To illustrate the legal situation in the EU, Chapter 11 discussed the decisions of the CJEU (*X and X*) and the ECtHR (*M.N.*) in 'asylum visa' cases, setting the M.N. case into the context of the *N.D. and N.T.* ruling of the ECtHR. The chapter then referred to a proposal of the European Parliament for a 'humanitarian' visa at EU level, granting access to an asylum procedure (discussed as 'asylum visa' in this book).

In contrast to all other safe pathways, the asylum visa foresees an individual claim, independent of quotas or sponsors. Based on the relevance attributed to individual access schemes in Chapter 10, this chapter found that legally implementing a permanent asylum visa scheme at EU level would have a significant normative effect on the principle of external responsibility and thus on the imbalance manifested in the asylum paradox: a legally implemented asylum visa scheme would open a safe pathway to protection with individual claims and procedural guarantees, which does not yet exist at EU level.

As the asylum visa is a pathway significantly limiting State discretion, Chapter 11 discussed the 'floodgate argument', referring to the fear of an uncontrolled number of protection seekers trying to reach the EU through such a scheme. Chapter 11 argued that apart from a wide range of practical and legal impediments to access visa procedures, not all asylum visa cases would meet the high thresholds of non-refoulement. Thus, the asylum visa would most likely not affect the principle of inter-State responsibility as much as other pathways with a view to its predictability and actual admission numbers. The asylum visa could, however, have a significant *normative* effect on the inter-State responsibility: its implementation would change the current paradigm of an allocation of responsibility on the sole basis of geographical proximity.

16.3.2 Resettlement

Chapter 12 addressed resettlement as a quota-based pathway which is on the rise in the EU. The traditional concept of resettlement as a UNHCR co-

ordinated 'secondary access route' for protection seekers who have already found primary refuge in a first State of asylum, has a strong focus on protection and international solidarity and thus the potential to enhance the principles of external and inter-State responsibility. However, resettlement is a pathway focusing on the right of States to grant protection, without providing for individual rights and guarantees. Chapter 12 discussed the effect of legal and *de facto* 'gatekeepers' in this regard.

Additionally, resettlement can be instrumentalised as a method of migration control, as exemplified by an analysis of the 2016 proposal for a 'Union Resettlement Framework'. Such an approach to resettlement risks outweighing the positive effects of resettlement on the external and the inter-State responsibility. Chapter 12 discussed the relation of resettlement to territorial asylum as a key issue in terms of the effect of this pathway on the asylum paradox. The chapter argued that if the aim of migration control becomes the defining scope of a pathway, even leading to deterrent effects, the asylum paradox, with the imbalance of responsibility principles at its core, will be exacerbated.

16.3.3 *Ad hoc* humanitarian admission

Chapter 13 assessed *ad hoc* humanitarian admission schemes, delimiting these schemes from traditional resettlement on the one hand (see Chapter 12), and schemes with a primary focus on private or community sponsorship on the other (see Chapter 14). This book defines *ad hoc* humanitarian admission schemes as:

> Temporary governmental programs committing to an *ad hoc* admission of individuals, families, or groups of people in need of protection due to a specific situation of crisis, independent of their geographical location, often based on fixed quotas, not necessarily depending on private funding.

Chapter 13 identified three main issues: the framing caused by humanitarian admission schemes with a view to 'good refugees' and 'bad asylum seekers'; the correlation of access and rights, as beneficiaries may be granted a weaker status in receiving States than protection seekers who entered irregularly; and, lastly, the wide range of admission criteria, including the 'close tie' requirement. Admission requirements can range from specific language skills and professional backgrounds to belonging to a certain gender or religion. 'Utilitarian' admission requirements mostly reflect the

urge to consider pre-existing links with the host State. They can therefore be attributed to the aim of safeguarding the internal order of States in line with the principle of internal responsibility. However, in most cases the underlying normative assumptions are questionable: whether a person of a certain cultural or religious background has, for instance, better prospects of integration or cultural acceptance is hypothetical. With a view to the principle of external responsibility, utilitarian admission requirements may cause an issue as soon as the protective scope of the admission is diminished due to the way they are applied or in case of a discriminatory practice.

Finally, Chapter 13 noted that the 'close tie' requirements could further be seen as a form of 'responsibility allocation', equally affecting the principle of inter-State responsibility. Overall, however, *ad hoc* admission schemes reflect an approach of 'emergency solidarity' in contrast to permanent schemes aiming at doing justice to a 'common but differentiated' approach to responsibility-sharing. This is not to deny, however, the humanitarian need for these schemes in situations of acute crisis.

16.3.4 Sponsorship schemes

Chapter 14 addressed the last pathway in the focus of this book: the admission through 'sponsorship schemes'. The term 'sponsorship schemes' is an umbrella term which this book uses to address 'private- or community-based sponsorship'. More specifically, this book defines sponsorship schemes as (*ad hoc* or permanent) humanitarian admission schemes that make the admission of protection seekers dependent on a (mostly) financial commitment from civil society members as 'sponsors' in the receiving States. Sponsorship schemes can be set up as individual pathways, or quota-based schemes.

On the one hand, sponsorship schemes can empower civil society members to take an active role in expanding options of safe access to protection. Thus, they rely on a reciprocity between the sponsors and the State: while the commitment of civil society to humanitarian admission might lead to the implementation of safe pathways in the first place, the 'safety net' provided by States in case the sponsor fails to comply with the initial commitment might encourage members of civil society to participate in such schemes.

Overall, sponsorship schemes show great potential to strike a balance between the principles of internal and external responsibility. They can empower civil society and enhance the agency of protection seekers. However,

there are two key issues in this regard: the scope of the 'responsibility transfer' and the complementarity of sponsorship schemes, as these schemes may address family members of protection seekers abroad. The 'responsibility transfer' is thus at the same time the distinguishing and most controversial feature of sponsorship schemes. Drawing on the case of Germany, Chapter 14 discussed how the involvement of private sponsors, who are relatives of protection seekers abroad, can lead to situations of emotional pressure to provide a financial guarantee for an admission. This again, may cause follow-up problems for the sponsors, the protection seekers and the States. Chapter 14 argued that the tensions and trade-offs arising between States and sponsors could be mitigated, e.g. by providing beneficiaries with a protection status adjusted to their needs; avoiding an excessive burden on financial capacities, e.g. by adapting the transfer of responsibility to the sponsors to their financial capacities and the duration of the temporary residence permits granted ('sharing responsibility, not burdens'); placing the responsibility transfer on a broad public basis; and, most importantly, ensuring complementarity of the schemes, particularly regarding family reunification.

17 List of key findings

1. The current state of access to international protection in the legal context of the EU can be framed along the lines of an 'asylum paradox': This book describes the paradoxical interplay between the granting of *territorial protection* on the one hand and the *prevention of access to territory* on the other as 'asylum paradox' (see Chapter 1). The asylum paradox can be identified in the laws, jurisprudence, and State practice governing access to territory and protection in the EU. To explain this 'asylum paradox', legal scholarship mainly draws on the tensions between sovereignty and human rights (see Chapter 5).
2. The asylum paradox is the result of an imbalance of three responsibility principles:
   This book argues that the asylum paradox can be reconstructed according to a triad of responsibility principles: the internal, the external and the inter-State responsibility (see Chapters 7 to 9). It further argues that the asylum paradox is the result of an imbalance of these responsibility principles, due to a predominant focus of States on the principle of internal responsibility (see Chapter 10).

3. The triad of responsibility principles serves as basis for a *responsibility framework*, which can offer a threefold function for the analysis and assessment of safe pathways to protection: an analytical, a heuristic, and a normative function:
   First, the responsibility framework has an analytical function, as it allows different elements of safe pathways to be structured according to the triad of responsibility principles. Second, it has a heuristic function, allowing to reveal and predict tensions and trade-offs between the responsibility principles depending on the implementation of a pathway. Finally, it has a normative function as it serves as an evaluative standard for the assessment of potential effects safe pathways can have on the asylum paradox (see Chapter 10).
4. The responsibility framework sets out three key considerations to guide the normative assessment of safe pathways with a view to the effects on the asylum paradox:
   a. Pathways with (direct or indirect) deterrent effects would enhance the predominant focus of the current system on the principle of *internal* responsibility and neglect the principle of external responsibility, thereby exacerbating the imbalance of responsibility principles and thus the asylum paradox.
   b. Additional and complementary pathways promoting the application of individual rights in the extraterritorial context enhance the principle of external responsibility and can change the current protection paradigm grounded on territorial access to asylum.
   c. Pathways providing alternatives to the current (geographical) allocation of responsibility at international level, as well as measures promoting a 'common but differentiated responsibility', enhance the principle of inter-State responsibility (see Chapter 10).
5. The asylum visa can change the current protection paradigm:
   Safe pathways or methods of implementation promoting the application of human rights in the extraterritorial context reflect a strong commitment to the principle of external responsibility. They have the normative potential to counter the imbalance of principles manifested in the asylum paradox (see Chapter 10). An example is the asylum visa, offering an individual access scheme (*in addition* to territorial asylum), with individual rights, thereby overall enhancing the right to seek asylum. Thus, legally implementing a permanent asylum visa scheme would lead to a normative shift in paradigm with a view to the territorial concept of asylum as well as the geographical allocation of

responsibility (see Chapter 11). However, the asylum visa offers limited predictability for States and not all protection seekers would meet the high threshold of non-refoulement. With a view to the principles of external and inter-State responsibility, this pathway would therefore have to be *complemented* by other pathways to be effective.

6. Resettlement and *ad hoc* humanitarian admission schemes have a limited normative effect on the asylum paradox:
   Resettlement and *ad hoc* humanitarian admission schemes reflect the right of States to grant protection. They do not provide for individual claims or procedural rights and include a range of utilitarian admission criteria reflecting State interests. Nonetheless, these pathways can bridge the protection gap on an individual basis. Compared to the asylum visa, however, they have a limited *normative* effect on the current paradigm of territorial protection and geographical allocation of responsibility at international level – and therewith on the asylum paradox (see Chapters 12 and 13).
7. Utilitarian considerations do justice to the internal responsibility. They can, however, also have positive effects on the principles of external and inter-State responsibility:
   In voluntary schemes utilitarian considerations can facilitate admissions and allow for a consideration of individual ties to the receiving State. Both aspects can have a positive impact on the principle of external responsibility if protection considerations remain paramount and there is no discriminatory practice.
   Regarding the principle of inter-State responsibility, 'close tie' requirements could be seen as a consideration of 'solidarity bonds' with a view to responsibility-sharing at international level. The effect on the principle of inter-State responsibility would then strongly depend on the complementarity of respective schemes, particularly with respect to family reunification (see Chapter 14.5.2).
8. The *de facto* effect of resettlement and *ad hoc* humanitarian admission schemes on the asylum paradox depends on their approach to responsibility-sharing and the scope of the quotas:
   As permanent quota-based pathway, resettlement enhances a 'common but differentiated approach to responsibility-sharing', with a high level of predictability. Overall, resettlement reflects a strong commitment to the principle of inter-State responsibility. *Ad hoc* humanitarian admission schemes are crucial in times of crisis. They do, however, reflect an approach of 'emergency solidarity' with a limited effect on the asylum

paradox. Overall, the effect of resettlement and *ad hoc* humanitarian admission schemes on the asylum paradox depends on the scope of admission quotas.

9. Sponsorship schemes can have a significant impact on the asylum paradox, depending on their implementation:
   Sponsorship schemes rely on reciprocity between the sponsors and the States. Overall, their effect on the asylum paradox depends on the scope of the 'responsibility transfer' ('responsibility- instead of burden-sharing') and the complementarity of sponsorship schemes, particularly with respect to family reunification (see Chapter 14.5).
10. Safe pathways with direct or indirect deterrent effects exacerbate the asylum paradox:
    Safe pathways or methods of implementation with a primary focus on migration control and (direct or indirect) deterrent effects exacerbate the imbalance of responsibility principles manifested in the asylum paradox. They may have an impact on the right to leave and the right to seek asylum. Examples are elements of the 2016 proposal for a resettlement regulation at EU level, as well as the 'one-to-one approach' based on the 'EU–Turkey Statement' of 2016 (see Chapters 12 and 13).
11. Six key issues set the course in the assessment, leading to tensions and trade-offs between the principles of responsibility, influencing the effect of safe pathways on the asylum paradox (see Chapter 15, Section 15.2):
    a. The relation of safe pathways and territorial asylum (no deterrent effects and *additionality* of a pathway).
    b. The *complementarity* of safe pathways to each other, as they all target different situations.
    c. The design of a pathway as individual access route with individual rights and guarantees or as a scheme at State discretion.
    d. The design of a pathway as permanent scheme or as *ad hoc* scheme.
    e. The way in which safe pathways regulate issues of *access to the procedures* and *safety during* the procedures, both *de facto* and legally.
    f. The correlation of access and status rights after arrival.

18 Outlook

This book was finalised following a range of new challenges to the international protection system. From 2019 onwards, the COVID-19 pandemic led the world into a new state of exception and crisis. In various ways, protection seekers were affected by State measures aimed at preventing a further spread of the Coronavirus. Borders were closed and already scarce options of safe pathways, such as resettlement and *ad hoc* humanitarian admission schemes, were put on hold. The Taliban's takeover of Afghanistan in 2021, the war in Ukraine from 2022 onwards, the breakout of the civil war in Sudan and the war in Gaza since 2023 are just some examples of conflicts that have led to another significant rise of people being forced to flee. With over 108 million people forcibly displaced worldwide, mostly still in their home countries or regions of conflict,[933] the question of access to protection remains one of the most pressing concerns of our time. Drawing on Benhabib's prominent metaphor of the outdated normative 'map' we are using to navigate 'an unknown terrain',[934] this last chapter adds the notion of the 'vessel'[935] to this picture. With this image in mind, the following sections identify three key areas for further research with a view to access to protection: the 'map' (18.1), the 'vessel' (18.2) and the 'terrain' (18.3).

18.1 The map: human rights must follow borders and adapt to new challenges

This book advocates a progressive interpretation and application of human rights norms in the context of extraterritorial access control. It takes the view that a State may control entry to its territory. However, States may not legally move beyond their borders exclusively in furtherance of their internal responsibility. Where State action moves beyond borders, human rights are tied to these actions. By ratifying international human rights treaties States have voluntarily set limits to their discretionary power when deciding over entry to their territories. Limiting this commitment to situa-

933 See UNHCR, *Global Trends: Forced Displacement in 2022* (2022), available at https://www.unhcr.org/global-trends-report-2022.

934 Benhabib, *supra* note 130, at 6.

935 In scholarly literature, 'the vessel' has also been ascribed to stateless persons, who do not 'sail' under any State flag; see Mann, *supra* note 381, at 21, with further references.

tions at the territorial border, leading to an arbitrary allocation of responsibility based on geographical proximity, might have been convincing at the time of ratification. At a time when border regimes have long since left the territorial sphere of a State, this appears anachronistic and risks undermining the entire protection system. If State control moves beyond the territorial border, human rights must follow. This is not a claim for open borders; rather, it is a claim for granting access to the law.

The internal and the external responsibility outlined in this book are normative reflections of legal relationships. They therefore have the potential to unfold their validity independent of the territorial context. The assessment in this book pointed to the leading – but not exclusive – role of territory in this regard, acknowledging the legal concept of jurisdiction as essential element of the 'legal bond' between a State and a protection seeker in the extraterritorial context. However, this book argues that making this legal bond inaccessible by denying jurisdiction perpetuates the asylum paradox. While extraterritorial measures of border and migration control prevent access to territory, denying jurisdiction in asylum visa cases prevents access to the law.

Another issue calling for further research lies in the necessity to adjust the current protection system to new challenges faced in the 21st century. The impact of climate change on forced displacement raises new legal issues. While the particularly vulnerable situation of refugees under the Refugee Convention merits special attention, the dichotomy between the concept of 'migrant' and 'refugee' (even in its broader sense including complementary protection), creates a gap for those in need of human rights protection due to new kinds of human rights threats, not covered by the current protection system. A step towards bridging this gap was the adoption of the Global Compact for Migration, with its recommendations for the implementation of safe pathways for, *inter alia*, individuals displaced due to natural disasters or climate change. Legal scholarship can contribute to a progressive interpretation of these recommendations. Specific legal action with a view to both issues would lie in expanding and legally implementing safe pathways to protection, always in addition to territorial asylum. This book points to potential pitfalls to be considered with respect to protection-sensitive pathways.

18.2 The vessel: safe pathways to protection

This book concludes that the asylum visa is a key pathway to counter the imbalance of responsibility principles manifested in the asylum paradox. There is a need for research on how an asylum visa scheme could effectively function at EU level, also with respect to the current system of responsibility allocation in the EU. Crucial issues are how procedural guarantees could be upheld in the extraterritorial context and how the 'fear of numbers' could be countered, based on effective responsibility-sharing mechanisms. This book has compared the international protection regime to the civil law concept of joint and several liability, pointing to the system's lack of a 'compensation mechanism'. The question of how to set up a functioning inter-State cooperation raises several legal and practical issues. Apart from the works already discussed in this book, further research would be needed to outline how 'compensation mechanisms' could work at international level, and in particular how responsibility could be shared 'fairly' regarding inter-State relations and protection seekers alike. Given the highly sophisticated forms of international cooperation already in place with a focus on migration control, this task is not impossible. In any case, the answer cannot lie in keeping Pandora's box closed by generally dismissing the application of human rights in the extraterritorial context.

The CJEU's decision in the *X and X* case in 2017 triggered a legislative initiative for setting up an EU humanitarian visa scheme. Additionally, an EU Resettlement Regulation has been in the making since 2016, aiming at harmonising resettlement as a safe pathway to the EU. These proposals raise new issues. One of them is the relevance of the CFR, particularly regarding resettlement procedures based on a future EU Resettlement Regulation. The CFR could unfold its relevance regarding issues of discrimination in the selection procedure as well as procedural rights in the case of rejection of a claim. With respect to all these issues, the responsibility framework could serve as analytical tool, helping to structure the future legal discourse.

This book argues that drawing on the responsibility framework is not merely a terminological choice; rather, it can add analytical and normative strength to legal arguments. The content of the different responsibilities can thereby be further elaborated by different scholars, depending on the context and disciplinary background. Insights gained from reconstructing the asylum paradox based on responsibility principles could serve further purposes. Even if delimiting the normative scope of each principle in a different way, whether broadening or restraining it, thinking of access

against the backdrop of the responsibility framework forces all principles of responsibility – and therewith all three perspectives – to be taken into account. Eventually, the responsibility framework could be adapted for the analysis and assessment of other policy measures, laws or State practice concerning access to territory and protection.

18.3 The terrain: digitalisation, technology and mobility

This book put 'traditional' pathways to protection in the focus, addressing schemes and legal proposals already on the table of policy makers in the EU. There are numerous new ways of rethinking safe pathways with a view to the changing 'terrain' around us. There are two key issues this book wants to point out in this last section. The first is the role of digitalisation and technology. An example that may illustrate the impact that digitalisation and technology have had on the 'terrain' protection seekers and host States navigate is the digital EU fingerprint-database 'EURODAC'. Digitalisation and technology can also provide opportunities to facilitate safe access to protection. For instance, technology can be used to enhance the agency of protection seekers by providing access to information and (digital) application forms, video interviews or contact with organisations that can assist in the travel process. Digitalisation and technology play a role with respect to the assessment of applications by States, and the cooperation and coordination between States. Further research in this regard could aid in answering some of the questions pointed out above, and open new ways of approaching the concept of asylum.

The second key issue is the need to further explore options of mobility and belonging. There is extensive research addressing the changing role of citizenship and political membership in the context of an ongoing globalisation. In this context, some scholars have picked up on proposals for special passports for protection seekers. This idea can be traced back to the 'Nansen passports', which existed from 1922 onwards. Today's globalised and digitalised world opens new prospects for revisiting this option.[936]

936 Cf. for example the forum debate on the European University Institute's Global Citizenship Observatory, with its opening contribution by Jelena Džankić and Rainer Bauböck, *Mobility without Membership: Do We Need Special Passports for Vulnerable Groups?* (December 17, 2021), available at https://globalcit.eu/mobility-without-membership-do-we-need-special-passports-for-vulnerable-groups/4/.

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