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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

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Abstract
Whereas the EU is developing a highly protective Common European Asylum System in purported compliance with the Geneva Convention,[1] it is also displaying growing reluctance to provide unhindered access to it to those in need.[2] The question of *physical* access to protection is ambiguously dealt with within EU law. On the one hand, it appears that entry to the Schengen zone has been designed disregarding refugees'[3] entitlement 'to special protection'.[4] Prior to admission, refugees seem to have been assimilated to the broader class of (potentially illegal) immigrants and thus required to submit to general immigration conditions,[5]

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1) Articles 63 and 307, EC Treaty and new Article 63(1), Treaty on the functioning of the Union (Lisbon Treaty).

2) See the recently launched EU Border Management Package by the European Commission: 'A comprehensive vision for an integrated European border Management System for the 21st Century,' Press Release, IP/08/215, 13 February 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/215&format=HTML&aged=0&language=EN&guiLanguage=en. For *ECRE*'s reaction see: http://www.ecre.org/resources/press_releases/1028; for the *Refugee Council*'s position see: http://www.refugeecouncil.org.uk/news/press/2008/february/20080213.htm.

3) Here the notion of *refugee* is to be read widely, as encompassing all kinds of asylum-seekers.

4) Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the field of asylum and resettlement*, Geneva, 28 July 1951.

5) In practice, refugees are distinguished from the immigrant mass only once the asylum request has been filed (Article 1, CISA: 'asylum seeker shall mean any alien *who has lodged an application for asylum* within the meaning of this Convention and in respect of which a final decision has not yet been taken) or the principle of *non-refoulement* (ex. Article 33 GC and Article 3 ECHR) has found territorial application. Access to the CEAS depends 'not on the refugee's need for protection, but on his or her own ability to

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including visa.[6] On the other hand, some isolated EU law rules give the impression that refugees are to be exonerated from normal admittance requirements.[7]

This article intends to show how, 'in the light of present day conditions,'[8] a contextual,[9] dynamic[10] and teleological[11] interpretation of Articles 31 and 33 of the Geneva Convention as well as of Articles 3 ECHR and 2(2) of Protocol 4 ECHR require that the second set of EU rules be appropriately furthered.

Keywords
Schengen visa; carrier sanctions; access to international protection

1. Introduction

In the course of the last decades, with the closure of borders to legal immigration only family reunification and asylum have been left for those willing to settle in wealthy democracies to enter in a regular fashion.[12] Therefore, the asylum channel appears to be habitually abused by bogus protection seekers; at least this is regularly so alleged.[13] To this professed misuse of the asylum system there has followed a progressive blurring of the lines between genuine refugees[14] and irreg-

enter clandestinely the territory of another country' (UNHCR, 'Brief as Amicus Curiae,' filed 21 December 1992, in *McNary v. Haitian Centers Council Inc.*, US Supreme Court Case No. 92–344, §18).

6) Council Regulation 539/2001 imposes visa requirements to the nationals of a number of refugee-producing countries such as Afghanistan, Iraq, Somalia and Sudan.

7) Article 5(2), CISA: 'rules [on entry requirements to the territories of the Contracting Parties] shall not preclude the application of special provisions concerning the right of asylum;' entry won't be refused for non-compliance with entry conditions in the Schengen zone if a 'Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations;' Article 1(b) of Council Regulation 1932/2006, exonerates recognized refugees from visa requirements; and Article 4(2) Council Directive 2001/51 on carriers sanctions foresees that MS shall introduce penalties to carriers bringing illegal immigrants into the Union 'without prejudice to [their] obligations in cases where a third country national seeks international protection.'

8) Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, §31.

9) ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1994, p. 6.

10) ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, ICJ Reports 1971, p. 16.

11) ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p. 15.

12) N. Berger, *La politique européenne d'asile et d'immigration, enjeux et perspectives*, Bruylant, 2000; J-Y. Carlier, *La condition des personnes dans l'Union Européenne*, Larcier, 2007, p. 137 ff.

13) The European Commission has recently pointed at the necessity to: 'provide national asylum administrations with adequate tools enabling them to efficiently manage asylum flows and *effectively prevent fraud and abuse*, thereby preserving the integrity and credibility of the asylum system', in: *Green Paper on the Common European Asylum System*, COM(2007) 301 final of 6 June 2007 (*Green Paper on Asylum* hereinafter), p. 3 (emphasis added). In its brand new *Policy Plan on Asylum* for the coming years the Commission restates the very same principle: 'the efficiency of the asylum system' is to be enhanced 'whilst maintaining [its] integrity […] by preventing abuse', in: *Policy Plan on Asylum – An Integrated Approach to Protection Across the EU*, COM(2008) 360 final of 17 June 2008 (*Policy Plan on Asylum* hereinafter), p. 11.

14) Here the notion of *refugee* is to be read widely, as encompassing not only recognised refugees but also asylum-seekers outside the country of their nationality, according to UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva, 1979, § 28: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition'.

ular migrants in public perception. As a result, States of the North tend to distinguish little in their policies between immigration management and refugee protection.[15] Actually, it would appear that 'immigration control and asylum policies are gradually merging. Having defined the prevention of 'irregular' arrivals as the overall rationale, this seems to be a process in which the control strategy is bound to take over from the exigencies of refugee protection'.[16] This phenomenon becomes particularly visible (and noxious) at the stage of entry.

Currently, in western countries access to international protection has been made dependant 'not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of [the destination State]'.[17] Asylum systems start their functioning only once refugees can be considered to have reached State territory. And physical access to that territory and, hence, to protection is subordinated to admission according to general immigration laws, which generally include the detention of a passport displaying a valid visa. Such measures of 'remote border control'[18] force refugees to make recourse to illegal means of migration.[19] Visa requirements coupled with carriers' sanctions have been described precisely as 'the most explicit blocking mechanism for asylum flows'.[20] This – i.e. to give univocal answers to all migrants overlooking the mix character of the flows – arguably neglects refugees' entitlement 'to special protection on account of their position'.[21]

The situation within the EU appears, at first sight, to be no different.[22] Whereas a highly protective Common European Asylum System (CEAS) is being developed in purported compliance[23] with the Geneva Convention 1951[24] and human

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15) J. Van der Klaauw, 'Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?', in: *Irregular Migration and Human Rights, Theoretical, European and International Perspectives*, Martinus Nijhoff, 2004, p. 116.

16) G. Noll and J. Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in: *The European Union and Human Rights*, OUP, 1999, p. 368.

17) UNHCR, 'Brief as Amicus Curiae', filed 21 December 1992, in *McNary v. Haitian Centers Council Inc.*, US Supreme Court Case No. 92–344, § 18.

18) V. Guiraudon, 'Before the EU Border: Remote Control of the "Huddle Masses"', in: *In Search of Europe's Borders*, Kluwer Law International, 2002, pp. 191–214.

19) Amnesty International, 'Spain: The Southern Border', EUR 41/008/2005, pp. 16–18.

20) J. Morrison and B. Crosland, 'Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy', UNHCR, *New Issues in Refugee Research*, Working Paper No. 39, 2001, p. 28.

21) Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the field of asylum and resettlement,* Geneva, 28 July 1951.

22) House of Lords Select Committee on the European Union, *Proposals for a European Border Guard*, Session 2002–3, 29th Report, § 13, claiming that EU visa requirements plus carriers' sanctions have 'pushed back' the common external borders to the countries of origin.

23) Article 63 and 307, EC Treaty and new Article 78, Treaty on the functioning of the Union (Lisbon Treaty) require secondary law on asylum to fully comply with the requirements of the 1951 Geneva Convention. In this connection Article 32(2) VCLT becomes relevant as it rules that: 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.

24) UN Convention Relating to the Status of Refugees, 1951 (*Geneva Convention* hereinafter).

rights,[25] Member States are also displaying growing reluctance to provide unhindered access to it to those in need.[26] The question of physical access to protection is ambiguously regulated in EU law. On the one hand, it appears that entry to the Schengen zone has been designed disregarding refugees' needs. Prior to admission, refugees seem to have been assimilated to the broader class of (potentially illegal) immigrants and thus constrained to submit to general immigration conditions, including visa when required.[27] Refugees appear to be distinguished from the immigrant mass only once the asylum request has been filed[28] or the principle of non-refoulement finds territorial application.[29] On the other hand, some secluded EU law rules, directly alluding to human rights and refugee law principles, give the impression that refugees are to be exonerated, as a matter of legal obligation, from normal admittance requirements.[30] Thus, it becomes critical to elucidate whether from those principles to which EU law refers there ensues an obligation for EU Member States not to obstruct physical access to protection; whether it is necessary, as a matter of legal duty, to distinguish

25) Article 6(2), EU Treaty and new Article 6, EU Treaty (Lisbon Treaty). The observation on Article 32(2) VCLT as referred to in note 12 applies here as well.

26) See the recently launched EU Border Management Package by the European Commission: 'A comprehensive vision for an integrated European border Management System for the 21st Century', Press Release, IP/08/215, 13 February 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/215&format=HTML&aged=0&language=EN&guiLanguage=en. For *ECRE*'s reaction see: http://www.ecre.org/resources/press_releases/1028; for the *Refugee Council*'s position see: http://www.refugeecouncil.org.uk/news/press/2008/february/20080213.htm.

27) Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempted from that requirement, OJ L 81/1 of 21 March 2001, amended by Council Regulation (EC) No. 2414/2001 of 7 December 2001, OJ L 327/1 of 12 December 2001, Council Regulation (EC) No. 453/2003 of 6 March 2003, OJ L 69/10 of 13 March 2003, Council Regulation (EC) No. 851/2005 of 2 June 2005, OJ L 141/3 of 4 June 2005 and Council Regulation (EC) No. 1932/2006 of 21 December 2006, OJ L 405/23 of 30 December 2006.

28) '*Asylum seeker* shall mean any alien who has lodged an application for asylum within the meaning of this Convention and in respect of which a final decision has not yet been taken', in: Article 1, 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 OJ EC of 22 September 2000 (*CISA* or *Convention Implementing the Schengen Agreement* hereinafter). In the same direction see Article 2(d), Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 18 February 2003, OJ L 50/01 of 25 February 2003 (*Dublin Regulation* hereinafter).

29) *Inter alia,* arguments of the French Government in: Eur. Ct. H. R., *Amuur v. France*, Appl. No. 19776/92, 25 June 1996.

30) Article 5(2), CISA: 'rules [on entry requirements to the territories of the Contracting Parties] shall not preclude the application of special provisions concerning the right of asylum;' entry won't be refused for non-compliance with entry conditions in the Schengen zone if a 'Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations;' Article 4(2) Council Directive 2001/51 on carriers sanctions foresees that Member States shall introduce penalties to carriers bringing illegal immigrants into the Union 'without prejudice to [their] obligations in cases where a third country national seeks international protection'. See bellow for further elaboration.

refugees from other aliens seeking admittance at the frontiers of the EU *Single Protection Area*.[31] In such a case, the second set of rules must be furthered in a comprehensive manner.

This study deals precisely with the examination of the EU visa and carrier sanctions' regime pondered against the requirements of the Geneva Convention 1951 and related human rights' instruments 'in the light of present day conditions'.[32] A contextual,[33] evolutionary[34] and teleological[35] interpretation of the instruments concerned provides the background to this analysis. After a brief presentation on the interpretative method applied, the two sets of EU law rules on entry are scrutinized, paying special attention to how they relate to refugees' access to protection within Schengen territory. This done, taking account of the fact that direct reference is made therein to the primacy of human rights and refugee law principles, the analysis of such principles follows. At that stage, a distinction is drawn between the situation of fully-fledged refugees, fulfilling the definition of Article 1(A)(2) *refugees to-be* of the Geneva Convention, and that of refugees to-be, still within the boundaries of the country of origin. As we shall see, the Geneva Convention applies only to the first category, to whom Articles 33(1) and 31(1) afford chief safeguards.[36] This does not entail, however, that refugees to-be remain unprotected; other human rights become relevant to their case. A close look on the right to leave any country, including one's own,[37] as well as on the absolute prohibition of ill-treatment[38] reveals the special attention that this class of aliens deserve. The main purpose of this article is to establish whether entry rights exist under International Law – to which EU Law accords precedence[39] – for both fully-fledged refugees and refugees to-be. In the affirmative, the EU regime on visas and carrier sanctions must accommodate them unequivocally within its purview. Otherwise, as it will be concluded, EU Member States are to be deemed at variance with their (voluntarily engaged) legal obligations in regard of both categories of aliens.

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31) This is the expression used by the European Commission to denote the space within which the CEAS deploys its effects: 'Creating a Common European Asylum System as a constituent part of an Area of Freedom, Security and Justice emerged from the idea of making the European Union a *single protection area*, based on the full and inclusive application of the Geneva Convention and on the common humanitarian values shared by all Member States', in: European Commission, *Green Paper on Asylum*, p. 2 (emphasis added).

32) Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, § 31.

33) ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1994, p. 6.

34) ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, ICJ Reports 1971, p. 16.

35) ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p. 15.

36) Articles 31 enshrines the principle of non-penalization for illegal entry and 33 that of *non-refoulement*.

37) Article 12 ICCPR and Article 2(2) Protocol 4 ECHR.

38) Article 7 ICCPR, Article 1 CAT and Article 3 ECHR.

39) *Supra* n.12 and n.14.

2. Preliminary Remarks on the Interpretative Method Applied

As indicated in the Vienna Convention on the Law of the Treaties,[40] the interpretation of international law instruments needs to be contextual and purposive, rather than literal only.[41] The interpretation exercise, 'does not stop when a meaning compatible with the wording is reached: this meaning has to be put against the backdrop of the object and purpose of the treaty concerned'.[42] The International Court of Justice has confirmed this approach, stating that 'the rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it'.[43] Indeed, 'in accordance to customary international law […] a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose'.[44]

In addition, reliance on supplementary means of interpretation, as the Travaux Préparatoires are,[45] is to be cautious and subordinated to the interpretation according to text, context, object and purpose of the instrument under consideration. In truth,

> mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the [interpreter] is bound to take into account the fact that the concepts embodied [in the instrument at hand] were not static, but were by definition evolutionary […]. The Parties [to it] must consequently be deemed to have accepted them as such […]. [The interpreter] must take into consideration the changes which have occurred in the supervening [time], and its interpretation cannot remain unaffected by the subsequent development of the law […].[46]

The interpretation of any international treaty must thus be diachronic. 'Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation',[47] that is, taking account of 'present day conditions'.[48]

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40) Article 31, Vienna Convention on the Law of the Treaties, 1969 (also referred to as *VCLT*).

41) A.T. Naumik, holds the opposite reading, asserting that 'the Vienna Convention adopts the "textual approach"', in: 'International Law and Detention of US Asylum Seekers: Contrasting *Matter of D-J-* with the United Nations Refugee Convention', *IJRL*, 2007, Vol. 19, No. 4, p. 674ff.

42) H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers, 2006, p. 16.

43) ICJ, *Arbitral Award of July 31, 1989*, 12 November 1991, ICJ Reports 1991, p. 53 and pp. 69–72.

44) ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1991, p. 6 (emphasis added).

45) Article 32, Vienna Convention on the Law of Treaties, 1969.

46) ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, 21 June 1971, ICJ Reports 1971, p. 16.

47) *Ibid*.

48) Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, § 31.

Finally, for the purposes of construing international agreements of humanitarian content, account must be taken of their specific nature. The International Court of Justice first acknowledged the special quality of this type of international agreements in its 1951 *Advisory Opinion on Reservations to the Genocide Convention*. There, it established that 'the Convention was manifestly adopted for a purely humanitarian and civilising purpose' and that, therefore, 'in such a Convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the raison d'être of the Convention'.[49] There appears to be a wide consensus around the consideration of the Geneva Convention as an international treaty of this kind. The Preamble to the Convention records the recognition by signatory States of 'the social and humanitarian nature of the problem of refugees'.[50] Subsequently, both the UNHCR Executive Committee and the UN General Assembly in their respective conclusions and resolutions have restated the humanitarian quality of the Convention.[51] This makes it possible to ascertain that the Geneva Convention pertains to the particular *species* of international treaties of humanitarian content, in the way the International Court of Justice indicates. It is thus to be teleologically interpreted, in accordance with its humanitarian purpose – namely, the provision of international protection of the fundamental rights and freedoms of refugees,[52] which constitutes 'the raison d'être of the Convention'.[53]

From this it ensues that a comprehensive interpretation of human rights instruments, as the Refugee Convention is, in accordance with the principle of good faith,[54] needs to be contextual, evolutionary and, pursuant to their humanitarian

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49) ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p. 15, § 23. An exception to treaty invalidity rules was accordingly codified in the Vienna Convention on the Law of the Treaties. Article 60(5) stipulates that as regards the 'provisions relating to the protection of the human person contained in treaties of a humanitarian character' the general rule that a breach of provisions may be invoked by other parties to the treaty as to terminate or suspend its application does not apply.

50) Recital 5, Preamble, Geneva Convention 1951.

51) S.E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement', in: *Refugee Protection in International Law - UNHCR Global Consultations on International Protection*, CUP, 2003, pp. 106–107 and references therein.

52) This can be inferred from the object and purpose of the Convention, as reflected in its preamble. The Geneva Convention, taking account of 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination' (Recital 1) and 'considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms' (Recital 2) has been adopted to 'revise and consolidate previous international agreements relating to the status of refugees and to *extend* the scope of and *protection* accorded by such instruments by means of a new agreement' (Recital 3) (emphasis added).

53) ICJ, Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p. 15, § 23.

54) Article 26, Vienna Convention on the Law of the Treaties, 1969.

range, *predominantly* teleological. These are, precisely, the three interpretative methods used here; applied 'as an integrated or interdependent whole'.[55]

3. Schengen Visas and Carriers' Sanctions: Interception Measures *for All*?

Although no generally established definition of 'interception' exists, it is accepted that the notion commonly denotes 'measures applied by States outside their national boundaries which prevent, interrupt, or stop the movement of people without the necessary immigration documentation for crossing their borders by land, sea, or air'.[56] Interception may be physical or 'active', as it is in the case of interdiction of boats at sea, as well as administrative or 'passive'.[57] Visa requirements and carriers' sanctions, as they may thwart embarkation or continuation of journey, constitute examples of passive interception.

Interception practices are not new.[58] The last two centuries have witnessed the formation of the nation-states distinctively rooted in the belief that statehood comprises the right to shape national communities.[59] During that process, frontier management and admission policies have been regarded as key State prerogatives, linked to the interests of national sovereignty.[60] Control over entry, residence and expulsion of aliens was exercised when the circumstances so

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55) This is the interpretation Elias makes in: T.O. Elias, *The Modern Law of Treaties*, Oceana Publications Leiden/New York, 1974, pp. 74–75, as regards the four main elements of Article 31 VCLT. He refuses that a hierarchical criterion, whereby the text would in any manner prime over the context, the object and the purpose of the instrument under consideration, should be applied. Here the same expression is used, as to denote that contextual, dynamic and teleological interpretations are to be undergone as parts of the same interpretative whole.

56) G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd Ed., OUP, 2007, pp. 371–372.

57) *Ibid*.

58) UNHCR, Executive Committee Conclusion No. 97, 2003.

59) Nafziger contests the validity of the 'conventional wisdom' on this point. He claims that 'the proposition that a state has the right to exclude all aliens is of recent origin. Several insights emerge from sampling the writings of influential publicists of various nationalities who have recited the absolutist version of the proposition. Many of these writers, citing no authority, apparently regard the proposition as self-evident. The sovereign's right to exclude aliens is simply a maxim. When authority is cited, by far the most frequent is Anglol-American case law from the period 1889–1893, followed in order by highly selective snippets from the writings of Emmerich de Vattel, excerpts in digests of international law from 19th-century United States diplomatic correspondence, and black-letter pronouncements apparently rendered ex cathedra by earlier publicists'. […] 'The proposition that a state may exclude all aliens often appears as a maxim. No justification is given. When it is provided, the most common philosophical justification is the sovereign's inherent powers to govern all activity in and entering its territory. A related concept is that of an autonomous, communal self-determination to choose all other members of a national polity. Because the right to exclude is so often justified simply as a sort of given attribute of a sovereign's inherent powers, a brief critique of this concept is appropriate', in: J. A. R. Nafziger, 'The General Admission of Aliens under International Law', *AJIL*, No. 77, 1983, pp. 807 and 816.

60) J. Torpey, 'Coming and Going: On the State Monopolization of the "Legitimate Means of Movement"', *Sociological Theory*, Vol. 16, No. 3, pp. 239–259.

required.[61] Marrus describes how visas were introduced in the interwar period to control undesired movement at some instances.[62] Even sooner, carriers were sporadically involved in immigration control. Already in the nineteenth century legislation was passed in the US to restrain shipping companies from transporting ill or immoral passengers. Non-compliance opened the possibility for sanctions being imposed.[63] Today, however, these measures have acquired a new dimension. They have lost their exceptional character to become the standard migration policy tool in western democracies.[64]

In Europe, several States have introduced in the past two decades visa requirements for the nationals of countries perceived at risk of illegal immigration. The United Kingdom took the lead, imposing visa to citizens of Turkey and Sri Lanka in unhidden response to increased and supposedly abusive refugee claims of people originating from those countries.[65] In the 1990s, during the exodus of refugees from the war in ex-Yugoslavia, Benelux countries and Finland introduced visas for Bosnians. To better enforce those requirements, several European States subsequently enacted carriers' liability Acts.[66] Private companies were thus made responsible to make sure that travellers without proper documentation would not be transported inland.[67]

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61) See the classical exclusion cases in Anglo-American case law: US Supreme Court, *Chae Chan Ping v. United States*, 130 US 581 (1889); *Nishimura Ekiu v. United States*, 142 US 651 (1892); *Fong Yue Ting v. United States*, 149 US 698 (1893) and *Musgrove v. Chun Teeong Toy*, 1981 A.C. 272. For a recent elaboration of the exclusion doctrine by the US Supreme Court see *Kleindienst v. Mandel*, 408 US 753 (1972). For a nuanced version of this premise see the formula with which the Eur. Ct. H. R. opens its case law relating to migration: 'Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens', see, *inter alia*, *Chahal v. UK*, Appl. No. 22414/93, 15 November 1996, § 73.

62) M.R. Marrus, *The Unwanted: European Refugees in the Twentieth Century*, OUP, 1985.

63) A.R. Zolberg, 'The Archaeology of 'Remote Control", in: *Migration Control in the North Atlantic World: the Evolution of State practices in Europe and the US from the French Revolution to the Inter-War Period*, OUP, 2003.

64) Some authors claim that these practices are new in another sense too; in so far as they are now being used to 'circumvent legal constraints absent in the early twentieth century'. It is claimed that 'these measures aim at preventing unwanted migrants from accessing the system of legal protection and the asylum process, thereby avoiding the domestic and international legal norms that stand in the way of restricting migration flows', in: V. Guiraudon, *op. cit.*, p. 195.

65) S. Collison, 'Visa Requirements, Carriers Sanctions, 'Safe Third Countries' and 'Readmission': the Development of an Asylum 'Buffer Zone' in Europe', *Transactions*, Vol. 21, No.1, 1996, pp. 76–90; see also Simon Brown LJ in *R v. Secretary of State for the Home Department, Ex parte Hoverspeed*, 1999, INLR 591, 594–595: 'it was intended to make it much more difficult for those who want to come to this country, but who have no valid grounds for doing so [...] It is also intended to stop abuse of asylum procedures by preventing people travelling here without valid documents and then claiming asylum before they can be returned'.

66) A. Cruz, *Nouveaux contrôleurs d'immigration – Transporteurs menacés de sanctions*, Eds. L'Harmattan, 1995.

67) S. Scholten, 'Carriers Sanctions: Third Party Involvement in Immigration Control', paper presented at the annual LSA Conference, Berlin, 2007, p. 3 (on file with author); see also Simon Brown LJ in *R v. Secretary of State for the Home Department, Ex parte Hoverspeed*, 1999, INLR 591, 594–595: 'The logical necessity for carriers' liability to support a visa regime is surely self-evident. Why require visas from certain countries (and in particular those from which most bogus asylum seekers are found to come)

The European Union has followed suit. As mandated by the Convention Implementing the Schengen Agreement (CISA),[68] short-term entry visas have been introduced.[69] They share a uniform format,[70] in order to prevent 'counterfeiting and falsification'.[71] The countries whose citizens need to be in possession of a visa when crossing the EU external border have been listed in Council Regulation (EC) No. 539/2001[72] together with the countries whose nationals are exempt from that requirement. Both the so-called 'black list' and 'white list' have been appended to the Regulation in Annex I and II respectively. Explicitly, no protection or persecution considerations have been borne in mind when dressing these lists. The preamble to the Regulation establishes that 'the determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating, inter alia, to illegal migration, public policy and security, and to the European Union's external relations with third countries'.[73] As a result, a number of net refugee-producing countries have been blacklisted. Citizens originating from Afghanistan, Iraq, Somalia or Sudan are expected to avail to visa requirements. None of the *may* exceptions covered by Article 4 of the Regulation concerns refugees.[74] Far from that, recognised refugees are explicitly subject to visa conditions '[…] if the third country in which they are resident and which has issued them with their travel documents is a third country listed

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unless its nationals can be prevented from reaching our shores? Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime. Without [the Carriers Liability Act] there would be little or no disincentive for carriers to bring them'.

68) *Supra* n. 17.

69) Article 10, CISA: 'a uniform visa valid for the entire territory of the Contracting Parties shall be introduced. This visa, […] may be issued for visits not exceeding three months'.

70) Council Regulation (EC) No. 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164/1 of 14 July 1995, amended by Council Regulation (EC) No. 334/2002 of 18 February 2002, OJ L 53/7 of 23 February 2002.

71) *Ibid.*, Recital 6, Preamble.

72) *Supra* n. 16.

73) In spite of what the Preamble states, it is not at all evident that any thorough analysis has been done as to decide which country goes to the black list and which one to the white list and why. It appears that both the lists and the reasons have been inherited 'en bloc' from Schengen times. For a comprehensive critique of this point see E. Guild, 'The Border Abroad – Visas and Border Controls', in: *In Search of Europe's Borders*, Kluwer Law Interanational, 2003, p. 92ff. In the same vein see D. Bigo and E. Guild, 'La mise à l'écart des étrangers – La logique du visa Schengen', *Cultures & Conflits*, No. 49, 1/2003, pp. 34–38.

74) Article 4, Council Regulation (EC) No. 539/2001: '(1) A Member State may provide for exceptions from the visa requirement […] as regards: (a) holders of diplomatic passports, official-duty passports and other official passports; (b) civilian air and sea crew; (c) the flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident; (d) the civilian crew of ships navigating in international waters; (e) the holders of laissez-passer issued by some intergovernmental international organizations to their officials. (2) A Member State may exempt from the visa requirement a school pupil having the nationality of a third country listed in Annex I who resides in a third country listed in Annex II and is traveling in the context of a school excursion as a member of a group of school pupils accompanied by a teacher from the school in question […]'.

in Annex I […]'.[75] No express reference is made to unrecognised refugees in the Regulation, though. But the 'Common Consular Instructions',[76] currently governing the procedures and conditions for the issuance of short-stay visas in spite of their uncertain legal status,[77] leave no scope to doubt that they too are, in principle, subject to visa requirements if originating from a blacklisted country. The proposed 'Community Code on Visas' (CCV) makes this particularly plain.[78] Article 1 CCV establishes that 'rules for processing [short-term] visa applications […] shall apply to any third country national, who must be in possession of a visa when crossing the external borders pursuant to Council Regulation (EC) No, 539/2001 […]'. Article 2 CCV specifies that 'third-country national' designates 'any person who is not a citizen of the Union […]'. In its 'Comments on the [CCV] Articles' the Commission further clarifies that 'the concept of "third-country national" […] also includes refugees and stateless persons'.[79]

If among the conditions for delivery room had been left for the consideration of protection concerns as a matter of routine, the fact that refugees need to submit to visa requirements would entail a lesser distress. But, in so far as the issuance of a visa may determine subsequent responsibility for asylum,[80] States generally show little interest in covering those needs. In reality the EU visa regime has developed in disconnection of refugee matters. It has been standardized around the purpose of allowing short-term visits for tourism, business, study and like intent.[81] Hence, 'the main issues to bear in mind when examining visa applications are: the security of the [Schengen] Contracting Parties and the fight against illegal immigration'.[82] Key is to 'detect those applicants who are seeking to immigrate […] using grounds such as tourism, business, study, work or family visits as

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75) Article 3, Council Regulation (EC) No. 539/2001 and Article 1, Council Regulation (EC) No. 1932/2006.

76) Council document, Common consular instructions for the diplomatic missions and consular posts, OJ C 326/1 of 22 December 2005 (*CCI* hereinafter).

77) The CCI, inherited from Schengen times, published in the *C* series of the Official Journal of the European Union, have not been directly rooted in any of the legal basis provided by the EC/EU treaties and are thus devoided of full legal authority. This anomaly will be remedied once the proposed Community Code on Visas (see below) is adopted in the form of a Regulation grounded on Article 62(2) of the EC treaty.

78) European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, 19 July 2006 (*CCV* hereinafter), which will repeal the Common Consular Instructions according to its Article 48(2)(a).

79) *Ibid.*, p. 15. The same definition of 'third-country national' is retained in Article 2(6) of the European Parliament and Council Regulation (EC) No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as well as in Article 2(a) of the Dublin Regulation.

80) In case no relevant family ties can be identified in some other Member State, responsibility for examining an asylum application will lay with 'the Member State which issued the visa' (Article 9, Dublin Regulation).

81) *Specimen harmonised uniform visa application form*, Annex 16, CCI.

82) *Basic criteria for examining applications*, V., CCI.

a pretext'.[83] Therefore, documents normally required to proof good faith in the application comprise valid travel papers, documents proving the purpose and the conditions of the planned journey, evidence of adequate means of subsistence during stay and proof of return at the end of the term.[84] Surely, these are conditions genuine refugees are unable to fulfil.[85]

Difficulties do not end here. Not only European law expects refugees to comply with visa requirements, but measures have also been introduced to preclude irregular entry into the Union. In development of Article 26(2) CISA, the French proposal for the harmonisation of financial penalties on carriers transporting aliens lacking necessary documentation,[86] in spite of the European Parliament's opposition,[87] has finally been adopted.[88] Thereafter, 'Member States shall take the necessary measures to ensure that the penalties applicable to carriers [...] are dissuasive, effective and proportionate [...]'.[89] Motives are thus given to transporters to be cautious. To avoid penalties, carriers heading to the Union will need to refuse embarkation to any inadequately documented alien; pretended refugees (presumably) included. Since penalties will be imposed on transport of 'aliens who do not possess the necessary travel documents',[90] checks by carriers risk focusing solely on verifying papers, instead of inquiring into underlying motivations for undertaking travel.[91]

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83) *Ibid*.

84) *Documents to be enclosed and 'guarantees regarding return and means of subsistence'*, III.2 and III.3., CCI.

85) It is estimated that 90% of refugees rely on irregular means to gain access to the EU, in: European Council of Refugees and Exiles (ECRE), 'Broken Promises – Forgotten Principles: ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999 – Brussels 2004', June 2004, p. 17 (available at: www.ecre.org). See also *Nadarajah Vilvarajah v. Secretary of State for the Home Department* [1990] Imm AR 457, at 459: '[...] those who are to claim to be refugees and who arrive in this country seeking asylum may well have to arrive armed with false documents and false passports. It may be that there is no other way in which they can leave the country from which they have come and come to this country'. This paragraph has been subsequently quoted by the UKHL in its decision on *R v. Naillie; R v. Kanesarajah* [1993] AC 674, [1993] 2 All ER 782, [1993] 2 WLR 927, [1993] Imm AR 462.

86) Initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, OJ C269/8 of 20 September 2000 (*French proposal for a Carriers' Liability Directive* hereinafter).

87) European Parliament, Report on the initiative of the French Republic for adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission (14074/2000 – C5-0005/2001 – 2000/0822(CNS)), A5-0069/2001 of 27 February 2001 and vote of 13 March 2001 (minutes available at: www.europarl.europa.eu).

88) 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 (*Carriers' Liability Directive* or *CLD* hereinafter), OJ L187/45 of 10 July 2001.

89) Article 4(1), Carriers' Liability Directive.

90) Article 26(2), CISA.

91) J Schiemann held in *R v. Secretary of State for the Home Department, Ex parte Khalil Yassine, Rahma*

The strictness of this regime and its apparent incongruence with refugee concerns, contrasts with what the CISA originally appeared to provide. Article 5(1) CISA enumerates general conditions aliens must fulfil to be allowed for three-month admissions into the Schengen area.[92] These are conditions with which refugees are in no position to comply. Allegedly, therefore, Article 5(2) CISA contains a special provision, modulating the general regime, which favours refugees. It establishes that 'an alien who does not fulfil the conditions [of Article 5(1)] must be refused entry into the territories of the Contracting Parties, unless a Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations'. The last indent of Article 5(2) CISA further provides that '[entry] rules shall not preclude the application of special provisions concerning the right of asylum […]'. Articles 5 and 13 of the Schengen Borders Code, which have repealed Articles 2 to 8 CISA,[93] reinstate the very same principle, adding that refusal of entry at the border 'shall be without prejudice to the application of special provisions concerning the *right* of asylum and to *international protection*'.[94] In this line, Article 4(2) of the Carrier's Liability Directive indicates that the obligation to impose penalties onto carriers transporting illegal aliens into the Union 'is without prejudice to Member States' obligations in cases where a third country national seeks international protection'.[95] This is congruent with the idea stated already in Article 26(2) CISA,[96] which the Preamble restates, that the 'application of this Directive is without prejudice to the obligations resulting from the Geneva

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Yassime, Mohammad El-Nacher, Hicham Ali Hachem, Salam Bou Imad, Zouheir Bou Imad [1990] Imm AR 354 that: '[…] the effect of the [Carriers' Liability] Act […] is to pose substantial obstacles in the path of refugees wishing to come to this country. This is because: Visa nationals require a prior visa before coming here; you cannot get a visa on the basis of being a refugee […]; by reason of the […] Act *carriers are disinclined to carry those without visas*. In those circumstances he who wishes to obtain asylum in this country […] has the option of: Lying to the United Kingdom authorities in his country in order to obtain a tourist or some other sort of visa, obtaining a credible forgery of a visa or obtaining an airline ticket to a third country with a stopover in the United Kingdom' (emphasis added).

92) (a) A valid document authorising border-crossing; (b) a valid visa when required; (c) accreditation of the purpose and conditions of the intended stay and proof of sufficient means of subsistence, both for the stay and for the return; (d) no Schengen Alert; (e) no record of a public order/national security nature.

93) Article 39(1), Schengen Borders Code.

94) Articles 5(4)(c) and 13(1), Schengen Borders Code (emphasis added).

95) The original version of this provision established that penalties 'shall not apply if the third-country national is admitted to the territory for asylum purposes', in: Article 4(3), French proposal for a Carriers' Liability Directive. The original preambular statement indicated that 'it is essential that the exercise of such provisions should not prejudice the exercise of the right to asylum. With this in mind, it is important that Member States should not apply the penalties which they are required to introduced under this Directive if the third-country national is admitted to the territory for asylum purposes', in: Recital 2, Preamble, French proposal for a Carriers' Liability Directive.

96) Article 26(2) CISA requires Contracting Parties to 'undertake, *subject to the obligations resulting from their accession to the Geneva Convention* […], to impose penalties on carriers which transport aliens who do not possess the necessary travel documents' (emphasis added).

Convention […]'.[97] By the same token, the Schengen Borders Code establishes the overarching principle governing the movement of persons across the Schengen borders that controls 'shall apply […] without prejudice to […] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.[98]

However, at present, in the case a Member State would consider it *necessary* on protection grounds to derogate from common conditions to deliver Schengen visas, it *may* issue one with limited territorial validity (LTV), circumscribed to its own territory. Indeed, Article 15 and 16 CISA combined, which the Schengen Borders Code leave intact, could be plausibly interpreted as to encode that 'in principle' the issuance of any sort of visa constitutes *a faculty* of Contracting Parties. Part V.3. of the CCI endorses this approach by literally stating, in relation to LTVs, that 'a visa the validity of which is limited to the national territory of one or several Contracting Parties *may* be issued: [*inter alia*] in cases where a diplomatic mission or consular post considers it necessary to derogate from the principle laid down in Article 15 of the [CISA] on one of the grounds listed in Article 5(2) [CISA] (on humanitarian grounds, for reasons of national interest or because of international obligations […]'.[99] It is striking how European law resolves that for a Member State to honour an overriding international legal obligation to provide for an exception from normal entry conditions it suffices to make it optional to issue a LTV visa for the purpose.[100] The Common Consular Instructions go even further; they introduce a direct discouragement to Schengen Member States to issue LTVs: Annex 14 CCI warns that 'LTVs are issued by way of exception' and therefore 'it should not be expected that the Schengen Contracting Parties will use and abuse the possibility to issue LTVs; this would not be in keeping with the purpose and objectives of Schengen'.[101] The language here is contradictory, as are the two sets of rules we have examined so far. The first set appears to indirectly require Member States to submit everyone stemming from blacklisted countries to strict visa requirements, while the second seems to oblige them to exempt refugees from the lot, provided that they consider it necessary, according to their freely contracted international obligations. In such a case, LTVs come into play. But, complicating matters further, the CCI – whose legal status is under doubt – make the issuance of LTVs discretionary, presumably contradicting the principle that migration control and border surveillance should occur

97) Recital 3, Preamble, Carrier's Liability Directive.
98) Article 3 as well as Recital 20, Preamble, Schengen Borders Code.
99) Part V.3., CCI (emphasis added).
100) Article 21(1), forthcoming CCV, appears to correct this situation by establishing that 'a visa with limited territorial validity (LTV) *shall* be issued exceptionally in the following cases: (a) when a diplomatic mission or consular post considers it necessary, […] because of international obligations, to derogate from the principle that the entry conditions laid down in […] the Schengen Borders Code, must be fulfilled […]' (emphasis added).
101) Article 21, forthcoming CCV, makes identical allusion to the exceptional nature of LTVs.

'without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.[102] As an escape valve Article 4(2) of the Carriers' Liability Directive, in development of Article 26(2) CISA, appears to provide for the necessity to introduce in transposing national law an exemption from penalties to transporters who bring into the Union international protection seekers devoided of proper documentation. In such cases, Member States seem to be constraint to allow carriers to accord de facto waivers of valid travel documents and visas as appropriate.[103]

Two ambiguous alternatives remain for refugees to legally access protection within the Union: optional and exceptional LTV visas by Schengen State authorities and improbable de facto waivers by carriers. And that all conditioned to Contracting Parties deeming it necessary, in regard of some indefinite international legal commitments. Being this so, it becomes crucial to determine when (if ever) and to what extent international law imposes on Member States the obligation to derogate, as a matter of legal duty, from the principle that admission should be denied if entry conditions, including visa, are not fulfilled. A contrario, key is to establish whether and how the current regime of International Law compels Schengen Contracting Parties to grant entry to refugees. Only then it will become apparent whether these two solutions are sufficient.

4. Any Entry Rights under International Law for Refugees?

4.1. *Refugees and Migrants, Shared Genus but Different Species – The Geneva Convention: Regulating Mixed Flows through International Deference*

While Convention refugees to be recognised as such[104] need to become international migrants,[105] this does not constitute their most distinctive characteristic. Above all, refugees comprise a specific category of victims[106] of most atrocious

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102) Article 3(b) and Recital 20, Preamble, Schengen Borders Code, which repeal Articles 2 to 8 of the CISA.

103) In this connection it is worrisome to note with Ph. De Bruycker that: 'la plupart des Etats membres n'ont pas jugé bon de rappeler dans leur droit interne la précaution figurant au § 2 de l'article 4 de la directive [...]', in: 'Rapport de synthèse concernant la transposition de la directive visant à compléter les dispositions de l'article 26 de la Convention d'application de l'accord de Schengen du 14 juin 1985', in: *Immigration and Asylum Law of the EU : Current Debates*, Bruylant, 2005, p. 424.

104) Status determination is never constitutive but declarative only, see UNHCR, *Handbook*, § 28: 'a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'.

105) They must find themselves 'outside the country of (their) nationality', Article 1(A)(2), Geneva Convention.

106) UNHCR, *Handbook*, § 56: '[...] It should be recalled that a refugee is a victim – or potential victim – of injustice [...]'.

human rights' violations, to which the international community owes special attention.[107] 'Conceptually, refugeehood is unrelated to migration [...]. Refugeehood is one form of unprotected statelessness [...]. Alienage should be considered one manifestation of a broader phenomenon'[108] of rights' deprivation. Refugeehood shows the severance of the ordinary relationship linking the citizen to his State and the dispossession of the fundamental rights to which he is entitled and would otherwise be able to enjoy. Alienage is contingent to refugeehood; is a consequence rather than a cause of refugeehood. The discussions leading to draft the Preamble of the Geneva Convention illustrate precisely this idea: 'a refugee who has been deprived of his nationality or who no longer enjoys the protection and assistance of the State to which he belongs nominally no longer has the advantages derived from the possession of nationality, to which everyone has the right'.[109] Refugeehood was considered to start as the membership to the body politic in the State of origin broke and the possibility of rights effectuation disappeared. Alienage was considered the addendum to the situation which justified international intervention.[110]

The notion of deference towards refugees, perceived as victims who disserve special treatment, had a wide impact in the drafting process of the Refugee Convention: Although it was considered that, in principle, every refugee was to conform to the laws and regulations of the asylum country,[111] 'it had to be recognized that in certain cases refugees could not satisfy requirements identical with those provided for nationals'.[112] The will of acknowledging the 'special circumstances of refugees'[113] led the Conference of Plenipotentiaries to adopt measures providing for their legal differentiation. As a result, Article 6 establishes 'a duty to exempt refugees from insurmountable requirements'[114] by commanding that 'any require-

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107) G. Loescher, *Beyond Charity: International Co-operation and the Global Refugee Crisis*, OUP, 1993, p. 33.
108) A. Shacknove, 'Who is a Refugee?', *Ethics*, 1985, p. 275.
109) Draft prepared by the Secretariat as a basis of discussion for the *ad hoc* Committee, UN doc. E/AC.32/2.
110) International protection is subsidiary to the national one; see UNHCR, *Handbook*, § 88: 'It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country'. During the drafting process of the Convention, 'The problem of [international] protection arose because naturalization and repatriation could not provide a complete and immediate solution to the refugee problem' (Comment by France in the Committee, in: P. Weis (Ed.), *The Refugee Convention, 1951*, Cambridge International Documents Series, Vol. 7, CUP, 1995, p. 24). In fact, 'considering that until a refugee has been able either to return to his country of origin or to acquire the nationality of the country in which he has settled, he must be granted juridical status that will enable him to lead a normal and self-respecting life' (Recital 5, Draft Preamble prepared by the Secretariat, UN doc. E/AC.32/2).
111) Article 2, Geneva Convention.
112) Contention on the meaning of 'in the same circumstances' (Article 6) by the Representative of Israel at the Conference of Plenipotentiaries, A/Conf.2/SR.5, pp.18–19.
113) *Ibid*.
114) J.C. Hathaway, *The Rights of Refugees under International Law*, CUP, 2005, p. 207.

ments [...] which the particular individual would have to fulfil for the enjoyment of [a] right, if he were not a refugee, must be fulfilled by him, *with the exception of requirements which by their nature a refugee is incapable of fulfilling*'.[115] The same impetus guided the Conference to exempt refugees from the requirements of reciprocity, which regulated the standard of treatment States generally accorded to aliens.[116] 'The notion of reciprocity was at the root of the idea of the juridical status of foreigners. The law considered [generally] a foreigner to be in normal circumstances, that is to say, a foreigner in possession of a nationality. The requirement of reciprocity of treatment placed the national of a foreign country in the same position in which his own country placed foreigners [...]. Since a stateless refugee was not a national of any State, the requirement of reciprocity loses, it was said, its raison d'être and its application to refugees would be a measure of severity. Refugees would be placed in an unjustifiable position of inferiority [in comparison to other foreigners in the host country]'.[117] With the exception from reciprocity 'it was merely intended to grant them [...] treatment commensurate with their special situation'.[118] In fact, 'if it were to be posited that refugees should not have rights greater than those enjoyed by other aliens, the Convention seemed pointless, since its object was precisely to provide for specially favourable treatment to be accorded to refugees'.[119] The net result is a *system of deference* in which a fair balance between the general principle of assimilation of refugees to other aliens and the need for their protection[120] is stroke. In this way the Convention 'assure[s] refugees the widest possible exercise of [their] fundamental rights and freedoms'.[121]

According to the drafters' first intention, when dealing with refugees today, the emphasis should not be placed on alienage but first and foremost on their 'entitlement to special protection on account of their position'.[122] Some relevant modern jurisprudence and State practice back this construction.[123] One may thus wonder

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115) Article 6, Geneva Convention (emphasis added). In this sense, see joint-submission by Israeli and UK representatives, A/Conf.2/SR.84, pp.1–5: Article 6 works as an exception 'intended to exclude conditions which a refugee, as such, is incapable of fulfilling'.

116) Article 7, Geneva Convention.

117) Comments by the Secretariat on Draft Article 8 (current Article 7), in: P. Weis, *op. cit.*, pp. 47–48.

118) Comment by the representative of IRO, in P. Weis, *op. cit.*, p. 51.

119) Comment by the representative of Austria, UN Doc. A/CONF.2/SR.6.

120) Comment by the UK representative on the proposed amendment to Recital 2 of the Preamble: 'Considering that the UN has [...] manifested its profound concern for refugees and *the need for their international protection*', in P. Weis, *op. cit.*, pp. 29–30 (emphasis added).

121) Recital 2, Preamble, Geneva Convention.

122) Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the filed of asylum and resettlement*, Geneva, 28 July 1951.

123) '*Special considerations apply where a person* seeking entry *claims asylum* in the United Kingdom [...] Every such case is to be referred by the immigration officer to the Home Office for decision regardless of any grounds set out in any provision of [immigration] rules which may appear to justify refusal of leave to enter. The Home Office will then consider the case in accordance with the provisions of the

whether the necessity to account for this privileged position that refugees enjoy amongst other aliens affects the way in which the Member States of the European Union can organize their common admission policies. As we have seen above, when dealing with entry management, the Union appears to focus on the refugee being a foreigner in lieu of considering him a particular kind of victim entitled to protection in a straightforward way. No concrete measures have been adopted to systematically differentiate refugees from other migrants at all stages of the flow.[124] But, is this problematic? In the next sections, an attempt is made to expound whether the Geneva Convention indeed requires, as it has been contended, that 'Member States […] establish effective protection-sensitive entry management systems'.[125]

4.1.1. *Extraterritorial Non-refoulement under 'Present Day Conditions'*[126]

According to Hathaway, 'the decision generally to constrain the application of rights on a territorial or other basis creates a presumption that no such limitation was intended to govern the applicability of the rights not subject to such textual limitations'.[127] 'In each of these cases, the failure to stipulate a level of attachment was intentional, designed to grant refugees rights in places where they might never be physically present'.[128] Article 33(1) of the Convention ranges amongst those freestanding provisions detached from any territorial qualification. As such, when forbidding the expulsion or return of refugees in any manner whatsoever to the frontiers of territories where they may be persecuted, it benefits, in principle, all refugees in all places subject to the jurisdiction of any Signatory State.

Most controversial is the field of application *ratione locii* of Article 33(1). The drafters of the Convention, when prohibiting expulsion and return, considered

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Convention and Protocol relating to the Status of Refugees […]', Immigration Rule 75 of the 1971 Act, quoted by Lord Slynn of Hadley in: UKHL, *R v. Naillie; R v. Kanesarajah* [1993] AC 674, [1993] 2 All ER 782, [1993] 2 WLR 927, [1993] Imm AR 462 (emphasis added); '[…] signing the Convention has undoubtedly caused serious problems for immigration control […]. Ever since then *those who claim asylum pursuant to the Convention and Protocol form a special category of persons* when arriving to the United Kingdom', Watkins LJ in: *R v. Yabu Hurerali Naillier; R v. Rajaratnam Kanesarajah* [1993] 1 All ER 75, [1992] 1 WLR 1099, [1992] Imm AR 395, 96 Cr App Rep 161 (emphasis added).

124) This has been implicitly recognised by the European Commission in its brand new *Policy Plan on Asylum*, pp. 10–11: 'With the development of comprehensive and more sophisticated border control regimes, the issue of asylum seekers' access to EU territory has increasingly come into focus. […] It is therefore crucial that the Union should focus its efforts on facilitating the managed and orderly arrival on the territory of the Member States of persons justifiably seeking asylum, with a view to providing legal and safe access to protection […]. To this effect, the Commission will examine ways and mechanisms capable of allowing for the differentiation between persons in need of protection and other categories of migrants *before* they reach the border of potential host States […]' (emphasis in original).

125) European Commission, *Green Paper on Asylum*, p. 14. See also UNHCR, Executive Committee Conclusion No. 97, 2003: 'States must take into account the fundamental differences between asylum seekers and other migrants' in interception cases.

126) Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, § 31.

127) J.C. Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, p. 161.

128) *Ibid.*, p. 162.

that, 'turning back a refugee to the frontier of the country where his life or liberty is threatened on account of his race, religion, nationality or political opinions [...], would be tantamount to delivering him into the hands of his persecutors'.[129] In fact, '[t]here was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country'.[130] In this first sense, 'although in a minimalist form of non-removal',[131] Article 33(1) reflects some sort of a right of entry for refugees. At a second level, despite claims advancing that 'nothing in the Convention can be interpreted as an obligation to admit asylum seekers',[132] the principle of non-refoulement appears to comprise not only a defence against expulsion but also a right of non-rejection at the border.[133] Certainly, already when discussing the Draft Convention the representative of the Secretariat explained that 'the practice known as refoulement in French did not exist in English language. In Belgium and France, however, there was a definite distinction between expulsion, which could only be carried out in pursuance of a decision of a judicial authority, and refoulement, which meant either deportation as a police measure or non-admittance at the frontier'.[134] Agreeing that the purpose of the Convention would be frustrated in the case rejection at the border could occur to genuine refugees, it was finally decided to retain the French wider notion of 'refoulement', instead of that of 'return' alone. And so the word 'refoulement' was included in brackets beside the word 'return' in the English version of Article 33(1).[135]

Beyond what the drafters expressly discussed more than fifty years ago, the problem today is to determine in the light of 'present day conditions'[136] where borders begin and how jurisdiction is to be determined, so as to define when and where the protection against refoulement takes effect. In principle, 'whether it [is] a question of closing the frontier to a refugee who asked admittance, or of turning him back after he [has] crossed the frontier, or even of expelling him after he has been admitted to residence in the territory, the problem [is] more or less the same.

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129) Comment by the Secretariat on Draft Article 31, in P. Weis, *op. cit.*, p. 279.

130) Comment by the French representative on Draft Article 33, in P. Weis, *op. cit.*, p. 327.

131) G. Noll, 'Seeking Asylum at Embassies: A Right to Enter under International Law?', *IJRL*, Vol. 17, No. 3, 2005, p. 548.

132) K. Hailbronner, 'Comments on the Right to Leave, Return and Remain', in: *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers,1996, p. 115.

133) D. Alland and C. Teitgen-Colly, *Traité du droit d'asile*, PUF, 2002, p. 229: 'L'expression française de "refoulement" vise à la fois l'éloignement du territoire et la non-admission à l'entrée'. In the same direction : G.S. Goodwin-Gill and J. McAdam, *op. cit.*, p. 246.

134) P. Weis, *op. cit.*, pp. 289–290. The UN Declaration on Territorial Asylum, Resolution 2312(XXII) of 14 December 1967, which in its Article 3(1) stipulates that 'no person referred to in Article 1(1) [i.e. persons entitled to invoke Article 14 UDHR] shall be subjected to measures such as *rejection at the frontier* [...]', goes in this direction. In addition, High Contracting parties to the Geneva Convention have subsequently received the principle as encompassing non-rejection at the border (see S.E. Lauterpacht and D. Bethlehem, *op. cit.*, pp. 113–115).

135) P. Weis, *op. cit.*, p. 335.

136) Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, § 31.

Whatever the case might be, whether the refugee [is] in a regular position, he must not be turned back to a country where his life and freedom could be threatened'.[137] By analogy, the case of extraterritorial exclusion of refugees through interception measures could simply be treated the same way. In fact, 'if States were able with impunity to reach out beyond their borders to force refugees back to the risk of being persecuted [...] the entire Refugee Convention [...] could [...] be rendered nugatory'.[138] However, States have often refused to assume responsibility in regard of their extraterritorial action affecting refugees;[139] the emergence of administrative frontiers and the exercise of sovereignty beyond geographical dominium have not been accompanied by any overt recognition of correlate duties in their regard. Remarkably, in *Sale*[140] the US Supreme Court dismissed the argument that non-refoulement could be breached by an operation of interception in high seas. As regards the concession of leave to enter for asylum purposes to an applicant at the State of origin, the British House of Lords has made plain, in the *Prague Airport* case,[141] that 'even those fleeing from foreign persecution [...] had no right to be admitted [...]'.[142] '[T]he making of an asylum claim is not one of the purposes for which leave to enter may be given. Nor are there any rules which say that this is one of the purposes for which a person may seek leave to enter'.[143] For the Lords, 'both the text and the negotiating history of Article 33 affirmatively indicated that it was not intended to have extraterritorial effect'.[144]

To wit, the scholarship is not unanimous in the qualification neither of the various possible situations nor of the concomitant degrees of obligation of the State of admission in each of them. Whereas some authors maintain a unified operation of the principle at the territorial border, in high waters and in relation to visa applications made abroad,[145] others distinguish three groups of State's interdiction practices: those happening at its frontier, those occurring at sea and those taking place within a third country. In their view they entail three different levels of responsibility in a decreasing scale, which correspond to the three differ-

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137) Statement by the American representative during the Drafting Ad Hoc Committee, E/AC. 32/SR.20, § 54.

138) J.C. Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, p. 164.

139) See *inter alia*, US Supreme Court, *Sale, Acting Commissioner, INS v. Haitian Centers Council* [1993] 113 S. Ct 2549; High Court of Australia, *Minister for Immigration and Multicultural Affairs v. Ibrahim* [2000] 294 CLR 1, HCA 55 and *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] 210 CLR 1, HCA 14; UKHL, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

140) US Supreme Court, *Sale, Acting Commissioner, INS v. Haitian Centers Council* [1993] 113 S. Ct 2549.

141) UKHL, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

142) *Ibid.*, § 12.

143) *Ibid.*, § 53.

144) *Ibid.*, § 68.

145) S.E. Lauterpacht and D. Bethlehem, *op. cit.*, p. 67.

ent levels of jurisdiction the State exercises in each of the cases.[146] At the fist rank of the scale, these authors maintain that the fact that Article 33(1) of the Geneva Convention applies to rejection at the border is uncontroversial. At the second stage, the extent to which it also applies to cases of interdiction on the high seas, they assert, is less pacific, but fairly acceptable too.[147] It is the third level which poses a major problem: in cases of rejected visas in a third receiving State one encounters two competing territorial authorities with concurrent jurisdiction over the affected subject. In this case, prior to resolving the conundrum at the horizontal level (sending State-receiving State), worthy is to establish whether and to what extent at the vertical level (sending State-individual) the State of admission actually exercises jurisdiction over the applicant in any relevant way. In the negative, no conflict of jurisdiction would occur between the sending and the receiving States, nor would any obligation of non-refoulement be activated in regard of the former.

The delimitation of State jurisdiction has been dealt with at length in human rights circles. There, the limited approach of the State concerning itself exclusively with its territorial human rights affairs has been questioned. There is a progressive disinclination to make the too easy link between the jurisdiction of the State and the limits of its territory, as designating the only ambit where it exercises its sovereignty. In truth, it has been established that human rights preclude both municipal and international unacceptable behaviour. The opposite would lead to a double standard, whereby a State could be allowed to 'perpetrate [human rights] violations [...] on the territory of another State, which violations it could not perpetrate on its own territory'.[148] The focus is thus gradually moving from the locus of the action towards its actual effects, be they intra- or extraterritorial.[149]

In the European context, the much criticized *Bankovic* decision of the European Court of Human Rights, although rejecting a pure 'cause-effect notion of jurisdiction'[150] and asserting that 'from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial',[151] nonetheless

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146) G. Noll, 'Seeking Asylum at Embassies', *op. cit*., p. 549ff and references therein.

147) Inter-Am. Comm. H.R., *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 [1997] 13 March 1997.

148) HRC, *Lopez Burgos v. Uruguay*, Communication No. R. 12/52, UN doc. A/36/40, 1981, § 12; *Celiberti de Casariego v. Uruguay*, Communication No. R 13/56, UN doc. A/36/40, 1981, § 10 and General Comment No. 31, 2004, § 10.

149) O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', *Baltic Yearbook of International Law*, Vol. 6, 2006, pp. 185–247. J.Y. Carlier and S. Sarolea, 'Evolutions *jurisprudentielles*' in: *Immigration and Asylum Law of the European Union: Current Debates, op. cit*. p. 12: 'La jurisprudence [de Strasbourg] répond à cette externalité [de l'étranger] en appliquant un critére se fondant sur la responsabilité plutôt que sur la localisation du risque.'

150) Eur. Ct. H. R., (Inadmiss. Dec.) *Bankovic and Others v. Belgium and Others*, Appl. No. 52207/99, 12 December 2001, § 75.

151) *Ibid*., § 59.

ruled that exceptional 'recognised instances of the extra-territorial exercise of jurisdiction by a State [...] include cases involving the activities of its diplomatic or consular agents abroad [...]. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State'.[152] Subsequently, *Issa and Others v. Turkey* came to establish that 'a State may [...] be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully- in the latter State [...] Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[153] The European Commission of Human Rights, as early as in 1974, had already recognized, in this line, that 'authorised agents of a State, including diplomatic and consular agents and armed forces, not only remain under its jurisdiction when abroad but bring *any other persons* or property *"within the jurisdiction" of that State*, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged'.[154] Indeed, the term "within the jurisdiction" 'is not equivalent to or limited to the national territory of the High Contracting Party concerned. It emerges from the language [...] and the from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad'.[155] On account of this jurisprudence, Noll argues that the term '"within the jurisdiction" does not refer exclusively to a geographical space, but to an administrative boundary, [...] [which suggests that] the administrative reach of a State exceeds its territorial borders'.[156] De Schutter further notes, in this vein, that where States expand their jurisdiction beyond national territory they remain under an obligation to respect the rights of the individuals who are under the effective control of its organs.[157]

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[152] *Ibid.*, § 73.

[153] Eur. Ct. H. R., *Issa and Others v. Turkey*, Appl. No. 31821/96, 16 November 2004, § 71.

[154] Eur. Comm. H. R., *Cyprus v. Turkey*, Appl. No. 6780/74 and 6950/75, 26 May 1975, 2 DR 136 (emphasis added); see also Eur. Comm. H. R., *Ilse Hess v. UK*, Appl. No. 6231/73, 28 May 1975, 2 DR 73.

[155] Eur. Comm. H. R., *W v. Ireland*, Appl. No. 9360/81, 28 February 1983, § 14.

[156] G. Noll, 'Seeking Asylum at Embassies', *op. cit.*, p. 567, quoting the Inter-Amer. Comm. H. R., *Coard et al. v. the USA*, Case No. 10951, 29 September 1999, Report No. 109/99.

[157] O. De Schutter, 'Irregular Migration and Human Rights', paper presented to the UniDem Campus Seminar: Management of Irregular Migration in Europe and Strategies to Combat Trafficking in Human Beings, Trieste, 9–12 October 2006, p. 6 (on file with the author). In his opinion, the exercise by refugees of their right to asylum falls within the scope of the obligations States are to honour when acting abroad.

As the extraterritorial exercise of sovereignty attracts the individual towards the sphere of State authority and control,[158] to the expansion of State power there must follow an extension of its correlate obligations.[159]

As borders are controlled remotely, if non-refoulement 'is to guarantee not rights that are theoretical or illusory but rights that are practical and effective',[160] its application is to commence accordingly. In Hathaway's opinion, 'the fact that the drafters assumed that refoulement was likely to occur at, or from within, a state's borders – and therefore did not expressly proscribe extraterritorial acts which lead to a refugee's return to be persecuted – simply reflects the empirical reality that when the Convention was drafted, no country had ever attempted to deter refugees other than from within, or at, its own borders [...]. There was certainly no historical precedent of a policy of proactive deterrence, encompassing affirmative actions intended specifically to take jurisdiction over refugees [...] without a concomitant assumption of responsibility [...]. A construction which excludes actions that would actually deliver a refugee back to his or her persecutors [...] is in fact the plainest and most obvious breach of the duty conceived by the drafters, namely to prohibit measures which would cause refugees to be "pushed back into the arms of their persecutors" '.[161] This is the lens through which the imposition by Schengen policies of visa requirements on refugees to be enforced by private carriers is to be scrutinized.

As regards visas, the State granting them has full sovereign command over the procedure.[162] When entry depends on a visa, the State has complete *authority and control* to interfere with the regular admission to its territory of any particular alien concerned. The grant or denial of visas cannot but be considered an act of jurisdiction of the State requiring them, with a potential to hamper the effectiveness of the prohibition of refoulement. In the *Prague Airport* case, the House of Lords recognised that pre-clearance operations by the immigration police acting abroad actually 'purport to exercise governmental authority' over those targeted.[163] The equivalence between pre-clearance operations and visas was avowed too. Lord Steyn observed that: 'had a visa regime been imposed, the effect on the appellants,

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158) Eur. Ct. H. R., *Issa and Others v. Turkey*, Appl. No. 31821/96, 16 November 2004, § 71.

159) For the opposite opinion see House of Lords, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, § 64 (Lord Steyn): 'The conclusion must be that steps which are taken to control the movements of such people who have not yet reached the State's frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and the purpose of the Treaty is to argue for the *enlargement of the obligations* which are to be found in the Convention. [...], I am not persuaded this is the way in which the principle of good faith can operate' (emphasis added).

160) See, *inter alia,* Eur. Ct. H.R., *Airey v. Ireland*, Appl. No. 6289/73, 9 October 1979, § 24.

161) J.C. Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, pp. 337–338.

162) G. Noll, 'Seeking Asylum at Embassies', *op. cit.*, pp. 567–568.

163) UKHL, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 2005, UKHL 55, § 45.

so far as concerned their applications for asylum, would have been no different [than the one achieved through the pre-clearance procedure]'.[164] Accordingly, if pre-clearance procedures are a manifestation of the State 'authority and control' and visas are tantamount to pre-clearance procedures, it must logically follow that the imposition of a visa regime too constitutes an exercise of jurisdiction capable of triggering a State's extraterritorial responsibility.

However, if visas are denied while refugees are still in their countries of origin, the teleological interpretation of Article 33(1) clashes with the criteria for qualification for refugee status contained in Article 1(A)(2) of the Convention – namely with the requisite of being 'outside the country of [own] nationality'.[165] In such a stance, it could be claimed that attaching too much importance to the wording of Article 1(A)(2) 'results in a meaning incompatible with the spirit, purpose and context [of the Convention]' and that, accordingly, 'no reliance can be validly placed on it'.[166] This would certainly take better account of the 'humanitarian and civilising purpose' of the Convention and the need to privilege the spirit over the letter of its provisions.[167] Political declarations in the European regional context appear to come in support of such a construction. In 1967, the Committee of Ministers of the Council of Europe, aware of the fact that refoulement could occur in any unforeseeable ways, considered that protection against it should also be provided in any manner whatsoever. It thus recommended that Member States 'ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or *any other measure which would have the result of compelling him to return* to, *or remain in, a territory where he would be in danger of persecution* [...]'.[168] Should this reasoning be retained, to 'metaphorical borders'[169] there would respond a metaphorical prohibition of refoulement. A perfect equilibrium would be established between the exercise of extraterritorial jurisdiction and the protection against extraterritorial refoulement. But, this would require interpreting "outside his country of origin' in a legal, jurisdictional sense, rather than

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164) *Ibid*., § 28.

165) In *ibid.*, § 18 and 19, Lord Bingham of Cornhill maintains that: 'however generous and purposive its approach to interpretation, the Court's task remains one of interpreting the written document to which the contracting States have committed themselves. It must interpret what they have agreed; [...] [nothing] significantly greater than or different from what they agreed to do'.

166) ICJ, *Arbitral Award of July 31, 1989*, 12 November 1991, ICJ Reports 1991, p. 53 and pp. 69–72: 'the rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it'.

167) ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p. 15, § 23.

168) Committee of Ministers of the Council of Europe, Resolution No. (67) 14 on Asylum to Persons in Danger of Persecution, 29 September 1967, § 2 (emphasis added).

169) This paraphrases the expression Lord Bingham of Cornhill uses in § 26 of the UKHL *Prague Airport* case.

in a physical, territorial sense',[170] against the original wording of the Convention. Although international interpreters of human rights obligations have already made exceptional recourse to this technique of interpretation,[171] in the specific case of the Geneva Convention the argument has by and large been rejected.[172] Accepted is that if the refugee finds himself still within his country of origin, the protection of Article 33(1) cannot be triggered. Article 33(1) applies ipso facto to those meeting the qualification conditions. Being 'outside the country of his nationality' is therefore indispensable.[173]

On the other hand, visas may be refused in a neighbouring country to that of the nationality of the refugee.[174] Provided that in those territories his life or freedom would be threatened in the sense banned by the Convention, rejecting the extraterritorial applicability of Article 33(1) becomes problematic. The reasoning of the House of Lords in its *Prague Airport* case appears to indirectly recognise this possibility. The only hindrance to the extraterritorial application of Article 33 of the Geneva Convention identified by the Lords is that the appellants never left the Czech Republic. Since the extraterritorial applicability of both English municipal and international obligations in regard of the principle of non-discrimination

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170) G.S. Goodwin-Gill and J. McAdam, *op. cit.,* p. 250.

171) In spite of the fact that Article 2(1) ICCPR is clearly worded, 'each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant […]' (emphasis added), the HRC has, over the years, rendered the cumulative criteria into alternative ones; see, *inter alia*, General Comment No. 31, 2004, which, taking account of today's context and in order to avoid the development of double standards in the level of human rights obligations of States, decides to favour the spirit of the Covenant over its actual wording and rules, in § 10, that: 'States Parties are required by Article 2(1) to respect and to ensure the Covenant rights to all persons who may be within the territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, *even if not situated within the territory of the State Party*' (emphasis added).

172) Both the most littered doctrine and national jurisprudence have considered this reading to depart too far away from the original intentions of the drafters. For a doctrinal account see, *inter alia,* G.S. Goodwin-Gill and J. McAdam, *op. cit.,* p. 250 and references therein. For the most salient jurisprudence see UKHL, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, § 18.

173) UNHCR, *Handbook*, § 88.

174) Taking account of the rules contained in the CCI, it is probable that Schengen Member States be reluctant to issue visas to non residents, see *Visa applications lodged by non-residents*, II.3., CCI: 'When an application is lodged with a State which is not the applicant's State of residence and there are doubts concerning the person's intentions (in particular where there is evidence pointing to illegal immigration), the visa shall be issued only after consultation with the diplomatic mission or consular post of the applicant's State of residence and/or its central authority'. Note that these consultations may expose the refugee to further peril, in the event the persecution from which he tries to escape emanates from official authorities of the State of origin. Article 4(2) of the forthcoming CCV will go even further, as it establishes that: '[…] applications may be lodged by third country nationals, *legally present* in a third-country different from their country of residence in that third country. Such applicants shall provide justification, for lodging the application in that country and there must be no doubt as to the applicant's intention to return to the country of residence' (emphasis added).

is accepted,[175] if interception would have occurred en route, in the case it would have entailed devolution to the country of persecution, it is difficult to see how the House would have been capable of maintaining the inapplicability of the Geneva Convention to the case.

However, some doctrine has aired two contextual arguments in support of a restrictive reading of Article 33(1) also in this scenario.[176] The first contextual argument relates to the transposition to our case of the interpretation that the majority of the US Supreme Court maintained in *Sale*[177] of Article 33(2), which constitutes the context of Article 33(1) of the Geneva Convention according to Article 31(1) VCLT: Because States could not make use of the exception contained in Article 33(2)[178] to the principle of non-refoulement in a extraterritorial setting, it should be inferred that Article 33(1) itself cannot apply beyond State territorial jurisdiction. Yet, this argument is tautological.[179] A systematic interpretation of the Convention wants that the relationship between the rule contained in Article 33(1) not be confounded with its exception in Article 33(2). The subsumption exercise concerns first the principle and only if the case additionally falls within the purview of the exception, the latter can be activated. As regards the scope of application *ratione personae* of Article 33(1), as it emanates from the discussions leading to the adoption of the Geneva Convention, it applies not only to recognised refugees, but chiefly also '*to refugees seeking admission*, to refugees illegally in the country and to refugees admitted temporarily or conditionally'.[180] The UK representative further remarked that, accordingly, 'refugees who had been allowed to enter could be sent out only by expulsion', i.e. in pursuance of a

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175) UKHL, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, § 44 '[…] The operation in Prague Airport placed the United Kingdom, in breach of this international obligation [i.e., the principle of non-discrimination on racial grounds] and 97–98 '[…] The operation was […] not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party.'

176) G. Noll, 'Seeking Asylum at Embassies', *op. cit.*, p. 554ff.

177) 'Under the second paragraph of Article 33 an alien may not claim the benefit of the first paragraph if he poses a danger to the country in which he is located. If the first paragraph did apply on the high seas, no nation could invoke the second paragraph's exception with respect to an alien there: an alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of Article 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of Article 33.2 was limited to those already in the country because it was understood that Article 33.1 obligated the signatory state only with respect to aliens within its territory', in: *Sale, Acting Commissioner, INS v. Haitian Centers Council* [1993] 113 S. Ct 2549.

178) Article 33(2), Geneva Convention reads: 'The benefit of [non-refoulement] may not, […], be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

179) See J Blackmun's dissent to *Sale*: 'The tautological observation that only a refugee already in a country pose a danger to the country "in which he is" proves nothing'.

180) Comment by UK representative, in: P. Weis, *op. cit.*, pp. 289–290 (emphasis added).

decision by a judicial authority. This explains the different scope of application *ratione personae* of paragraphs 1 and 2 of Article 33. In this sense, the US representative underscored that 'there should be no doubt that paragraph 1 applied to all refugees [...]. Concerning paragraph 2, those measures were certainly taken in accordance with a procedure provided by law'.[181] Protection from refoulement was made independent from formal qualification so that any refugee 'as soon as he fulfils the criteria contained in the definition'[182] is entitled to protection against it. By way of contrast and in the guise of a further guarantee, the exception in Article 31(2) begs both prior determination of status and final judicial conviction affording expulsion. Not only the UNHCR Executive Committee but also subsequent State applications come to confirm this approach.[183]

The first contextual argument discarded, it remains to contest the second. It has been claimed that, because Article 33(1) 'cannot be interpreted in isolation from the norms regulating the exercise of power among nation-states in the international system',[184] the principle of sovereignty comes to modulate the manner in which non-refoulement should be construed, as an essential component of the context within which it is to be read. Against this backdrop, it is argued that the notion of 'expel or return ("refouler")' suggests that a direct sovereign relationship is required between the removing agent and the territory from which the removal is operated. In this light, the removing agent needs *a fortiori* to be a territorial sovereign.[185] Though, here again, the argumentative line appears to be biased. An interpretation of Article 33(1) grounded in its plain and ordinary meaning shows that the only geographic restriction encrypted in its formulation 'regards the country where a refugee cannot be sent to, not the place where a refugee is sent from'.[186] In addition, it has already been largely illustrated here that jurisdiction cannot be measured in territorial terms only. If it is accepted that Article 33(1) read in conjunction with the principle of sovereignty requires a jurisdictional link between the removing agent and its object, it is to be refused that that jurisdictional

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181) P. Weis, *op. cit.*, p. 285.

182) Status determination in the asylum State is never constitutive but declarative only, see UNHCR, *Handbook*, § 28 and *supra* n. 3 and n. 94.

183) UNHCR, Executive Committee Conclusion No. 79, 1996, reaffirms 'the fundamental importance of the principle of non-refoulement [...] *irrespective of whether or not individuals have been formally recognized* as refugees' (emphasis added). See also the conclusion by Lord Goff that: 'the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention' in: UKHL, *R. v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All ER 193.

184) G. Noll, 'Seeking Asylum at Embassies', *op. cit.*, p. 555.

185) *Ibid*.

186) ECRE, *Defending Refugees' Access to Protection in Europe*, December 2007, p. 20 (available at: www.ecre.org); J-Y. Carlier notes in this regard that: 'Les tenants de la territorialité du principe de non-refoulement confondent la territorialité de l'ordre juridique lié par la convention de Genève qui ne permettra pas de se prévaloir de la convention contre un Etat ne l'ayant pas ratifié, avec l'étendue spatiale des obligations de l'Etat lié', in: *La condition des personnes dans l'Union Européenne*, *op. cit.*, p. 178.

link need *per force* be territorial. It should then be accepted that the defence against refoulement operates regardless of *from where* precisely the prohibited action takes place, as soon as the person concerned is a refugee and jurisdiction, be it territorial or not, has been exercised in a significant manner. This considered, the refusal by a State of admission of a visa to a refugee fearing for his life or freedom in a third country would prompt the action of Article 33(1).

In relation to carriers, it may happen that they detect defects in documentation already at the point of boarding in the country of origin. In such a scenario, the applicability of Article 33(1) would, as in the case of visas, be blocked by refugee qualification criteria. However, if defects are identified when already in transit or embarkation takes places in a third State, the interception of a refugee 'outside the country of his nationality', provided it entails return of the person to the territories of prospective persecution, may well amount to a violation of Article 33(1). Since 'States cannot contract out or 'privatize' their legal obligations',[187] the conduct of the carrier would undeniably engage its (extraterritorial) responsibility[188] and the prohibition of non-refoulement in Article 33(1) would necessarily deploy its entire effects.

Coming back to the matter of competing jurisdictions opposing the sending State, to which admission is requested by a refugee, and the receiving State, detaining full territorial sovereignty, it needs to be noted that the issue has been tackled at three different instances. At the international level, the International Court of Justice's *Asylum Case*[189] deals with this matter, albeit in an indirect way. Much of the judgement concerns the interpretation of the two Conventions on asylum to which both Peru and Columbia where parties and to the distinction between extradition of common criminals and protection of refugees through 'diplomatic asylum'.[190] Nonetheless, the decision has prompted fruitful commen-

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187) In the context of private detention centres the HRC stressed that: 'The Committee is concerned that the practice of the State party in contracting out to the private commercial sector core State activities [...] weakens the protection of rights under the Covenant. The Committee stresses that the State remains responsible in all circumstances for adherence to all articles of the Covenant' in: HRC, Comments on the 4th UK Periodic Report, 27 July 1995, UN Doc. CCPR/C/79/Add.55, § 16.

188) ICL, *Articles on the Responsibility of States for Internationally Wrongful Acts*, UNGA res.56/83, 12 December 2001. These articles, in spite of not being binding yet, show accepted international practice. Two of them are particularly relevant to our purposes, Articles 5 and 8. Article 5 stipulates that: 'the conduct of a person or entity, which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'. Article 8 establishes that: 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

189) ICJ, *Asylum Case (Columbia v. Peru)*, 27 November 1950, ICJ Reports 1950, p. 206.

190) The Court concluded that '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 the State. Such a

tary by publicists. *Oppenheim* has subsequently observed that 'there would seem to be no general obligation on the part of the receiving State to grant an ambassador the right of affording asylum to a refugee, whether criminal or other, not belonging to the mission […]. [I]n the absence of an established legal basis […] a refugee must be surrendered to the territorial authorities at their request and if surrender is refused, coercive measures may be taken to induce it. […] It is sometimes suggested [though] that there is, exceptionally, a *right* to grant asylum on grounds of urgent and compelling reasons of humanity, usually involving the refugee's life being in imminent jeopardy from arbitrary action'.[191] The remaining question is whether, exceptionally too, not only a right but also an *obligation* to grant asylum exists for a diplomatic mission in the receiving State on similar grounds and whether the failure to do so entails a breach of the principle of non-refoulement.

The European Commission of Human Rights has been confronted with this matter in *WM v Denmark*[192] – although the case did not relate to a fully-fledged refugee, but a refugee to-be, it still illustrates the point which is made here-. The case concerned a citizen of the then German Democratic Republic (DDR) who whished to move to the west. As permission to emigrate was refused, he, together with other 17 persons, entered the Danish embassy to request negotiations with the DDR authorities. Despite some dealings taking place, the Danish ambassador finally decided to hand over the applicant and his companions to the DDR police. WM then complained of a violation of his rights under Article 5 ECHR at the hands of the DDR due to the surrender by the Danish embassy. In that connection, the Commission recognised to be 'satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 of the Convention'. And, surprisingly, in the language of *Soering*,[193] recalled that 'an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention'. Although, after consideration of the particulars of the case, the Commission decided to dismiss the application, the door was left open to consider that an obligation to grant diplomatic asylum may arise out of the ECHR and, *a contrario*, that the obligation not to refouler be breached otherwise.

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derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case'.

191) *Oppenheim's International Law*, 9th Edition, Longman, 1992, § 495 (emphasis added).

192) Eur. Comm. H. R., (Inadmiss. Dec.) *WM v. Denmark*, Appl. No. 17392/90, 14 October 1992.

193) Eur. Ct. H. R., *Soering v. UK*, 7 July 1979, Appl. No. 14038/88. This judgment relates to extradition, not to *refoulement* of refugees, even less to diplomatic asylum or to denial of a safe-conduct or a humanitarian visa in view of granting international protection.

Actually, in the domestic context, the English Court of Appeal in a case involving the British Consulate in Melbourne and the grant of protection to asylum applicants of Afghan origin under the *territorial jurisdiction* of the Australian authorities, taking account of these developments, ruled that: '[I]f the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the [European] Convention [of Human Rights] where this is compatible with public international law. Where a fugitive is facing the risk of death or injury [...] no breach of international law will be occasioned by affording him refuge. Where, however, the receiving State requests that the fugitive be handed over, the situation is very different. The basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction [...]. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. *In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum*'.[194] Being this so, there appears to be no formal obstacle to consider that a similar obligation to protect and not to refouler ensues from Article 33(1) of the Geneva Convention in regard of refugees applying for asylum, in the form of an entry visa, at a Schengen embassy in a third State. By analogy, the same applies in the case of a carrier being requested a *de facto* waiver by a refugee 'outside the country of his nationality'.

4.1.2. *Contextualising Article 31 in Good Faith: Visas and Carrier Sanctions as Due Requisites for First Admission or Undue 'Penalties' Foreclosing Qualification?*
The Geneva Convention does not contain any provision clearly dealing with the question of first admittance to the country of refuge. Nowhere it is made explicit whether refugees, before arrival, are supposed to submit to general immigration rules and the commentaries of those partaking in the drafting process lead to no unambiguous conclusion on this point. The necessity to regulate first admission in the Convention was not perceived with any urgency, but it is not clear whether this was due to the general feeling that as a matter of course States would not lose their powers of interdiction or whether this lacuna is attributable to the deference with which refugees were regarded. The two possibilities remain open: either

[194] UK Court of Appeal (Civil Division), *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office* [2004] EWCA Civ 1344, § 88 (emphasis added).

States expected, in principle, that refugees comply with immigration requisites prior to their presentation for admission at the border and, only exceptionally, illegal entry would be de-penalized provided that the conditions of Article 31 be met; or States assumed *a priori* that refugees were incapable of fulfilling such requirements and to make sure that any temptation to penalize them therefore would banish, Article 31 enshrined a sufficient guarantee. To be sure, deference vis-à-vis refugees would translate in their exoneration from compliance with general immigration rules for the purpose of first entry.

Several representatives of different countries made at various points of the negotiations leading to the wording of current Article 31 comments that could induce us to believe that refugees were generally intended to seek authorisation to enter legally the country of refuge. The discussions around the notion of 'without authorisation' in Article 31(1) go unequivocally in this direction.[195] The representative of Chile was amongst the firsts to point that '*if the authorities permit* a foreigner whose life or liberty is endangered by political, racial or religious persecution, *to enter the country* in order to escape such persecution, they will unquestionably refrain from imposing penalties or sanctions on him for failure to produce the documents usually required from those entering the territory of the State'. In the same line, the delegate from Belgium insisted in making clear that his delegation understood that 'the words "who enters or is present in their territory without authorization" do not cover refugees who had gained access to a territory illegally, *after authorization had been refused*'. The French representative added that: "without authorization" might refer to a refugee who had made application and *had been refused authorization*, and still persisted in trying to remain in the country. [...] If [...] *it was decided* [...] *not to admit* a refugee, and the refugee persisted in trying to remain in the territory, he would no longer come under [current Article 31], but under the ordinary national law'.

On the other hand, evidence can also be traced of the opposite trend. The representative of the Secretariat, referring to 'the refugees who did not come within the framework of the Convention', explained to the Committee that: 'It was they, and they alone, whom non-admittance measures should concern'. Therefore, '[i]t did not seem necessary to include those measures in a Convention which was to apply only to refugees authorized to reside regularly in the reception country'.[196] At a more advanced stage of the negotiations, the French representative realized that 'it had been argued that the Convention did not govern the question of admission, but continental countries had no choice in that matter. When faced with a flood of refugees upon their frontiers, they could not help but grant them asylum, and possibly refugee status'.[197] Arguably, in the aftermath of

195) P. Weis, *op. cit.*, pp. 293–294.
196) P. Weis, *op. cit.*, p. 285.
197) P. Weis, *op. cit.*, p. 30.

the II World War, first admittance was regarded as an inescapable humanitarian duty. The general tenor during the Conference of Plenipotentiaries who finally adopted the definitive text of the Convention was that 'it was unlikely that any State would in reality refuse admittance to a person obliged to leave his own country'.[198] In addition, at that time, preferred destinations were overseas. In continental Europe first reception of refugees in view of further resettlement was felt to be unavoidable and, in a number of cases, temporary as well. Thus, one of the provisions more profoundly discussed by the drafters of the Convention was that on travel documents. Apparently, only once a refugee had been attached to the jurisdiction of a reception State, was he expected to submit to general immigration rules. Only once the anomaly of not detaining effectively any nationality would have been palliated through the issuance of new identity papers and travel documents by the first asylum country, would the refugee be in a position to comply with immigration requirements. Presumably, this is why subsequent travel after refuge in a first country of asylum was made expressly conditioned to the obtainment of the visa that a country of final destination could require. And this would be why 'the issue of such visas may be refused on grounds which would justify refusal of a visa to any alien'.[199]

The general design of the Convention construed as a system of deference towards refugees comes in support of the latter reading. Although, as a matter of general rule, 'every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations,[200] the impossibility to which refugees were confronted in order to comply with certain requirements was in the minds of the drafters too. When discussing the wording of current Article 6 on the standards of treatment to be accorded to (recognised) refugees, the drafters referred to 'requirements as to length and conditions of sojourn or residence' with which compliance would generally be required. Some of these requirements were identified in the debate as conditions which refugees would not be capable of fulfilling. Such conditions included 'the production of a national passport or a nationality certificate'.[201] This is why it was decided that refugees, once *in* a country of asylum, were to be provided with identity papers.[202] Refugees *lawfully staying in* the territory of a Contracting State should in addition be issued 'travel documents for the purpose of [onward] travel'.[203] It could from here be inferred that the drafters of the Convention did not await refugees to be able to flee carrying their identity and travel papers along. Conceivably, it was

198) Comment by US representative on Draft Article 31, in P. Weis, *op. cit.*, p. 283.
199) Paragraph 9, Schedule, Geneva Convention.
200) Article 2, Geneva Convention.
201) P. Weis, *op. cit.*, p. 46.
202) Article 7, Geneva Convention.
203) Article 28, Geneva Convention.

expected that *destination countries* would substitute to their countries of origin in these chores.

The deferential impetus of the Convention did also reach Article 31. State power to impose penalties to refugees on account of illegal entry was strictly restrained. 'There was no doubt that refugees must not be penalized because they were refugees'.[204] It was considered that 'a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a bona fide refugee'.[205] In the course of the negotiations, it was affirmed that 'non-admission or expulsion had to be regarded as sanctions'.[206] Considering their extremely severe nature if applied to refugees, it was recommended that recourse be made as *ultima ratio*, 'for very grave reasons, namely matters endangering national security or public order'.[207] Following profound discussion, expulsion and refoulement were detached from those penalties to be possibly imposed upon illegal entry, confined to separate articles and submitted to strict conditions of application. So, illegally entering refugees could neither be expelled nor remain unadmitted at the border on account of their (accomplished or just attempted) irregular ingression.[208] Otherwise, 'measures of expulsion or non-admittance at the frontier, intended to protect law and order, [would] achieve opposite results when an attempt [would be] made to apply them to refugees without taking into account their peculiar position'.[209] If one could subsume interception measures into the wider notion of refoulement, one should reach a similar conclusion: visas and carriers' sanctions applied to refugees without considering their peculiar position reach the opposite result to the one sought by the Convention. They should, hence, be equally dismissed.

In any case, mindful as it might be to endeavour to unveil the true intentions of the drafters,[210] the systematic interpretation of the Convention reveals that

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204) Comment by French representative on Draft Article 7, in P. Weis, *op. cit.*, p. 52.

205) Commentary on Draft Article 31 by the Secretariat, in P. Weis, *op. cit.*, p. 279.

206) Comment by French representative on Draft Article 31, in P. Weis, *op. cit.*, p. 294.

207) Comment by representative of the Secretariat on Draft Articles 31, 32 and 33, in P. Weis, *op. cit.*, p. 285.

208) If the principle enshrined in Article 31 is that *accomplished* illegal entries should not be penalised provided that the conditions enshrined in its wording are fulfilled, the *attempted* illegal entry should be considered as being included in the exemption, as a lesser degree of fault.

209) Comment by representative of the Secretariat on Draft Articles 31, 32 and 33, in P. Weis, *op. cit.*, p. 285.

210) ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, 21 June 1971, ICJ Reports 1971, p. 16.

Article 31 does not deal in any way with qualification criteria for refugee status.[211] Its field of application is circumscribed to the possibility to impose penalties to 'refugees unlawfully in the country of refuge' on account of illegal entry or presence. Reading in Article 31 that legal admission constitutes a prerequisite for qualification adjoins an extra condition to the refugee definition, exceeding those contained in Article 1(A)(2) of the Convention, thereby reserving Article 1 against the literal provision of Article 42(1).[212] Such an addition would not only be illegal but it would also entail particularly noxious effects. It would lead to an aprioristic exclusion from status for reasons which the Convention does not include. Conversely, it is only after recognition and for the grounds exhaustively enshrined in Article 1 that it can be determined whether the claimant is to be disqualified from refugee status. As Article 31, Article 1 too must be interpreted systematically. The analysis of inclusion under Article 1(A) must precede that of exclusion under Articles 1(D), (E) or (F), otherwise there is a serious danger that the relationship between principle and exception be reversed. If we first assess exclusion prior to inclusion, the relationship between the rule in Article 1(A) and its exceptions in Articles 1(D), (E) and (F) risks being inverted. Thus, no anticipated exclusion can take place before examining qualification; even less if it is for reasons that go beyond those expressly contemplated by the Convention. Indeed, exceptions in law must be interpreted restrictively. Here, the rule to follow is that enshrined in Article 1(A)(2), which establishes that 'for the purposes of the Convention, the term "refugee" shall apply to *any person* who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. The legal qualification the person receives under national law is immaterial. And, as some jurisprudence has rightly emphasized, [213] the possession of a valid passport or/and of a visa appears to be equally irrelevant. If the person meets the conditions of the definition, he becomes *ipso facto* a refugee, whom the Contracting Party concerned needs to recognise as such if it is to fulfil its legal engagements in good faith.[214]

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211) J. Vedsted-Hansen, 'Non-admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?', in: *Refugee Rights and Realities – Evolving International Concepts and Regimes*, CUP, 1999, p. 278: 'The provision […] is very specific about the legal context to which [it] applies. […] It refers to the scope of protection against *penalisation* for illegal entry or presence' (emphasis in the original).

212) Article 42(1), Geneva Convention: 'At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36–46 inclusive'.

213) Watkins LJ observes that 'It is, therefore clear […] that special consideration apply to persons seeking asylum and *a valid passport is not a requisite*' in: *R v. Yabu Hurerali Naillier; R v. Rajaratnam Kanesarajah* [1993] 1 All ER 75, [1992] 1 WLR 1099, [1992] Imm AR 395, 96 Cr App Rep 161 (emphasis added).

214) Since 'none of the provisions of the Convention would apply unless the refugees were genuine', (Comment by UK representative) 'it was essential first to determine whether a refugee was *bona fide*' (Comment by US representative), in: P. Weis, *op. cit.*, p. 63 and 64. See also UNHCR, *Handbook*, § 189: 'It is obvious that, to enable State parties to the Convention and to the Protocol to implement

Regrettably, this reasoning finds no good reception in practice. On the contrary, mainstream commentators sustain that 'as international law stands today, States have no international legal duty to admit refugees',[215] for '[t]he several States have jealously guarded their freedom to decide which aliens or categories of aliens they will let enter their territories'.[216] Abundant jurisprudence endorses this argument and claims that 'States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory [...] States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual [...] is something which falls to each nation to resolve for itself'.[217] The Geneva Convention is deemed not to create any exception to this rule.[218] Domestic courts routinely maintain that 'steps which are taken to control the movements of such people who have not yet reached the State's frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and the purpose of the Treaty is to argue for the enlargement of the obligations which are to be found in the Convention'.[219]

From the extracts above, the good faith argument appears to have been misunderstood. It does not contend that visa requirements and carrier sanctions are unlawful *per se* and under any given conditions. Rather, it upholds that denying visas or *de facto* waivers to the particular class of migrants which the Geneva Convention protects is illegal. The legitimacy of measures enacted to manage unordered immigration is not contested in all cases. What the good faith principle sustains is that such measures need to be 'capable of allowing for the

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their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated [...] It is therefore left to each Contracting State to establish the procedure that it considers most appropriate'. See also H. Battjes, *op. cit.*, p. 467: 'the object and purpose and the obligation to perform treaty obligations in good faith imply an obligation to determine refugee status'. See also Eur. Ct. H. R., *Amuur v. France*, Appl. No. 19776/92, 25 June 1996, § 43: 'confinement must not deprive the asylum-seeker of the *right to gain effective access to the procedure for determining refugee status*' (emphasis added). See also ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1991, p. 6: international obligations must be interpreted in good faith.

215) A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. II, A. W. Stijhoff, 1972, § 194 at p. 196.

216) *Ibid.*, § 195 at p. 197.

217) High Court of Australia, *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) 210 CLR 1, HCA 14, § 44.

218) *Ibid.*, McHugh and Gummow JJ in this connection claim that '[States] have refused to agree to international instruments which would impose on them duties to make grants of asylum'. In that connection, A. Grahl-Madsen has contended that: '[i]t will be clearly seen that Article 31(1) does not obligate any State to admit any refugee into its territory. It merely relates to the treatment of refugees who have already found their way into a country of refuge, although unlawfully so' in: *The Status of Refugees in International Law*, *op. cit.*, § 196 at p. 201.

219) UKHL, *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, § 64.

differentiation between persons in need of protection and other categories of migrants *before* they reach the border of the potential host States [...]'.[220] Hence, one cannot but reaffirm, together with Goodwin-Gill and McAdam,[221] that in so far as passive interception measures prevent the Geneva Convention from ever being triggered, States are at fault with their obligation to implement the Treaty in good faith. Visas and carrier sanctions, as they are currently being operated, foreclose irregular arrivals in an *indiscriminate* manner. Both refugees and non-refugees fall into the trap; 'they do indirectly what it is not permitted to do directly',[222] that is, to disregard refugees' entitlement 'to special protection on account of their position'.[223] For this reason and as applied to refugees, they are illegal.

4.2. *Seeking Refuge in Human Rights*

After the human rights' *revolution*,[224] undergone through the drafting of the Universal Declaration of Human Rights and her daughter instruments, the 1951 Refugee Convention and the 1966 Human Rights Covenants, human rights obligations have come to impose a humanitarian exception to the right of States to freely delineate their national communities. The unlimited power of States to control the entry, residence and removal of undesired immigration has from then on been constrained by the recognition of rights inherent to the human person.

In the context of the Council of Europe, the European Commission of Human Rights has very soon indicated that 'under general international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory. [...] However, a State which signs and ratifies the European Convention on Human Rights and Fundamental Freedoms must be understood as agreeing to restrict the free exercise of [...] its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under the Convention'.[225] The Strasbourg Court has followed this approach. It has consistently maintained that States, when combating

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220) European Commission, *Policy Plan Asylum*, p. 11 (emphasis in original).

221) G.S. Goodwin-Gill and J. McAdam, *op. cit.*, pp. 387–388: 'This duty [of good faith] is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeat the object and purpose of a treaty [...]. The duty requires parties to a treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty. Thus, a State lacks good faith when it seeks to avoid or to divert the obligation which it has accepted, or to do indirectly what it is not permitted to do directly'.

222) *Ibid*.

223) Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the field of asylum and resettlement,* Geneva, 28 July 1951.

224) S. Skogly*, Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Intersentia, 2006, p. 4.

225) Eur. Comm. H. R., *X v. Sweden*, Appl. No. 434/58, 28 ILR 242.

illegal immigration, are still to honour their international human rights commitments. The national interest of States to control access to their territories cannot deprive migrants of the protection they derive from the international regime. The Court has continuously expressed the necessity to conciliate the fundamental rights of migrants with the imperatives to which domestic immigration policies attempt to respond. As a result, entry controls are to be exercised in accordance with human rights provisions.[226]

Certainly, the same applies to the case of refugees: 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by [human rights instruments]'.[227] Significant is hence to underline that the status of refugees is determined not solely on the premises of international refugee law, but rather by the compendium of all different human rights' instruments relevant to any person in the same circumstances. It becomes particularly pertinent, in the context of refugees to-be – those still inside the country of own nationality –, to analyse the compatibility of Schengen visas and carriers' sanctions with the requirements of everyone's right to leave any country, including his own,[228] as well as with everyone's entitlement to be free from torture, inhuman or degrading treatment or punishment.[229]

4.2.1. *Everyone's Right to Leave Any Country (to Seek Asylum)*

The right to leave one's own country was not conceived as being absolute. Article 12(3) ICCPR expressly allows for restrictions for the sake of 'national security, public order, public health or morals or the rights and freedoms of others'. Restrictions, from their part, 'must be provided by law, must be necessary in a democratic society and must be consistent with all other rights recognized in the Covenant'.[230] The Human Rights Committee, scrutinizing restrictions imposed by countries of origin, requires, in addition, that 'the application of restrictions in any individual case [...] be based on clear legal grounds and meet

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226) See, *inter alia*, Eur. Ct. H.R. *Cruz Varas and Others v. Sweden*, Appl. No. 15576/89, 20 March 1991; *Vilvarajah and Others v. UK*, Appl. No. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991; *Chahal v. UK*, Appl. No. 22414/93, 15 November 1996; *Amuur v. France*, Appl. No.19776/92, 25 June 1996; *H.L.R. v. France*, Appl. No. 24573/94, 29 April 1997; *D. v. UK,* Appl. No. 30240/96, 02 May 1997; *Jabari v. Turkey*, Appl. No. 40035/98, 11 July 2000; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. No.13178/03, 12 October 2006; *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008.

227) Eur. Ct. H. R., *Amuur v. France*, Appl. No. 19776/92, 25 June 1996, § 43.

228) Article 12(2), UN International Covenant on Civil and Political Rights, 1966 (also referred to as *ICCPR*) and Article 2(2), Protocol No. 4, European Convention on Human Rights, 1950 (also referred to as *ECHR*).

229) Article 7, UN International Covenant on Civil and Political Rights, 1966; Article 1, UN Convention Against Torture 1985 (also referred to as *CAT*) and Article 3, European Convention on Human Rights, 1950.

230) Article 12(3), UN International Covenant on Civil and Political Rights, 1966.

the test of necessity and the requirements of proportionality'.[231] In their practice, 'States should always be guided by the principle that the restrictions must not impair the essence of the right'.[232] 'Limits to the right to leave are permissible, but they must not render the right ineffective'.[233] Otherwise it would become 'theoretical or illusory'.[234]

Article 2(2) of Protocol No.4 of the European Convention on Human Rights recognises the right to leave in a similar tenor. Interferences by public authorities are admissible, but only if provided by law and considered 'necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. [235]

On the other hand, the existence of a right to leave has not been perceived as entailing a right of free international travel. The European Court of Human Rights has affirmed, in this connection, that the right to leave 'implies a right to leave for such a country of the person's choice to which he may be admitted'.[236] In principle, if a foreigner wishes to enter a country different from his own, he will only be entitled to do so 'through legally permissible routes'.[237] So, in regard of interception measures from destination countries, the available international jurisprudence on this point appears to set a different standard than the one operating in relation to countries of origin. Whereas for countries of origin the presumption goes that exit visas are suspected of being disproportionate and the refusal to issue a passport considered inadmissible,[238] the same logic has not been applied to interception measures imposed by countries of destination. The Human Rights Committee, while expressing its concern that such measures have a potential to compromise the right to leave in practice, it has never gone so far as to openly condemning them.[239] In *Dixit v. Australia*,[240] although it was directly confronted with the question of assessing the proportionality of denying an entry visa to an alien, the case was dismissed on admissibility grounds. Hence, no guid-

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231) HRC, General Comment No. 27, 1999, § 16.

232) *Ibid*., § 13.

233) C. Harvey and R. P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law', *IJRL*, Vol. 19, No. 1, 2007, p. 6.

234) See, *inter alia,* Eur. Ct. H.R., *Airey v. Ireland*, Appl. No. 6289/73, 9 October 1979, § 24.

235) Article 2(3) of Protocol No.4, ECHR.

236) Eur. Ct. H. R., (Inadmiss. Dec.) *Peltonen v. Finland*, Appl. No. 19583/92, 20 February 1995; (Inadmiss. Dec.) *KS v. Finland*, Appl. No. 21228/93, 24 May 1995; *Napijalo v. Croatia*, Appl. No. 66485/01, 13 November 2003.

237) C. Harvey and R.P. Barnidge, 'The Right to Leave One's Own Country under International Law', paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, p. 2 (available at: www.gcim.org).

238) HRC, *Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya*, Communication No. 1107/2002, § 7.2: the Committee underscores the importance of passports *per se* as the vehicles of realization of the right to leave; as its *sine qua non*.

239) HRC, General Comment No. 27, 1999, § 10.

240) HRC, *Dixit v. Australia*, Communication No. 978/2001, 28 March 2003.

ance has been provided as to how the proportionality test is to be conducted in these cases. However, worth is noticing that the Committee rejected the complaint for non-exhaustion of domestic remedies. It could thus be argued with Noll that 'the Committee implicitly accepted that the grant of visas to aliens abroad comes under the ambit of the Covenant. Had it thought otherwise, the case [would] had been declared inadmissible *ratione [materiae]*, and any reasoning on the exhaustion of domestic remedies would have been superfluous'.[241]

The Strasbourg Court, for interception at sea, has taken an even more obsequious approach towards Contracting States. In *Xhavara v. Italy*[242] it considers that the interception by the Italian authorities of an Albanian boat trying to reach the Italian coast was not aimed at hindering the right to leave Albania, but at preventing irregular entry in Italy. Without entering into considerations upon the proportionality of the measure, the application was declared incompatible *ratione materiae* with the Convention on those grounds, as if the right to leave would not have any existence of its own in regard of destination countries.

This is a construction that neglects what Goodwin-Gill and McAdam call the *binary nature* of States' obligations. Far from what the 'conventional wisdom'[243] contends, the right to leave is to be considered as 'a right engaging the responsibility of individual States, rather than the international community as a whole. The right to leave is not a right which other States need to 'complete' through a duty to admit; rather, it is simply a right each State must guarantee'.[244] Indeed, 'it remains the duty of each country to open its own borders [as it may be proportionate], without looking for excuses or waiting for others to act'.[245] Richer countries cannot shield themselves behind a 'collectivized' reading of the right to leave to negate its *Wirkung* in their own regard. The opposite would amount to make some other indefinite poorer State in the South, less able to manage at will migration flows, responsible for any given undesired migrant. The truth is that *each and every* Signatory State of an instrument recognizing the right to leave, exercising power beyond its territorial jurisdiction through interception, remains bound to

241) G. Noll, 'Seeking Asylum at Embassies', *op. cit.*, p. 561 ('*ratione locii*' in the original).

242) Eur. Ct. H. R., (Inadmiss. Dec.) *Xhavara v. Italy*, Appl. No. 39473/98, 11 January 2001.

243) The expression is borrowed from J.A.R. Nafziger, *op. cit.*, p. 804.

244) I have extended the original argument, which goes on: 'where a State refuses to let an individual depart because he or she does not posses the necessary documentation to enter a third State, then the right loses its binary State-individual focus and necessarily acquires and international dimension', in: G.S. Goodwin-Gill and J. McAdam, *op. cit.*, p. 382. The authors appear to restrict the applicability of this argument to the country of departure that would police the requirements imposed by a third country of destination. This would be tantamount to sustaining a purely territorial conception of jurisdiction. Since both the HRC and the Strasbourg Court have already established that both the Covenant and the Convention apply in an extraterritorial way as well, I do not see why this argument would not apply to any State of destination whose (extraterritorial) entry requirements/interception practices would be deemed disproportionate in the light of Article 12(2) of the Covenant or Article 2(2) Prot. 4 of the Convention.

245) S. Hoffmann, *Duties Beyond Borders*, Syracuse University Press, 1981, pp. 224–225.

its obligation to guarantee it to everyone subject to its authority and control. After all, they have freely contracted to do so.

In support of this argument comes Article 26 of the Vienna Convention on the Law of Treaties as it rules that: 'every treaty in force is binding upon the parties to it and must be performed *by them* in good faith'. The French version is even more telling: 'Tout traité en vigueur lie les parties et doit être exécuté *par elles* de bonne foi'. When it comes to consider the interplay between international obligations and domestic law, Article 27 establishes that: 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The Preamble of the Geneva Convention may also be construed as backing this interpretation. Its Recitals 4 and 5 request 'international co-operation' to cope with refugee crises and call on Contracting Parties to do '*everything within their power* to prevent this problem from becoming a cause of tension between States'. Deflection measures applied to refugees to-be achieve opposite results. Instead of fostering durable solutions, they directly disrupt the flow.[246] The European Court of Human Rights, in a case predating *Xhavara* and concerning administrative detention of asylum seekers in the international zone of an airport, has seemingly integrated in its reasoning precisely the approach expounded here. Taking account of the special value the right to leave has for refugees, without condemning the French Republic directly on this ground, it anyway argued that: 'the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on [...] the right to leave any country, including one's own [...]. *This possibility becomes theoretical if no other country* offering protection comparable to the protection they expect to find in the country where they are seeking asylum *is inclined or prepared to take them in*'.[247] In a similar vein, albeit in a weaker tone, the UNHCR Executive Committee has concluded that: 'regard should be had to the concept that *asylum should not be refused solely on the ground that it could be sought from another State [...]*'.[248]

From the foregoing it ensues for destination countries that the absence of a straightforward right of free entry does not justify the nullification of the expli-

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246) This argument, although adapted from the detention setting to that of extraterritorial exclusion of refugees to-be, is borrowed from A.T. Naumik, *op. cit.*, p. 689.

247) Eur. Ct. H. R., *Amuur v. France*, Appl. No. 19776/92, 25 June 1996, § 48. In this connection see also: Eur. Comm. H. R., (Inadmiss. Dec.) *Harabi v. The Netherlands*, 5 March 1986, Appl. No. 10798/84, where the Commission concluded that: 'the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention [...]. Such an issue may arise, a fortiori, if an alien is, over a long period of time, deported repeatedly from one country to another *without any country taking measures to regularise this situation*' (emphasis added).

248) UNHCR EXCOM, Conclusion No. 15 (XXX), *Refugees without an Asylum Country*, 1979, § iv (emphasis added); for a citation in jurisprudence see, *inter alia*, UK Hight Court (QB), *R v. Secretary of State for the Home Department, Ex parte Khalil Yassine, Rahma Yassime, Mohammad El-Nacher, Hicham Ali Hachem, Salam Bou Imad, Zouheir Bou Imad* [1990] Imm AR 354.

citly recognised right to leave. It also follows that, as any other right, the right to leave obeys the binary structure of legal obligations (Signatory State of admission-individual under its jurisdiction) and that excuses rooted in a collectivized construction of it lack any sound ground. On top of it all, from the aforesaid it arises that, while restrictions to the right to leave are permitted, the essential content of the right must remain intact. As happens with many of the rights contained in the European Convention on Human Rights,[249] a proportionality test is to be undertaken in each case.[250] Firstly, the interference, in the guise of an entry visa, is to be provided by law. Secondly, that visa needs to be necessary to the realisation of the objective invoked, which, in turn, is to serve one of the limitative motives that allow for the restriction of the right.[251] '"[N]ecessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question'.[252] Finally, 'the notion of "necessity" is linked to that of a "democratic society". [...] [A] restriction on a Convention right cannot be regarded as "necessary in a democratic society" [...] unless, amongst other things, it is proportionate to the legitimate aim pursued'.[253] The restriction must be proportionate *in casu*. It must not be excessive or impertinent to the fulfilment of the objective sought. Thus, if less intrusive measures remain, those should be preferred.

Submitting Schengen visas *in abstracto* to a proportionality test would depart away from the scope of this article. The intention here is not to contest the general adequacy of Schengen visas as a policy tool to control migration. The purpose is to assess its opportunity when applied to refugees to-be. And so, if we want to consider this particular case, a new factor is to be accounted: Bearing in mind refugees' entitlement 'to special protection on account of their position',[254] to the right to leave any country must adhere the right to seek asylum from persecution.[255] The aggregate *right to leave to seek asylum* constitutes the *lex specialis* to be

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249) See, for instance, § 2 of Articles 8 to 11, Section I, ECHR.

250) See, *inter alia*, the jurisprudence of the Eur. Ct. H. R. on Article 8 ECHR and its interpretation on § 2 for a fairly elaborated model of proportionality test.

251) Article 2(3) of Protocol No.4, ECHR: '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 also § 2 of Articles 8–11, ECHR for an almost identical formulation.

252) See, *inter alia*, Eur. Ct. H. R., *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 22 October 1981, § 51.

253) *Ibid*., 53.

254) Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the field of asylum and resettlement,* Geneva, 28 July 1951.

255) While is it true that international law does not expressly recognize a right to seek asylum in any legally binding form at the universal level and that no literal allusion to Article 14 UDHR can be traced in the body of the Geneva Convention, according to its spirit, every person is entitled to freedom from persecution. This is confirmed at various instances. First, the drafters of the Geneva Convention considered that 'the right of asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it'. The French delegation even suggested that 'the

applied to any person seeking to undertake international flight to escape from persecution.[256] As Article 14 UDHR does not establish any other limitation to the right to flee than those arising from legitimate prosecution,[257] it appears that the aggregate right to leave to seek asylum imposes a stricter principle of proportionality, limiting the possibility for destination countries to impose interception measures even further than what does the right to leave operating alone. The question arises: '[…] We do know that the imposition of visa requirements on nationals of refugee-producing countries puts refugees [to-be] in the situation of having to resort to irregular forms of migration to […] seek protection'.[258] Indeed, as Schengen visas have been designed, without LTVs being compulsory, they do not allow for protection needs to be properly taken into account. This translates in the necessity for refugees to resort to smuggling, putting their lives at further risk to undertake international flight. In this set-up, only those escapees assuming the extra amount of danger that a hazardous illegal route entail may find sanctuary in the wealthy democracies of the EU. Is this proportionate? The legal answer is clearly no. It can not be that in order to exercise a *legal* entitlement to escape in search of international protection refugees need *generally* to breach the law, and that only *exceptionally* safe and legal access to the EU be afforded, if

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right of asylum should be mentioned explicitly together with the reference to the Universal Declaration of Human Rights' made in the Preamble and the ad hoc Committee eventually accepted the suggestion. Afterwards, delegates from other countries felt that then the same should be done for other articles of the UDHR as well, since the object and purpose of the Convention was 'to ensure the widest possible exercise of all fundamental rights and freedoms'. Plausibly, it was finally decided that any singling out of particular rights would have been done at the detriment of other rights not expressly referred to. Hence, a generally encompassing reference in general to the UDHR, i.e. to *all* the rights to which refugees where entitled, was preferred. Various regional agreements and national legal systems the world over have subsequently recognized a legally binding entitlement to seek and enjoy asylum from persecution as a fundamental human right. (See for the references to the *Travaux Préparatoires*, P. Weis, *op. cit.*, p. 6 and 296; as regards regional instruments see, for instance, Article 22(7) of the American Convention on Human Rights, Article XXVII of the American Declaration on Human Rights and Article 12(3) of the African Charter on Human and Peoples' Rights; and for a list on the constitutional and legislative provisions transposing Geneva Convention obligations into the municipal law of each State Party see S. E. Lauterpacht and D. Bethlehem, *op. cit.*, Annex 2.2)". In the EU context, all Member States recognise the 'fundamental right' category of the 'right to seek asylum', ("see, *inter alia*, F. Moderne, *Le droit constitutionnel d'asile dans les Etats de l'Union Européenne*, Economica, Presses Universitaires d'Aix-Marseille, 1997; D. Alland and C. Teitgen-Colly, *Traité du droit d'asile*, PUF, 2002. In 2002, ten out of the then fifteen Member States of the Union explicitly recognised a right to asylum and five of them laid down this right in their respective constitutions, see D. Bouteillet-Pacquet, 'Subsidiary Protection: Progress or Set-back of Asylum in Europe? A critical Analysis of the Legislation of the Member States of the European Union', in: *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?*, Bruylant, 2002, p. 221). Most importantly, Article 18 EUCFR enshrines explicitly a 'right to asylum', whose legally binding effect is forthcoming.

256) Note that Article 14(1) UDHR does not limit its scope of application *ratione personae* to Geneva Convention refugees, according to its wording: '*everyone* has the right to seek and to enjoy in other countries asylum from persecution' (emphasis added).

257) Article 14(2), UDHR.

258) ECRE, *Defending Refugees' Access to Protection in Europe*, *op. cit.,* p. 27.

they make their way up to the Schengen border. Quite the contrary: Schengen countries of destination cannot actively or passively – legally or materially – preclude – nor even diminish – their chances to escape.[259] Definitely, in the case of the right to leave to seek asylum public order considerations play a lesser role than the one they may perform in the case of the right to leave let alone. The principle of proportionality requires that underlying motives of the person undertaking international escape from persecution be taken into account when designing and applying interception measures. Therefore, 'it is crucial that the Union focuses its efforts on facilitating the [...] arrival on the territory of the Member States of persons justifiably seeking asylum, with a view to providing legal and safe access to protection [...]'.[260]

4.2.2. *The Prohibition of Torture: 'Everyone Means Everyone'*[261]

The prohibition of torture, inhuman or degrading treatment or punishment is one essential feature of most human rights' instruments.[262] A concrete definition of torture is provided by Article 1(1) of the International Convention against Torture, according to which 'torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. The Strasbourg Court has introduced a gradation between torture, inhuman treatment and degrading treatment. It maintains that 'in order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 [ECHR] between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious or cruel suffering'.[263] As regards ill-treatment, the European Court of Human Rights retained in its

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259) J-Y. Carlier, *La condition des personnes dans l'Union Européenne*, *op. cit.,* pp. 178–179. 'Si le principe de non-refoulement n'impose pas aux États d'aller chercher des réfugiés dans le monde, il impose aux États de ne pas mette en œuvre des mécanismes empêchant la faite du réfugié. Si l'État n'a pas d'obligation de faire, il a, à tout le moins, une obligation de ne pas faire.'

260) European Commission, *Policy Plan on Asylum*, pp. 10–11.

261) Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to the Eur. Ct. H. R., *Saadi v. Italy,* Appl. No. 37201/06, 28 February 2008.

262) See, *inter alia,* Article 1 CAT, Article 7 CCPR, Article 3 ECHR.

263) See, *inter alia,* Eur. Ct. H. R., *Aydin v. Turkey*, Appl. No. 23178/94, 25 September 1997, § 82; *Selmouni v. France*, Appl. No. 25803/94, 28 July 1999, § 96.

Greek case that the notion comprises 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable'.[264] In turn, degrading treatment is that which 'humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[265] As relates to punishment, which is inhuman or degrading, the concept refers to acts, which can be characterized as inhuman or degrading treatment and which are imposed as a retribution or penalty.[266]

Protection against torture is absolute; neither restrictions, nor derogations are allowed.[267] Indeed, as the European Court of Human Rights has recently recalled, the prohibition of torture 'enshrines one of the fundamental values of democratic societies. […] Unlike most of the substantive clauses of the [ECHR], Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation'.[268] Furthermore, acts such as extradition[269] and expulsion[270] may give rise to an indirect violation of the prohibition of ill-treatment.[271] The fact that the prohibited action may be perpetrated by or in the receiving State, in no way diminishes the responsibility of the Contracting State. Actions and omissions of the Contracting States, be their effects territorial or extraterritorial, may amount to a violation of Article 3 ECHR. 'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an

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264) Eur. Ct. H. R., *Greek Case*, 1969, 12 Yearbook 1, 186.

265) See, *inter alia*, Eur. Ct. H. R., *Pretty v. UK*, Appl. No. 2346/02, 29 April 2002, § 52.

266) R. Alleweldt, 'Protection against Expulsion under Article 3 of the European Convention on Human Rights', *EJIL*, 4, 1993, p. 364 and references therein.

267) See Article 4(2) ICCPR and Article 15(2) ECHR). In both instruments the prohibition of torture range amongst those provisions from which States can never derogate. No "§ 2" is provided either, according to which restrictions could ever be permitted.

268) See, *inter alia*, Eur. Ct. H. R., *Ireland v. UK*, Appl. No. 5310/71, 8 January 1978, § 163; *Chahal v. UK*, Appl. No. 22414/92, 15 November 1996, § 79 and *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, § 127.

269) Eur. Ct. H. R., *Soering v. UK*, Appl. No. 14038/88, 7 July 1979.

270) See, i*nter alia*, Eur. Ct. H. R., *Vilvarajah and Others v. UK*, Appl. No. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991; *Chahal v. UK*, Appl. No. 22414/93, 15 November 1996; *Amuur v. France*, Appl. No.19776/92, 25 June 1996; *H.L.R. v. France*, Appl. No. 24573/94, 29 April 1997; *D. v. UK*, Appl. No. 30240/96, 02 May 1997; *Jabari v. Turkey*, Appl. No. 40035/98, 11 July 2000; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Appl. No.13178/03, 12 October 2006; *Salah Sheekh v. The Netherlands*, Appl. No. 1948/04, 11 January 2007; *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008.

271) In the same line, the Human Rights Committee 'notes that it is not sufficient for the implementation of Article 7 to prohibit [ill-]treatment or punishment or to make it a crime. *States parties* should […] *prevent* and punish acts of torture […] States parties *must not expose individuals to the danger* of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their expulsion, extradition or refoulement', (emphasis added) in: HRC, General Comment No. 20, 1992, UN Doc. HRI/HEN/1/Rev.1, specially § 8–9.

individual to the risk of proscribed ill-treatment'.[272] In addition, the grounds on which such a treatment may be inflicted are irrelevant. No attachment is required of the behaviour of the perpetrator to 'race, religion, nationality, membership of a particular group or political opinion'.[273] This is why 'the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees'.[274] What is more, the conduct of the person concerned is equally immaterial.[275] 'The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 [...]'.[276] No *quid pro quo* reasoning can alter the absolute nature of the prohibition of torture.[277] The Strasbourg Court has plainly rejected the arguments advanced by States that a weighing exercise should take place between the right of the individual not to be exposed to ill-treatment upon return to the receiving country and the interest of the sending State to expel him on account of the danger that the individual represents for the host community. It is simply not possible 'to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3 [...]. The conduct of the person concerned, however undesirable or dangerous, cannot be taken into account'.[278] The Court preserves in this way both the absolute character and the binary nature (individual-Contracting State) of the legal obligation arising from Article 3 ECHR to which reference has been made earlier.

In order to transpose this reasoning to the specific case of refugees to-be, a few precisions need to be made. Firstly, it is pertinent to remind that not only acts of extradition and acts of expulsion may amount to refoulement, but that '*any other measure pursuing that aim*'[279] or leading to the result of devolving the person to his persecutors[280] may qualify too. Secondly, in the case the kind of persecution feared by the individual could be equated to the type of ill-treatment proscribed by Article 3 ECHR, protection against refoulement would not only be triggered while still inside the country of origin but it would also become irremediably absolute. Yet, in international law no commonly agreed definition of persecution

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272) See, *inter alia*, Eur. Ct. H. R., *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, § 126.

273) Article 1(A)(2), Geneva Convention.

274) Eur. Ct. H. R., *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, § 138.

275) Eur. Ct. H. R., *Chahal v. UK,* Appl. No. 22414/93, 15 November 1996, § 79. *Soering v. UK*, App. No. 14038/88, 7 July 1979, §79–81; *Vilvarajah and Others v. UK*, App. No. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991, § 108.

276) See *inter alia*, Eur. Ct. H. R., *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, § 127.

277) See Concurring Opinion of Judge Zupancic to Eur. Ct. H. R*., Saadi v. Italy*, § 2.

278) *Ibid*., § 138; see also § 139.

279) Eur. Ct. H. R., *Jabari v. Turkey*, Appl. No. 40035/98, 11 July 2000, § 39 (emphasis added).

280) Committee of Ministers of the Council of Europe, Resolution (67) 14, 1967: 'no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or *any other measure which would have the result of compelling him to* return to, or *remain in, a territory where he would be in danger of persecution*' (emphasis added).

exists nor immediate consensus on the equation of persecution to ill-treatment or punishment. The UNHCR 1967 *Handbook on Procedures* provides some guidance in this respect. There, it is established that 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution'.[281] Indeed, it is generally accepted that the core of the notion includes the threat of deprivation of life or physical integrity. This does not readily amount to reduce persecution to acts of ill-treatment; grave violations of other human rights may well qualify as persecution too: destitution, arbitrary arrest, rape, denial of justice, illegal imprisonment, deliberate imposition of substandard living conditions, racial segregation, systematic denial of access to employment, etc can under certain conditions be considered persecutory acts. However, in so far as acts of persecution to be characterised as such need to attain a certain level of severity, it might be possible to ascertain with Goodwin-Gill and McAdam that 'a person who fears "persecution" necessarily also fears at least inhuman or degrading treatment or punishment'.[282] Thirdly, accepting the equivalence between persecution and ill-treatment, it would still be necessary to determine that there are 'substantial grounds for believing' that the denial of a visa by a State authority or the refusal of a *de facto* waiver by a private carrier at the point of embarkation would expose the individual to 'a real risk of being subjected to treatment contrary to Article 3'.[283] Should this link be established, the absolute protection of Article 3 ECHR would be triggered. A forth remark, relating to the conduct of the refugee to-be, becomes relevant in this respect. His behaviour, as in the case of those suspected of the most hideous crimes,[284] is absolutely immaterial for the qualification of an act of the intercepting State as one raising an issue under Article 3 ECHR. It is irrelevant whether the individual tries intentionally to curb immigration controls. He cannot be penalized therefore. The State would not be less responsible for its actions, should the refugee to-be defeat the visa regime. The protection afforded by Article 3 ECHR cannot be overruled by the fact that he breaks (or tries to break) domestic immigration norms. Here again, no *quid pro quo* reasoning can be applied. While States may have an interest to control the entry, residence and removal of aliens, this cannot be balanced against the absolute right of the individual to be protected from tor-

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281) UNHCR, *Handbook*, § 51.

282) G.S. Goodwin-Gill and J. MacAdam, *op. cit.*, p. 243. In support of this argument come the Comment by the French representative on Draft Article 33: 'any possibility […] of a genuine refugee being returned to his country of origin would not only be *absolutely inhuman*, but contrary to the very purpose of the Convention. […] There was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country' (emphasis added) in: P. Weis, *op. cit.*, p. 327.

283) Eur. Ct. H. R., *Chahal v. UK*, Appl. No. 22414/93, 15 November 1996, § 80.

284) Eur. Ct. H. R., *Chahal v. UK*, Appl. No. 22414/93, 15 November 1996, § 79; *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, § 127.

ture. The exercise by States of their right to control immigration remains subject to their international obligations, including those arising out of Article 3 ECHR vis-à-vis 'everyone within their jurisdiction'.[285] And 'everyone means everyone'.[286]

Some jurisprudential accounts sponsor this interpretation. As it has already been mentioned above, the European Commission of Human Rights recognised in *WM v. Denmark*[287] an act of jurisdiction on the part of the Danish ambassador when he expelled the asylum seekers off his premises, which where placed at the applicant's country of origin. The Commission recognised to be 'satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 of the Convention'. What is even more significant to our case is the fact that the Commission made recourse to *Soering*[288] to remind Denmark, as Signatory Party, that: 'an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention'. Yet, *Soering*, as we know, concerns the extradition of a convicted criminal from the territory of a contractor of the Convention, not extra-territorial denial of protection against ill-treatment by an embassy placed within the confines of a third State. The fact that express reference is made to this particular judgment allows us to maintain that the Commission proceeded by way of the same analogy which is proposed here. This precedent justifies our recourse above to *Chahal and Saadi* and the parallel which is operated between an extradition case and that of visa denial to a refugee to-be. This is, moreover, the very way in which the British Court of Appeal advanced as to construe UK's obligations in *B's*[289] case. Should it be clear that the refugee to-be would be subject to treatment contrary to Article 3 ECHR in his country of origin, 'the Convention may well impose a duty on a Contracting State to afford diplomatic asylum'.[290]

Although the Strasbourg Court has not yet pronounced itself directly on this matter, worthy is to note in this connection the proceedings in *Xhavara*.[291] In regard of an eventual violation of Articles 2 and 3 ECHR, the Court, taking account of the procedure pending in Italy against the captain of the warship *Sibilla*, declared the application inadmissible for non-exhaustion of domestic

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285) Article 1, ECHR. On the construction by the Strasbourg Court of the term 'jurisdiction' see *supra*.
286) Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to the Eur. Ct. H. R., *Saadi v. Italy* judgment.
287) Eur. Comm. H. R., (Inadmiss. Dec.) *WM v. Denmark*, Appl. No. 17392/90, 14 October 1992.
288) Eur. Ct. H. R., *Soering v. UK*, Appl. No. 14038/88, 7 July 1979.
289) UK Court of Appeal (Civil Division), *"B" & Others v. Secretary of State for the Foreign & Commonwealth Office* [2004] EWCA Civ 1344.
290) *Ibid*., § 88.
291) Eur. Ct. H. R., (Inadmiss. Dec.) *Xhavara v. Italy*, Appl. No. 39473/98, 11 January 2001 (available only in French).

remedies. In a *obiter dictum* the Court reminded, nonetheless, that: 'Les Etats [sont ténus] non seulement à s'abstenir de provoquer la mort de manière volontaire et irrégulière mais aussi à prendre les mesures nécessaires à la protection de la vie des personnes relevant de leur juridiction'. [...] 'La procédure judiciaire contre X vise précisément à établir si la conduite prétendument négligente de l'accusé a exposé les passagers du *Kater I Rades* à un danger disproportionné par rapport au but légitime de la protection de la sûreté nationale, et donc à déterminer si les mesures visant le contrôle de l'immigration ont été appliquées de manière incompatible avec l'obligation qui pèse sur les Etats de protéger le droit à la vie de toute personne'. In fact, whether protection against ill-treatment is to be afforded in the assertive form of a grant of diplomatic asylum or of explicit permission to enter issuing a visa, or whether mere abstention from interception by according a *de facto* waiver at the point of origin is sufficient, depends on the extent to which the facts of the case fall within the scope of the positive or the negative obligations emanating from Article 3 ECHR.[292]

5. Conclusion

From the foregoing analysis it stems that passive interception measures, as Schengen visas and carrier sanctions are, applied to refugees by European States of destination may, under certain conditions, breach the requirements of human rights law. It has been proven that territorial presence of the refugee – or of the refugee to-be- is not an absolute precondition for the existence of protection obligations, nor is the exercise of State authority and control in a territorial manner. Extraterritorial jurisdiction, deployed even within the confines of a receiving State, may well activate the human rights obligations of the sending State. In response, either negative or positive action may be adequate. That depends on the merits of each case.

If refugees are already outside the country of their nationality, visas refused in neighbouring States where their life or physical integrity is endangered in a sense banned by Article 1 of the Geneva Convention may well amount to an act of refoulement under Article 33(1). Exclusion from embarkation or continuation of journey in transit by carriers would, in similar circumstances, lead to an equivalent effect and would, accordingly, be equally forbidden. In regard of refugees to-be, those still within the territorial boundaries of the country of origin, the *right to leave to seek asylum* covers special relevance, as does the absolute protection against refoulement that Article 3 ECHR affords. The principle of interpretation in good faith together with the binary nature of legal obligations require Schengen Member States to take account of the human rights of refugees when making use of intercepting measures. A mechanical application of visa requirements, in obliteration of

[292] For a concomitant opinion see G. Noll, 'Seeking Asylum at Embassies', *op. cit.*, pp. 569–570.

refugees' special entitlement 'to protection on account of their position'[293] amounts to arbitrariness:[294] to a derogation from those Conventions entire.

If the validity of Schengen visas for general migration control purposes has not been adjudicated here, what has been unveiled is that to ensure that refugees can 'come to us'[295] in safety and legality[296] the possibilities provided for by Articles 5(2) and 16 CISA, as regards LTVs, as well as by Article 26(2) CISA and Article 4(2) of the Carriers' Liability Directive, in relation to carriers' sanctions, must be properly exploited.[297] This covers greater sense if one notices that the Schengen Borders Code, repealing Articles 2 to 8 CISA,[298] proclaims the overarching principle governing the movement of persons across the Schengen borders that controls 'shall apply [...] without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.[299] The forthcoming CCV reinforces this point as it avers compliance of the Regulation with fundamental rights. Paragraph 19 of its Preamble establishes that the Regulation 'respects fundamental rights and observes the principles recognised in particular in the European Convention on Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union'. This refers us back to current and prospective primary law of the Union[300] that secondary law instruments cannot escape. Hence, until and unless the Schengen regime on visas and carriers' sanctions unambiguously conforms to human rights and refugee law principles, the EU Member States concerned must be deemed in violation of their freely contracted legal obligations in regard of both refugees and refugees to-be.

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293) Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the filed of asylum and resettlement*, Geneva, 28 July 1951.

294) On the notion of arbitrariness, although circumscribed to Article 5 ECHR, but extrapolable to the spirit of the entire system of human rights protection, see, *inter alia*, Eur. Ct. H. R., *Kemmache v. France* (no.3), Appl. No. 17621/91, 24 November 1994, § 42. Goodwin-Gill speaks of inadmissible 'practices of containment without protection' in: 'The Right to Leave, Return and Remain', in: *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, 1996, p. 99.

295) V. Statement by MEP Kaufmann (GUE/NGL), Parliamentary Debate on the *Report on the initiative of the French Republic for the adoption of a Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member states third-country nationals lacking the documents necessary for admission* (14074/2000 – C5-0005/2001– 2000/0822(CNS)), 13 March 2001, Strasbourg sitting.

296) As the European Commission proposes in its recently launched *Policy Plan on Asylum*, pp. 10–11.

297) The proposal by ECRE of suspending 'visa restrictions for a determined period of time [...] for nationals and residents whose country is experiencing a recognised significant upheaval or humanitarian crisis' (in: *Defending Refugees' Access to Protection in Europe*, op. cit., p. 35) would not be the adequate way to go. A proper use of Articles 5(2) and 16 CISA would require the compulsory and systematic issue of LTV visas to refugees (to-be).

298) Article 39(1), Schengen Borders Code.

299) Article 3 as well as Preamble, § 20, Schengen Borders Code.

300) To Article 6 EU Treaty and to Articles 18–19 Charter of Fundamental Rights of the European Union (also referred to as *EUCFR*).

From the system of deference enshrined in the Geneva Convention it ensues that refugees are entitled to privileged treatment as soon as they meet the definition. For refugees to-be the aggregated right to leave to seek asylum in conjunction with the principle of non-refoulement contained in Article 3 ECHR requires Signatory States to be vigilant of their extraterritorial actions. Immigration policies must take both factors into due account. 'Measures to combat illegal immigration [...] should be implemented in a manner which does not deprive the right to asylum of its practical meaning'.[301] And systems of refugee protection are to be considered in a holistic way. Escape from persecution, admission to the country of asylum, procedural access to qualification procedures and enjoyment of status constitute inseparable components of the same continuum. All of these elements are to be borne in mind when designing measures of passive interception with the potential to impinge on the *effet utile* of the rights of refugees and refugees to-be.

Immigration deterring policies can no longer disregard the difference between asylum seekers and other migrants[302] with the excuse that 'it is impossible to distinguish between persons who may be justified to claim a right or to be rejected or returned, and the large number of people seeking admission for other purposes'.[303] It is no reason that the realisation of the right to access international protection entails significant costs to the sovereignty of signatory states of the Geneva convention, that the right can possibly be denied. Material difficulties in implementation can not sponsor the negation of a freely contracted legal negotiation. As the European Commission has very recently proposed, 'mechanisms capable of allowing for the differentiation between persons in need of protection and other categories of migrants *before* they reach the border of the potential host State'[304] must be adopted. A flexible use of LTVs coupled with a responsive system of *de facto* waivers by private carriers may serve the purpose. In any case, to be up to their international obligations, Schengen Member States need to put in place a system of curbing unwanted immigration which exempts refugees from the mix. 'Any dolphins alongside the sharks [cannot be] sacrificed'.[305] Illegal immigration may be combated, but not at all costs.[306]

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301) European Commission, *Green Paper on Asylum*, p. 14.
302) UNHCR, address to the European Parliament, February 2007, available at: www.unhcr.org
303) K. Hailbronner, *op. cit.*, p. 115.
304) European Commission, *Policy Plan on Asylum*, pp. 10–11.
305) A.T. Naumik, *op. cit.*, p. 697.
306) Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to Eur. Ct. H. R., *Saadi v. Italy:* 'States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those "absolute" rights from which no derogation may be made even in times of emergency'.