The Crisis of European Refugee Law: Lessons from Lake Success

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Hemme Battjes
Evelien Brouwer
Lieneke Slingenberg
Thomas Spijkerboer

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Chapter 1

Introduction

Hemme Battjes, Evelien Brouwer, Lieneke Slingenberg and Thomas Spijkerboer*

The increase in the numbers of people applying for asylum in Europe since 2010, with a sharp rise since the spring of 2015,[1] has created a sense of crisis. Refugee law, which is a component of a solution to any refugee crisis, concerns three basic questions. First, *who* is entitled to protection? Secondly, *what* should that protection entail — merely allowing the presence of refugees in the territory, or allowing access to the labour market and health and welfare systems? Thirdly, *where* should refugees receive protection — in the first country in which they arrive after fleeing their home country, or elsewhere? Our analysis below shows how these three issues are closely intertwined.

In order to start thinking about solutions, the causes of the increasing number of asylum applications should first be analysed. More specifically, we start in section 2 by analysing the situation of Syrian refugees and examining why the influx into Europe rose so steeply last year. We argue that after the outbreak of the war in Syria, a policy of prohibiting refugee movement, the absence of a credible resettlement policy, and the lack of acceptable reception and living conditions and prospects in the region combined to bring about the increase.

The European Union (EU) has considerable competencies on asylum and migration, and has developed an extensive body of law. In section 3 we analyse why the Common European Asylum System (CEAS) has proved incapable of dealing with this influx. The measures adopted and proposed by the European Commission (the Commission) and other institutions over the past twelve months are also unlikely to make the situation more manageable.

In search of the beginning of an answer to the refugee issue, we then turn, in section 4, to the past and specifically to the drafting of the Refugee Convention, which was adopted in order to address a far greater refugee crisis than the current one. We also consider later measures and policies addressing subsequent refugee problems, such as the problems triggered by the Yugoslav civil war in the 1990s. Against that background, we then offer some thoughts, in section 5, as to the way ahead.

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* Prof. H. Battjes, dr. E.R. Brouwer, dr. C.H. Slingenberg and prof. T.P. Spijkerboer all work in the migration law section of the department of Constitutional and Administrative Law of the Vrije Universiteit Amsterdam. We are grateful to Judith Verbeek for her editorial assistance.

1. Eurostat, 'Asylum and first time applications by citizenship, sex and age, Annual aggregated data (rounded) 2008-2015', http://appsso.eurostat.ec.europa.eu/nui/show.do, last accessed 27 April 2016.

Chapter 2

Syrian refugee crisis: prohibition of refugee movement[2]

A conflict has been raging in Syria since 2011 and has resulted in the forced movement of half of the Syrian population, most of them (some 7.5 million) inside Syria ('displaced persons'),[3] while others (some 4.8 million) have fled to territories outside Syria ('refugees').[4] The number of registered Syrian refugees has developed as follows:

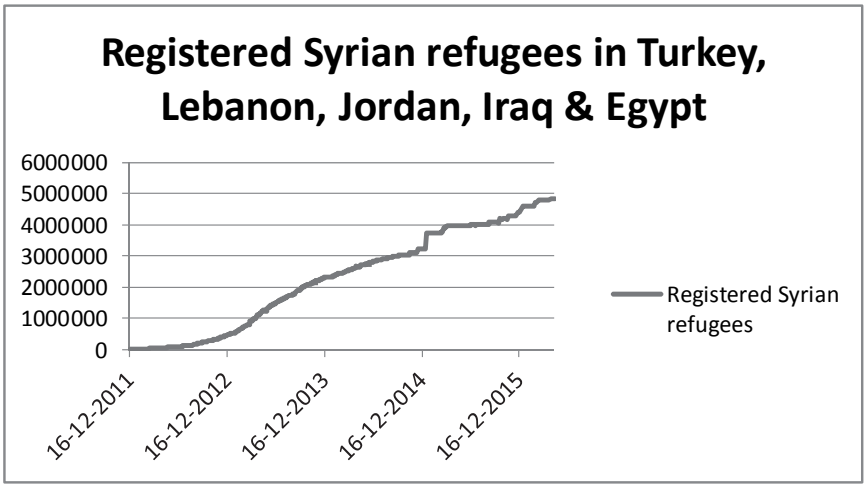

Figure 1. Source UNHCR (http://data.unhcr.org/syrianrefugees/regional.php), last update 25 April 2016

Over one million Syrians are currently registered as refugees in Lebanon, while 630,000 are registered in Jordan, 2.7 million in Turkey, 118,000 in Egypt and 246,000 in Iraq.[5] Compared to the number of inhabitants of these countries

2. This analysis follows the line of argument developed in M. den Heijer, J. Rijpma & T. Spijkerboer, 'Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum system', *Common Market Law Review* 53 (2016), 607-642, available at http://thomasspijkerboer.eu/migrant-deaths-academic/coercion-prohibition-and-great-expectations-the-continuing-failure-of-the-common-european-asylum-system-with-maarten-den-heijer-and-jorrit-rijpma-2016/, last accessed 27 April 2016.
3. www.unhcr.org/pages/49e486a76.html, last accessed 23 February 2016.
4. http://data.unhcr.org/syrianrefugees/regional.php, last accessed 23 March 2016.
5. Ibid.

(Lebanon: 5.8 million inhabitants,[6] Jordan: 8 million,[7] Turkey: 77.7 million,[8] Egypt: 82.5 million,[9] Iraq: 32.5 million[10]), the percentage of registered Syrian refugees is as high as 20% in the case of Lebanon (and estimated at 30% if non-registered refugees are included[11]).

These are the numbers shown in Figure 1. In Europe, however, the number of Syrian asylum seekers has followed a different pattern. Until the first half of 2015, Syrians barely moved to Europe. Even though increasing numbers of Syrians arrived in Italy in 2013 and 2014,[12] they did not start moving from the region (i.e. Syria's neighbouring countries) in any significant numbers until early summer 2015, by which time the Syrian refugee crisis had already been underway for several years and the number of Syrian refugees registered in the neighbouring countries had reached four million. As can be seen in Figure 2, the number of Syrian refugees in Europe has not yet reached 1 million, in a population of 508 million inhabitants.[13] These numbers have to be treated with some caution, however. The number of registered Syrian refugees in the region is inaccurate because the neighbouring countries have now closed their borders, as will be explained below, thus making it impossible for new arrivals to register. The number of asylum applications stated for European countries may also be artificially low because some countries have problems in even registering asylum applications, and this backlog may hide a substantial number of asylum applications. The actual absolute numbers, therefore, may be higher. It is likely, however, that the graphs presented here give a good impression of the trends in the development of the numbers of Syrian refugees and asylum seekers, both in the region and in Europe.

6. https://en.wikipedia.org/wiki/Demographics_of_Lebanon, last accessed 23 February 2016. With due apologies, we use Wikipedia as a source for demographics of non-European countries because the relevant pages are up to date and well sourced.
7. https://en.wikipedia.org/wiki/Demographics_of_Jordan, last accessed 23 February 2016.
8. On 1 January 2015, source Eurostat, http://appsso.eurostat.ec.europa.eu/nui/show.do, last accessed 27 April 2016.
9. https://en.wikipedia.org/wiki/Demographics_of_Egypt, last accessed 23 March 2016.
10. https://en.wikipedia.org/wiki/Demographics_of_Iraq, last accessed 23 March 2016.
11. Newspapers report the presence of 1.5 million Syrian refugees in Lebanon, comp. https://en.wikipedia.org/wiki/Syrians_in_Lebanon, last accessed 27 April 2016.
12. UNHCR, *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity* (2014).
13. On 1 January 2015, source Eurostat, http://appsso.eurostat.ec.europa.eu/nui/show.do, last accessed 27 April 2016.

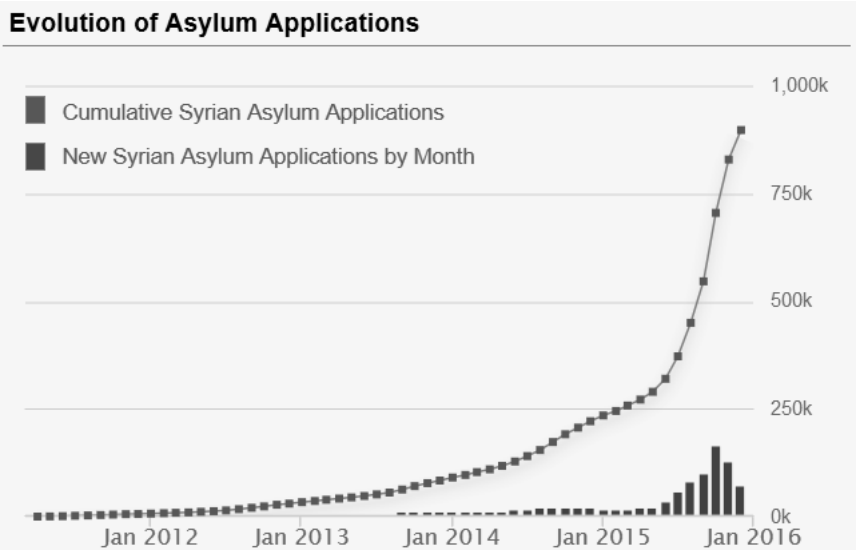

Figure 2. Syrian asylum seekers in Europe (incl. Balkans) 2011-2015, source UNHCR[14]

How is it possible that Syrians initially stayed in the region? And why, in summer 2015, did they begin moving to Europe in much greater numbers than before? A crucial element in this respect is the prohibitionist approach that has been adopted to forced migration: refugees and asylum seekers are not allowed to travel to Europe legally. This prohibitionist approach was initially implemented by harmonizing European visa policies. The first (unpublished) common visa list was adopted in 1993, based on the intergovernmental Schengen framework.[15] Since 2001, Regulation 539/2001 has specified the third countries whose nationals are required to have a short-term visa when crossing external borders, and those whose nationals are exempt from this requirement.[16] Nationals from all refugee-producing countries are subject to a visa requirement and therefore cannot legally enter the EU.[17] Simultaneously, the dramatic improvement in the technical quality of documents has made it much more difficult to travel on forged documents. The Schengen Implementing Agreement also harmonized the externalization and privatization of the visa requirement by means of carrier sanctions.[18]

Whereas airlines' successful enforcement of the harmonized visa policies closed off one possible route to Europe, asylum seekers and refugees were still able to

14. http://data.unhcr.org/syrianrefugees/asylum.php, last accessed 27 April 2016.
15. Decision Executive Committee, 14 December 1993.
16. OJ L 81/1, 21.03.2001. This list is periodically updated. The first communitarian visa list entered into force on 3 April 1996, Regulation 2317/95 of 25 September 1995, OJ L 234.
17. S. Mau, F. Gülzau, L. Laube & N. Zaun, 'The Global Mobility Divide. How Visa Policies Have Evolved over Time', *Journal of Ethnic and Migration Studies* 2015/41, pp. 1192-1213.
18. Art. 26 obliges the signatory states to require carriers (such as airlines) to ensure that passengers are in possession of the required documents (including visas) and to impose fines on carriers who fail to do so. Under Art. 4 Directive 2001/51, the minimum fine will not be less than EUR 3,000 and the maximum not less than EUR 5,000 per passenger. For more details, see T. Rodenhaüser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control', *International Journal of Refugee Law* 2014/26, pp. 223-247.

travel to countries bordering the EU, and to try to enter European territory from there. As part of the Schengen process, however, European states then began harmonizing their safe third country policies. These policies had their roots in the German and Dutch asylum policies of the late 1970s (see below), with the central notion being that if asylum seekers were returned to third countries for their claim to protection to be assessed, they would realize that it was pointless to travel to Europe and would therefore stop coming. This notion of automatic return without individual assessment was at the core of the 1993 German constitutional reform.[19] During the past 40 years, application of the safe third country principle on a scale of any significance has been prevented by third countries' obstruction or outright refusal to readmit asylum seekers and refugees. An exception in this respect is the cooperation between Spain and the North and West African countries, which seems to have resulted in a radical drop in the number of people trying to reach Spain from these countries by boat (and the subsequent increase in the numbers of such people trying to reach Italy by boat).[20]

Apart from trying to return asylum seekers and refugees to third countries, European states have also sought to cooperate with neighbouring countries in order to prevent departures from there to Europe, and to prevent the entry into these countries of people who might subsequently try to travel onwards to Europe. Until 2011, Italy sought to cooperate with Libya, with the measure of success varying according to the negotiation tactics used by the Libyan government.[21] Since the outbreak of the armed conflict in Syria, visa requirements for Syrians have been introduced by Algeria, Egypt,[22] Libya, Morocco and Tunisia,[23] most likely under pressure from the EU. This made it harder for Syrians to access the well-functioning route from the Libyan coast to Italy, and may have resulted in a shift of Syrian refugee migration from the central Mediterranean route to the eastern Mediterranean route (Turkey-Greece).[24]

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19. See *inter alia* K. Hailbronner, 'Asylum Law Reform in the German Constitution', *American University International Law Review* 1994/9, pp. 159-179; R. Marx & K. Lumpp, 'The German Constitutional Court's Decision of 14 May 1996 on the Concept of "Safe Third Countries" — A Basis for Burden-Sharing in Europe', *International Journal of Refugee Law* 1996/9, pp. 419-439. A harmonized version of the safe third country concept is laid down in Arts. 35, 38 and 39 of EU Directive 2013/32.
20. D. Godenau, 'An Institutional Approach to Bordering in Islands: The Canary Islands on the African-European Migration Routes', *Island Studies Journal* 2012/7, pp. 3-18; D. Godenau, 'Irregular Maritime Migration in the Canary Islands: Externalisation and Communautarisation in the Social Construction of Borders', *Journal of Immigrant and Refugee Studies* 2014/12, pp. 123-142; A. López-Sala, 'Exploring Dissuasion as a (Geo)Political Instrument in Irregular Migration Control at the Southern Spanish Maritime Border', *Geopolitics* 2015/20, pp. 513-534.
21. See *inter alia* E. Paoletti & F. Pastore, *Sharing the dirty job on the southern front? Italian-Libyan relations on migration and their impact on the European Union* (Working Paper 29), International Migration Institute, University of Oxford 2010. So far, only claims against acts of prevention in which officials of European states were involved have been successful. Thus, the ECtHR ruled in 2012 that the blocking of a ship in the Mediterranean by Italian officials, thus preventing its passengers from invoking the protection of Art. 3 ECHR against expulsion, was at variance with that provision: ECtHR 23 February 2012, 27765/09 (*Hirsi Jamaa*).
22. *Inter alia* UNHCR has expressed concern about new restrictions for Syrian refugees in Egypt, 12 July 2013, www.unhcr.org/51e03ff79.html, last accessed 23 February 2016.
23. We established this by comparing the data of Mau et al. (supra) with data from IATA (www.timaticweb2.com/home) in February 2016.
24. On this shift, see C. Heller & L. Pezzani, 'Ebbing and Flowing: The EU's Shifting Practices of (Non-) Assistance and Bordering in a Time of Crisis', http://nearfuturesonline.org/ebbing-and-flowing-the-eus-shifting-practices-of-non-assistance-and-bordering-in-a-time-of-crisis/, last accessed 23 March 2016.

Figure 3. Visa requirements for Syrians 2010 (source: Mau et al. 2015) & 2016 (source: IATA, www.timaticweb2.com/home)

To the extent that the EU has succeeded in persuading third countries to cooperate, this has logically had onward effects in countries closer to the source countries of refugees. Lebanon[25] and Jordan,[26] for example, now refuse to admit Syrian refugees, while Turkey initially announced it will now only allow Syrians to enter directly from Syria.[27] Since then, reports indicate that two border crossing points in Turkey have been closed.[28]

The effect of this policy is that private and public third parties (transport companies and third countries) prevent refugees from reaching the territories of EU countries. At the same time, the international community (including the EU) has not enabled refugees to subsist in the countries in which they are present. The UN Office for the Coordination of Humanitarian Assistance reported, for example, that only 56% of the funding required for this purpose in 2015 had been received.[29] This shows that the reception of Syrians in the region is underfunded, and this seems to be an ongoing trend as the UNHCR reported on 22 March 2016 that a mere 7% of the funding requirements for 2016 had so far been met, while by then 22% of the year

25. See, for example, 'Lebanon has just done the unthinkable', *Al Jazeera* 6 January 2015, www.aljazeera.com/indepth/opinion/2015/01/lebanon-just-done-unthinkable-20151611434991 4185.html, last accessed 23 February 2016; Syrians to face visa restrictions for Lebanon, *Al Jazeera* 3 January 2015, www.aljazeera.com/news/middleeast/2015/01/lebanon-visa-restrictions-syrians-2015131029059-563.html, last accessed 23 February 2016.
26. On 18 January 2016, the *Financial Times* reported that 16,000 Syrians were stranded in the desert at the Jordan border.
27. 'Turkey: No change in visa-regime with Syria, "open door policy" goes on', *Hürryet* 18 December 2015, www.hurriyetdailynews.com/Default.aspx?pageID=238&nID=92738&NewsCatID=510, last accessed 23 February 2016.
28. See, for example, 'Amnesty International: Injured Syrians fleeing Aleppo onslaught among thousands denied entry to Turkey', *Amnesty* 19 February 2016, www.amnesty.org/en/latest/news/2016/02/injured-syrians-fleeing-aleppo-onslaught-among-thousands-denied-entry-to-turkey/, last accessed 23 February 2016.
29. 'Total Funding to the Syrian Crisis 2015', *Financial Tracking Service*, https://fts.unocha.org/pageloader.aspx?page=special-syriancrisis&year=2015, last accessed 23 February 2016. The percentage went down from 70% (2012) and 72% (2013) to 58% (2014) and 56% (2015). The unmet requirements for 2015 amounted to USD 3.1 billion.

had passed. The World Food Programme has also reported 'critical funding shortages' that have forced it to reduce the level of assistance provided.[30]

Resettlement of Syrian refugees in other parts of the world — which is crucial if such countries, Lebanon in particular, are to continue hosting Syrian refugees — is not occurring to any significant degree. Since the beginning of the conflict, for example, only 179,147 Syrian refugees have been resettled elsewhere in the world.[31] This represents 3.7% of the 4.8 million Syrian refugees outside Syria, and a mere 2% of all Syrian refugees.

The most likely explanation of what happened in 2015 is that the combination of the EU's prohibitionist approach to refugees, the lack of resettlement and the inability for refugees to establish an acceptable form of subsistence in the region prompted a rapid increase in the demand for the services of smugglers on the Turkey-Greece route. Anecdotal evidence suggests that this initially led to a sharp increase in prices charged for such services, with the resultant increase in profit margins attracting more people to the smuggling sector. This in turn led to a rapid increase in supply, which resulted in falling prices. This then triggered people other than just Syrians (including refugees such as Eritreans or Afghans, and also non-refugees) to travel to Europe. These developments could explain why not only the number of Syrians entering the EU via Turkey has increased sharply, but also the number of other nationalities.[32] In this analysis, the combination of prohibition and not giving refugees a viable alternative in the region had the opposite effect of what was intended; it led to more migration, not just of Syrians, but also of migrants who would not otherwise have migrated to Europe. Although the data required to put this hypothesis to the test are currently lacking, the hypothesis is in line with dominant migration sociology[33] and provides the best explanation for the data that are available on irregular migrations to Europe since 2011.

In summary, the Syrian refugee crisis turned into what was perceived as a European refugee crisis due to the European policy of impeding refugees to travel legally to the EU. This policy was actively pursued through the imposition of strict visa requirements, complemented by measures inducing other parties to enforce this policy (i.e. sanctions intended to induce transport companies to refuse access to third-country nationals without visas) and cooperation with neighbouring countries aimed at control of their borders. This actively pursued policy of travel prohibition was combined with the almost complete absence of any policy providing refugees with an alternative to entering the Union illegally. Thus, there was no resettlement scheme of any substance, and insufficient financial or other assistance to help

30. 'Syria Emergency', *World Food Programme*, www.wfp.org/emergencies/syria, last accessed 23 March 2016.
31. 'Resettlement and Other Forms of Legal Admission for Syrian Refugees', *United Nations High Commissioner for Refugees* 18 March 2016, www.unhcr.org/52b2febafc5.html, last accessed 23 March 2016.
32. For the most recent data at the time of writing, see p. 6 of the 'Frontex Risk Analysis report', *Frontex Europe* published 20 January 2016, http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q3_2015.pdf, last accessed 23 February 2016. For a similar analysis, compare Optimity Advisors: 'A study on smuggling of migrants. Characteristics, responses and cooperation with third countries', Brussels: 2015 European Commission http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf, last accessed 23 February 2016.
33. For an overview, see M. Czaika & H. de Haas, 'Evaluating migration policy effectiveness', in A. Triandafyllidou, *Routledge Handbook of Immigration and Refugee Studies*, London: Routledge 2015, pp. 34-40.

countries bordering Syria to receive the Syrian refugees. In the next section we analyse how the EU reacted to the rise in the number of asylum seekers in 2015.

Chapter 3

EU's response to the 'refugee crisis'

3.1 Common European Asylum System: legal basis, purpose and substance

Since the Treaty of Amsterdam (1999), migration and asylum policies have been a competence of the EU legislator. This gradually extending competence[34] can be explained by two important, but separate developments in the EU. First, coordination and communitarization of asylum and migration law were seen as a necessary tool to complement the decision-making in the 1990s on the abolishment of internal border controls. Secondly, there was another and less 'utilitarian' incentive for this EU competence, and this can be found in the intrinsic meaning and role of human rights in the legal framework of the EU.

The first rules dealing with cooperation in the field of asylum law were adopted at an intergovernmental level (Schengen) between 1985 and 1990. When preparing to abolish internal border controls within the Schengen area (which at that time comprised only five member states), the national governments were concerned that the free movement zone would mean that not only would asylum seekers be able to submit multiple asylum applications in different countries, but also that those states with more favourable provisions would attract the highest numbers of asylum seekers.[35] These concerns resulted first in the 'Dublin mechanism' for determining which state was responsible for handling an asylum application (to be dealt with below) and secondly, but at a later stage, in the agreement on minimum harmonization of asylum law that was designed to prevent secondary movements of asylum seekers. During the European Council in 1999, the heads of governments adopted the Tampere Conclusions, which included the legislative programme of a Common European Asylum System (CEAS).[36] Several instruments have since been adopted under this programme, including minimum standards for the asylum procedure, the reception of asylum seekers and qualification as refugees.[37] Later, in the Lisbon Treaty of 2007, the member states agreed on a more ambitious basis for EU legislation in the field of asylum law. Instead of minimum guarantees, a new Article 78 TFEU, setting out the goal of 'uniform asylum status' and 'common asylum procedures', was enacted. On the basis of this provision, the

34. Currently laid down in Art. 67 TFEU.
35. For a short history on the development of EU harmonization of asylum law, see: P. Boeles et al., *European Migration Law*, Cambridge/Antwerp/Portland: Intersentia 2014, p. 246 ff. and on its relationship with international law: H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff Publishers 2006.
36. Conclusions European Council Tampere, 15-16 October 1999.
37. The Procedures Directive 2005/85, *OJEU* 2005, L 326; the Reception Directive 2003/9, *OJEU* 2003, L 31, *OJEU* 2004, L 304 and the Qualification Directive 2004/83.

EU legislator amended existing legal instruments, resulting in the recast Procedures, Reception and Qualification Directives.[38]

Together, these Directives deal with the three basic questions of refugee law: who qualifies for protection (Qualification Directive); what this protection should entail (Reception and Qualification Directives) and where this protection should be provided (Procedures Directive, together with the Dublin Regulation, see below). The Directives are based on pre-existing international law on refugee protection[39] (the Refugee Convention and case law of the European Court of Human Rights; see section 4 below). In the preambles, the Directives explicitly refer to the 'full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951', to the Charter on Fundamental Rights of the EU, which contains the right to asylum,[40] and to the European Convention on Human Rights (ECHR).[41] This means the Directives should be interpreted in conformity with these instruments.

The adoption of these asylum Directives did not, however, result in harmonized legislation or practice with regard to decision-making on asylum applications, asylum procedures and conditions of asylum reception. On the contrary, statistics show huge differences between the asylum recognition rates of member states, also with regard to asylum seekers of the same nationality, despite the harmonization of the rules on qualifying for protection in the Qualification Directive.[42] In 2014, for example, member states' recognition rates for Afghan and Iraqi asylum seekers varied between 20% and 95% and between 13% and 94% respectively. And whereas the recognition rates for Syrian and Eritrean asylum seekers were generally high in all the member states (95% and 89% respectively), data on the first admission decision (so not taking into account the decision in appeal) show major differences (between 60% and 100% for Syrians, and between 26% and 100% for Eritreans).[43] Of equal importance is that member states apply a highly different practice with regard to the status or residence permits received by beneficiaries of international protection and the rights that are attached to their status.[44] Furthermore, in 2015,

38. Recast Reception Directive 2013/33, *OJEU* 2013, L 180/96, date of implementation 21 July 2015; recast Procedures Directive 2013/32, *OJEU* 2013, L 180/60, date of implementation 21 July 2015; and the recast Qualification Directive 2011/95, *OJEU* 2011, L 337/9, implementation date: 21 December 2013.
39. Art. 78 TFEU states that the CEAS should be 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'.
40. Art. 18.
41. Recitals 3 and 16 of the Qualification Directive (2011/95); Recitals 3 and 60 of the Procedures Directive (2013/32); Recitals 3, 9 and 35 of the Reception Directive (2013/33).
42. Annual report EASO 2014: https://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-2014.pdf, last accessed 22 April 2016.
43. Eurostat, *Asylum Applicants and First Instance Decisions on Applications: 2014*, March 2015, 13. Recognition rates among the 30 main citizenships of asylum applicants granted decisions in EU 28, 2014. See also the report by the Dutch WODC research centre showing major differences in recognition rates, based on the nationality of the asylum seeker: A. Leerkes, *How (un)restrictive are we? 'Adjusted' and 'expected' asylum recognition rates in Europe* (Cahier 2015/10), The Hague: WODC 2015. This research compares recognition rates in the Netherlands with those in other European states.
44. Whereas, in 2014, Syrian asylum seekers in the United Kingdom, Germany, Poland and Denmark automatically acquired refugee status, in the Netherlands, Cyprus, Malta, Sweden and Spain they generally obtained only subsidiary protection (on the difference between refugee status and subsidiary protection, see section 4 below). Syrian asylum seekers in France, Hungary and Norway obtained either refugee status or subsidiary protection, while Switzerland provided only humanitarian protection (EASO annual report 2014, p. 44).

there were unilateral actions by member states that not only hampered a common European approach, but were often also at the cost of individual human rights.[45] These unilateral actions included the reintroduction of internal border controls,[46] the building of walls and fences at external borders, and the imposition of new restrictions on the rights of asylum seekers in national migration laws. The pushing back and detention of asylum seekers in the external border areas and failure to grant timely access to the asylum procedure or national courts prevent asylum seekers from enforcing their rights under EU asylum law and violate their right not to be sent back to a country where they risk persecution or where their lives or safety are under threat.

One of the deficiencies in the current EU approach is the absence of any practical or immediate mechanism for imposing sanctions in the event of manifest violations of fundamental rights and asylum laws. Although the Commission started 40 infringement procedures against 19 member states in September 2015 on the grounds of their failure to fully implement the asylum Directives, the Commission and other member states failed to respond clearly and firmly to human rights violations in the member states at the external borders.[47] So even to the extent that European law has harmonized asylum law in theory, an enforcement deficiency affecting crucial elements of asylum law in action is manifestly part of the CEAS.

In summary, the granting of asylum has not been harmonized effectively; the substance of asylum has not been harmonized effectively, and the CEAS apparently allows for an *Alleingang* of member states on essential points, including the prohibition of refoulement.

3.2 Dublin Regulation

The Dublin Regulation (Regulation 343/2003, replaced by Regulation 604/2013) is also part of the CEAS and includes criteria for determining which member state is responsible for handling an asylum application.[48] The goal of the Dublin mechanism is, on the one hand, to prevent asylum seekers from submitting applications in more than one state ('asylum shopping') and, on the other hand, to identify as soon as possible the state responsible for handling the asylum application (thus preventing 'refugees in orbit'). If a third country national applies for asylum in a member state that, according to the Dublin criteria, is not responsible for dealing with the asylum claim, the latter can transfer the asylum seeker to the 'responsible state'. This responsibility is determined on the basis of criteria applying in the order in

45. For an extended overview of the response by individual member states and the EU to the humanitarian crisis in 2015, see (in Dutch): E. Brouwer, 'Europees asielbeleid: van onderling wantrouwen naar een gedeelde verantwoordelijkheid', *NtER*, April 2016, no. 2, pp. 42-51.
46. For more details on internal border controls, see: E. Brouwer, 'Migration flows and the reintroduction of internal border controls: assessing necessity and proportionality', 13 November 2015 available at http://eumigrationlawblog.eu/migration-flows-and-the-reintroduction-of-internal-border-controls-assessing-necessity-and-proportionality/, last accessed 21 April 2016.
47. Press release, IP/2015/5699, European Commission 23 September 2015. This infringement procedure may result in a referral of the case to the CJEU, based on Art. 258 TFEU. This is dependent on the actions of the individual member states taken in response to the inquiry by the European Commission.
48. 'Dublin III', or Regulation 604/2013, entered into force on 19 July 2013, *OJEU* L 180, 29.06.2013. The 'Dublin mechanism' is applied by the 28 EU member states and four associated non-EU states (Norway, Iceland, Liechtenstein and Switzerland).

which they are listed. The Dublin Regulation first mentions, and hence gives priority to, the protection of minors and the unification of family members of asylum seekers and refugees. But these criteria are rarely applied because, in practice, a criterion lower in the 'Dublin hierarchy' plays the most important role: the state where a person first entered the EU.[49]

The fact that, in many cases, the state where the migrant arrived is responsible for handling the asylum application puts a burden on coastal states that is, in many respects, disproportional. This failure of the Dublin mechanism has long been pointed out by many commentators.[50] Their geographical location at the external borders of the EU means that member states such as Greece, Italy and Hungary receive higher numbers of asylum seekers than other states. The large numbers of people arriving, as well as the economic and political situation in these countries, result in poor reception conditions and a lack of procedural guarantees. In practice, authorities in these border states are not keen to register these asylum seekers in Eurodac[51] as they want to prevent their country from being designated the first state responsible for handling the asylum applications.

Another problem, resulting in a deficiency of the Dublin mechanism, is the assumption that asylum seekers will receive the same level of protection in every member state with regard to qualifying for international protection, the asylum procedure itself and reception conditions. In the first place, this assumption does not hold with regard to the United Kingdom, Ireland or Denmark because of their opt-out position in the CEAS. Although these three countries all participate in the Dublin Regulation, Denmark opted out of all asylum legislation, while the United Kingdom and Ireland chose to be bound by the first-phase asylum Directives only and thus do not apply the same rules as the other member states.[52] Secondly, as mentioned above, even among the member states applying the asylum Directives, significant differences exist with regard to the quality of reception conditions, qualification for protection and the length of procedures. Back in 2011, judgments of both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) made it clear that the Dublin Regulation could not be applied on the basis of 'blind trust', given the existing deficiencies in the asylum systems in some member states.[53]

Finally, many commentators have criticized the fact that even though the Dublin mechanism takes account of asylum seekers' individual situations, such as protec-

49. Art. 13 of Regulation 604/2013.
50. E. Guild, C. Costello, M. Garlick & V. Moreno-Lax, 'Enhancing the CEAS and Alternatives to Dublin', *Study for the LIBE-Committee of the European Parliament* 2015, www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf, last accessed 22 April 2016; ECRE report *Dublin II Regulation – Lives on Hold*, 2013; V. Mitsilegas, 'Solidarity and Trust in the Common European Asylum System', *Comparative Migration Studies* 2014/ 2, No. 2, pp. 181-202; M. Di Filippo, 'From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures', *International Institute of Humanitarian Law* (Policy Brief), January 2016.
51. Eurodac is a EU data system containing fingerprints of asylum seekers and persons who crossed the external borders irregularly. It supports the implementation of the Dublin Regulation on determining the responsible state. See also COM(2015) 150 final, 27 May 2015, European Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, Brussels: SWD 2015.
52. See P. Boeles et al., *European Migration Law,* Cambridge/Antwerp/Portland: Intersentia, 2014, pp. 253-254.
53. ECtHR 21 January 2011, 30696/09 (*M.S.S. v Greece and Belgium*) and CJEU 21 December 2011, C-411/10 and C-493/10 (*N.S. and others*).

tion of the family unit or unaccompanied children, it does not take into account the preference or personal interests of the asylum seeker with regard to the designation of the responsible state.[54] As well as hampering the integration of asylum seekers, this also results in a rather bureaucratic, discretionary distribution of asylum seekers in Europe.
In the end, for all these reasons, the Dublin mechanism has not resulted in a fair and coordinated allocation of asylum claims in Europe.

3.3 European Migration Agenda of 2015

In May 2015 the Commission published a plan ('A European Agenda on Migration')[55] to deal with the 'migration crisis'. Based on this agenda, a package of eight measures was presented by the Commission in September 2015.[56] This included a relocation scheme, the establishment of 'hotspots', a proposal for a common list of safe third countries of origin and a proposal for the establishment of a European Border and Coast Guard (EBCG). Since November 2015 the EU has also been cooperating with Turkey on this issue. This resulted in a deal in March 2016 on the return of migrants crossing the Aegean Sea to Turkey.
We will discuss these measures below and show that they focus primarily on the question of *where* refugees should obtain protection and on preserving the prohibition on legal travel, while neglecting the issue of *what* the protection should entail.

3.3.1 Relocation scheme

In its migration plan of May 2015, the Commission proposed relocating 120,000 asylum seekers from Greece, Italy, and Hungary to other EU member states. In September 2015, the Council of Justice and Home Affairs adopted, by qualified majority voting, an amended Commission proposal, increasing the number of asylum seekers to be relocated to 160,000.[57] As Hungary refused to cooperate with this relocation scheme, the current decision on relocation applies only to asylum seekers in Greece and Italy. The relocation scheme is limited to asylum seekers 'in clear need of international protection' and includes only those who have a nationality with an average recognition rate of 75% in all the member states, such as Syrians. In order to ensure a fair relocation, the Commission devised an allocation

54. See *inter alia* E. Guild, C. Costello, M. Garlick & V. Moreno-Lax, 'Enhancing the CEAS and Alternatives to Dublin', *Study for the LIBE-Committee of the European Parliament* 2015, www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf, last accessed 22 April 2016. See also; M. Mouzourakis, *We need to talk about Dublin, Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union*, Oxford: Refugees Studies Centre (Oxford Department of International Development) 2014, p. 20.
55. COM (2015) 240 final, 13 May 2015. The first evaluation of this action plan was published in: COM (2016) 85, 10 February 2016.
56. COM(2015) 450 final, 9 September 2015.
57. Council Decision (EU) 2015/1523 of 14 September 2015, published in *OJEU* L 239, providing in the relocation of 40,000 persons and Council Decision (EU) 2015/1601, 22 September 2015, published in *OJEU*, L 248 on the relocation of a further 120,000 asylum seekers. Based on the Commission proposal of 9 September, COM (2015) 451, 9 September 2015. The Czech Republic, Hungary, Romania and Slovakia voted against the proposal. Hungary has started an action at the Court of Justice seeking annulment of the Council Decision, essentially arguing that a legal basis for it is lacking (Case C-647/15, *Hungary v Council of the European Union*, brought on 3 December 2015; since then no procedural steps have been taken, last checked on 27 April 2016).

system that takes account of the geographical size of a member state, as well as its number of inhabitants and level of welfare (based on the GNP of each country).[58] The non-EU member states Norway, Iceland, Switzerland and Liechtenstein are not automatically bound by this scheme, but can make separate bilateral agreements with Greece and Italy on this basis.[59]

One of the weaknesses of this scheme is not only the forced transfer of asylum seekers within Europe, but also that it is voluntary for member states. The Council Decision only provides that, by 26 September 2016, 54,000 asylum seekers must have been relocated from Greece and Italy to other countries. Monthly publications by the Commission show the poor implementation of this relocation scheme. By February 2016, only 4,582 relocations had been offered by other member states, while only 481 asylum seekers had actually been transferred from Greece or Italy to another member state.[60] Even though this scheme formally still applies, its practical meaning has been overtaken since March 2016 by the EU-Turkey agreement discussed in section 3.3.5 below.

3.3.2 'Hotspots'

The establishment of 'hotspots' in the southern European coastal states was presented in 2015 as one of the major tools for addressing the refugee crisis and as complementary to the relocation of asylum seekers in the EU. It serves to help identify who is and who is not in need of international protection 'through a process of identification and filtering of applications'.[61] The first 'hotspots' were established in Lesbos and Lampedusa, with other centres gradually being set up in Chios, Samos, Kos and Leros in Greece, and in places such as Taranto, Trapani and Augusta in Italy. In fact, the establishing of these centres is proceeding very slowly due to a lack of money and staff, not least because of the failure by other member states to send experts and materials.[62]

The 'hotspot' approach involves cooperation not only between national authorities of the host state and other member states, but also of the EU agencies Frontex, the European Asylum Support Office (EASO), Europol and Eurojust.[63] These agencies should assist national authorities in screening, identifying and fingerprinting those arriving in 'hotspot areas'. The involvement of organizations such as Europol and Eurojust show that EU policymakers perceive the arrival of refugees and asylum seekers not only as a humanitarian crisis, but also, or maybe even more so, as a security risk. On a practical level, the involvement of these various authorities and

58. Under this system, Sweden would have to accept 2.92% and Hungary 1.79% of all asylum seekers, which is substantially lower than the number of asylum seekers these countries received in 2015. Germany would have to accept 18.42% and the Netherlands 4.35%.
59. Art. 11 of Council Decision (EU) 2015/1523 of 14 September 2015.
60. For current data on the implementation of the relocation scheme, see: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf, last accessed 22 April 2016.
61. Commission Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, Brussels, 10 February 2016, pp. 9-10.
62. On the implementation of hotspots in Greece and Italy, COM(2015) 678 and COM(2015) 679, 15 December 2015 and the press release of the European Commission IP/16/269 of 10 February 2016.
63. European Commission, Factsheet, 'The hotspot approach to managing exceptional migratory flows', available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/backgroundinformation/docs/2_hotspots_en.pdf, last accessed 22 April 2016.

organizations makes the situation at the 'hotspots' muddled, thus resulting in unclear delineation of tasks, powers and responsibilities.[64]
The provision of food, housing and medical assistance to large groups of people awaiting registration and further decision-making is heavily reliant on volunteers.[65]
As we have seen above, the number of registered asylum seekers relocated from the 'hotspots' to other member states is very low. This, combined with new arrivals at the Italian and Greek coasts, means the number of people 'locked' in the 'hotspots' is increasing, and this in turn is resulting in a humanitarian crisis.

3.3.3 Common list of safe third countries of origin

Another part of the Commission's package was the Proposal for a Regulation 'establishing an EU common list of safe third countries of origin'.[66] According to this proposal, applications by persons from safe countries could and should be processed quickly in accelerated procedures.[67] The idea behind this is presumably not to ensure that refugees from, say, Albania are recognized and issued with a residence permit faster than Syrian refugees. Instead, the idea would be that most Albanian asylum seekers are clearly not refugees and should be removed from the asylum system as quickly as possible.[68]
The Procedures Directive provides criteria for considering a country of origin safe. A country is deemed to be safe if there is 'generally and consistently' no persecution or torture or inhuman treatment.[69] This should follow from the law and its application 'within a democratic system and the general political circumstances'. In particular, it should be assessed whether protection is provided by observance of the ECHR, the International Covenant on Civil and Political Rights and/or the Convention against Torture, and whether there is a system of effective remedies against violations of those rights and freedoms.
In the proposed Regulation, the Commission concludes that Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Montenegro, Serbia and Turkey satisfy all these conditions. This conclusion is remarkable in a number of respects. For instance, the possibility to lodge complaints with the ECtHR counts as an 'effective remedy' for all countries (except Kosovo, see below), whereas this obviously cannot possibly count as an effective remedy 'before a national authority' as required by Article 13 ECHR. For Kosovo, which is not recognized as a state, not being a party to any human rights convention seems irrelevant, while the requirement for an effective

64. S. Carrera & L. den Hertogh, 'A European Border and Coast Guard: What's in a Name?', *CEPS Paper* 2016, no. 88, p. 8-10, *CEPS* 8 March 2016, available at www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name, last accessed 10 March 2016.
65. In his blog of 3 March 2016, Marco Notarbartolo di Sciara describes the practical situation at one of the designated 'hotpsots', Leros in Greece: www.unitedagainstracism.org/blog/2016/03/03/greece-aegean-sea-notes-from-a-refugee-camp-on-the-threshold-of-europe/, last accessed 16 April 2016.
66. COM(2015) 452 final, 2015/0211 (COD). Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU.
67. COM(2015) 452 final, 2015/0211 (COD), p. 2 and Preamble consideration (1).
68. Cf. the reference to 'abuses' on p. 2 of COM(2015) 452 final, 2015/0211 (COD). Cf. also 'Outcome of the Council meeting, Justice and Home Affairs', Affairs Brussels (EU), 11097/15, 20 July 2015, p. 9.
69. Annex 1 to the Procedures Directive.

remedy is not even mentioned.[70] Furthermore, the average EU recognition rate for asylum applications by citizens of these countries ranges from 0.9% (Macedonia) to no less than 23.1% (Turkey).[71] Indeed, the situation for some groups in the Balkan countries is precarious, as the Commission admits when it asks member states to pay 'particular attention' to, for example, 'discrimination or violence against individuals on ethnic or religious grounds or because of their political opinion as well as against individuals belonging to vulnerable groups such as LGBT, journalists, and children' in Albania.[72] It is doubtful, therefore, whether these countries are safe countries of origin on the basis of the criteria the Commission claims to apply.
What does designation of a country as a safe country of origin mean for the examination of asylum applications made by citizens of those countries? There are two possibilities. First, it may result in a higher burden of proof for such applicants.[73] That would constitute an outright violation of international law. All people who have a 'well-founded fear' of persecution are refugees (see below), and so Serbian gays do not have to demonstrate anything further or other than Syrians fleeing the war. In conformity with this, Article 3 of the Refugee Convention prohibits discrimination in the application of the Convention on grounds of race, religion or country of origin. Therefore it would be a clear violation of the Refugee Convention itself to raise the standard of proof for particular nationalities. Secondly, the designation may be no more than codification of the assumption (or, if one wishes, factual observation) that some countries are in general safer than, say, Syria, Eritrea, Iraq or Afghanistan. This amounts to nothing special since, according to the Qualification Directive, the general situation in the country of origin must always be taken into account.[74]
The Procedures Directive suggests that the second approach should be applied. This requires an 'individual examination' of applications submitted by people from safe countries of origin. Applicants should have the opportunity to show 'serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances';[75] in other words, the normal standard of proof.[76] If, then, applications by citizens of countries on the list of safe countries of origin are to be examined in the same way as other applications, what is the effect of this measure? As the Commission observes, these applications can be processed in accelerated or border procedures.[77] But so, too, may applications on nine other grounds,[78] while in a

70. Cf. COM(2015) 452 final, 2015/0211 (COD), Preamble recital (13) and p. 5.
71. COM(2015) 452 final, 2015/0211 (COD), Preamble recital (12) and (16).
72. COM(2015) 452 final, 2015/0211 (COD), pp. 3-4; unlike the other findings on Albania in the Explanatory memorandum, this call for attention was not taken over in the Preamble (see Preamble recital (12)).
73. The Dutch Deputy Minister of Security and Justice gave this interpretation of the safe country of origin arrangement in a letter to parliament of 3 November 2015 ('*zwaardere bewijslast*'; *Parliamentary Papers II* 2015/16, 19 637, 2076, p. 2).
74. Art. 4(3) AQD: 'The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied'.
75. Art. 36(1) APD.
76. See Art. 2(f) AQD.
77. COM(2015) 452 final, 2015/0211 (COD), Preamble (1).
78. Art. 31(8) APD.

country such as the Netherlands the examination of all applications starts with the fast track procedure.
Hence, the measure does not seem to contribute very much to alleviating the present burden on asylum systems in the EU, while designating countries as safe may be related to other factors than the actual safety of the country (as in the case of Turkey), or it may lead to neglect of the protection needs of minorities from those countries. In summary, the proposed Regulation is either irrelevant, or an incentive to violate international treaty obligations, and possibly both.

3.3.4 European Border and Coast Guard proposal

The Commission launched the proposal for establishing the European Border and Coast Guard (EBCG) in a 'Borders Package' presented on 15 December 2015.[79] This agency is designed to replace the current European agency Frontex and would be granted considerable powers. Whereas Frontex currently has only a coordinating role and supports member states in controlling their external borders, the EBCG is intended to have executive powers. These include the 'right to intervene' by sending border guard authorities from other member states to the common EU external borders, without the consent of the member states involved. However, the operational plan would still require agreement between the agency and the host member state.[80] Furthermore, the EBCG proposal aims to improve the coordination of information exchange and operational cooperation between 'border authorities and other authorities with coast guard functions'.
The underlying idea of extending these powers is that they will enable operations at the external borders to become less dependent on the willingness of national authorities to cooperate with the European agency. However, the current proposal does not include real tools for getting member states to cooperate or to provide staff and equipment. The real problem of the new EBCG proposal is that instead of addressing the causes of the current humanitarian crisis and investing in the asylum system of the EU, it is aimed (again) at strengthening external border controls. Furthermore, the proposal does not include any clear limitation of the powers or regulating of the responsibilities of the relevant authorities in, for example, cases of human rights violations. These gaps may specifically create a problem in those member states where military or paramilitary organizations are entrusted with 'coast guard functions'.

3.3.5 EU-Turkey agreement

In October 2015, the EU Council agreed on a Commission proposal for a package deal with Turkey. This plan referred to support for Turkey in border control and the reception and return of asylum seekers, together with promises of EUR 3 billion and references to lifting visa requirements for Turkish citizens and restarting ne-

79. COM(2015) 673, 15 December 2015. This plan includes further systematic checks at the external border controls, also with regard to EU citizens, and a new travel document for returnsreturn of irregular migrants. MEMO/15/6332, 15 December 2015.
80. S. Carrera & L. den Hertogh, 'A European Border and Coast Guard: What's in a Name?', *CEPS Paper* 2016, no. 88, pp. 8-10, *CEPS* 8 March 2016, available at www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name last accessed 10 March 2016.

gotiations on Turkey's accession to the EU.[81] At the time, it was clear that Turkey was hosting two million asylum seekers and refugees, the majority of whom, however, were residing illegally in Turkey and very few of whom actually had access to an asylum procedure. In March 2016, the European Council concluded an additional agreement[82] with Turkey, increasing the promised amount of financial support to EUR 6 billion and including further details on mutual cooperation with regard to the transfer of asylum seekers and external border controls.

In this agreement, the EU and Turkey agreed that all new migrants crossing from Turkey to the Greek islands on or after 20 March 2016 will be returned to Turkey. Migrants arriving in Greece will be registered and their asylum applications will be assessed in Greece in conformity with the Procedures Directive, but migrants who do not apply for asylum or whose asylum applications are found inadmissible or unfounded will be returned to Turkey. In addition, it was agreed that for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU. In this case, priority will be given to migrants who have not previously entered or tried to enter the EU irregularly.

The idea behind this agreement is that asylum applications can be declared inadmissible by Greece because Turkey can be considered a 'safe third country' within the meaning of the Procedures Directive (to be distinguished from the above notion of 'safe country of origin'). As many have pointed out, applying this concept to Turkey is highly questionable, considering that Turkey is not bound by EU asylum law, that Turkey has retained the geographical limitation in the Refugee Convention (see below) and that recent reports have established that Turkey has violated the human rights of refugees and asylum seekers, including by detaining them and (forcibly) returning them to the country of origin.[83] Various NGOs and journalists have published information on the deteriorating developments in Turkey, both with regard to asylum seekers and with regard to the rule of law and democracy.[84] At the end of 2015, Bulgaria was the only EU member state to consider Turkey as a safe third country.

In the first progress report on the implementation of the EU-Turkey agreement, the Commission emphasizes its 'success' in the form of 'the sharp decrease in the number of irregular migrants and asylum seekers crossing from Turkey to Greece' and that smugglers are finding it 'increasingly difficult to induce migrants to cross from Turkey to Greece'.[85] Since the EU-Turkey agreement was adopted, various

81. EU-Turkey Joint Action Plan, 15 October 2015, Memo/15/5860.
82. Press release, European Council, IP/ 144/16, 'EU-Turkey statement', 18 March 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/, last accessed 22 April 2016. On the question of whether this agreement is a convention within the meaning of international law, see: M. den Heijer & T. Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?', EU Law Analysis blog, 7 April 2016, available at: http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html, last accessed 22 April 2016.
83. See further S. Peers & E. Roman, 'The EU, Turkey and the Refugee Crisis: what could possibly go wrong?', available at http://eulawanalysis.blogspot.nl/2016/02/the-eu-turkey-and-refugee-crisis-what.html, last accessed 22 April 2016; O. Ulusoy, 'Turkey as a Safe Third Country?' blog on Border Criminologies, 29 March 2016, available at: www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third, last accessed 22 April 2016.
84. Reports of Human Rights Watch on Turkey, *World Report 2016. Events of 2015*, pp. 578-585, published 27 January 2016, www.hrw.org, last accessed 22 April 2016; Amnesty International, *Europe's Gatekeeper? Unlawful Detention and Deportation of Refugees from Turkey*, December 2015, www.amnesty.org/en/documents/eur44/3022/2015/en/, last accessed 22 April 2016.
85. COM(2016) 231, 20 April 2016, p. 12.

NGOs, including Amnesty International and Human Rights Watch, have reported gross human rights violations in Turkey, including a mass expulsion of Syrians from Turkey to Syria, and Turkish border guards' shooting at Syrian civilians trying to cross the Turkish border.[86] The Commission's progress report does not address either these human rights violations or the increasing number of migrants arriving at Italian borders.[87] The Dutch prime minister consistently referred to the reports of Amnesty International, Human Rights Watch and the Syrian Observatory for Human Rights in parliament as 'rumours', and has assured Parliament that the Turkish authorities have denied them.[88]

3.4 Flaws in current EU laws and policies

The arrival of the first substantial number of asylum seekers in the EU since the CEAS was set up is putting the functioning of the CEAS to the test. The lives lost at sea,[89] the circumstances of migrants in refugee camps in the region as well as in transit countries, the chaotic situation in some European states and the reintroduction of internal border controls by several member states demonstrate the EU member states' failure to respond adequately, as well as the fact that the Dublin mechanism is failing to function as an allocation scheme. Even though the Commission and member states have repeatedly emphasized their international law obligations and that the strengthening of the external borders should not prevent those entitled to international protection from gaining access to the European protection systems, no channels of any significance for safe and legal access to the CEAS have so far been opened.[90] On the contrary, by closing external borders and adopting the EU-Turkey agreement, member states are doing more and more to prevent individuals from seeking any form of protection in Europe. In summary, the measures proposed and taken by the EU do not or only very partially address the causes of the current crisis identified in sections 2 and 3; the prohibition on refugees travelling legally to the Union, the absence of a resettlement scheme for refugees in the region, and the absence of adequate protection and social rights for refugees in the region, combined with fundamental flaws in the CEAS itself as well as failing implementation of the CEAS.

This is not the first time Europe has been confronted with considerable numbers of refugees. Some of those earlier situations involved higher numbers than the

86. Press release 1 April 2016, Amnesty International, www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/, last accessed 21 April 2016 and press release 14 April 2016, *Human Rights Watch*, www.hrw.org/news/2016/04/14/turkey-open-borders-syrians-fleeing-isis, last accessed 21 April 2016.

87. Report of International Organization for Migration (IOM), published 19 April 2016, according to which 24,581 migrants arrived in Italy by sea in the first four months of 2016, with, 6,200 of them arriving in the first two weeks of April: http://reliefweb.int/report/greece/mediterranean-migrant-arrivals-2016-178882-deaths-737, last accessed 21 April 2016.

88. Uncorrected report of plenary session of the Second Chamber of 13 April 2016, available at www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail?vj=2015-2016&nr=76&version=2, last accessed 27 April 2016.

89. See for an overview the research project of Theodore Baird, Paolo Cuttitta, Lisa Komp, Tamara Last, Thomas Spijkerboer and Orçun Ulusoy of the Vrije Universiteit Amsterdam, at www.borderdeaths.org.

90. V. Moreno-Lax, 'Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward', Red Cross, Brussels: December 2015, in which she refers to the Stockholm Programme of the European Council, para. 5.1.

present, but did not cause the political tensions between European states on the scale we are now witnessing. Therefore, an historical analysis of the main issues in refugee law, as mentioned in the introduction and touched upon in the previous two sections, seems appropriate. *Who* is entitled to protection, and to what extent do refugees have a right to territorial asylum, and hence legal entry, bearing in mind the existing policy of barring legal entry? *What* should this protection entail in terms of benefits? And *where* should refugees receive protection? Should they be forced to stay in the first country of entry? Or should they be allowed to migrate further and remain in the EU? As we will see, these issues were no less relevant for those drafting refugee agreements after the First and Second World Wars. However, the approaches adopted then differed — in some ways markedly so — from those currently being adopted by the EU.

Chapter 4

Historical analysis of refugee protection

4.1 Introduction

When the Refugee Convention was concluded in 1951,[91] Europe was facing a refugee problem that was considerably larger than the one it is facing today. The continent had been destroyed by a war which had displaced some 60 million people, while in 1953 14 million refugees (i.e. people outside their country of origin) were present in Germany alone.[92] According to UNHCR, in 1951 about one million refugees were present in Europe who still needed to be resettled elsewhere.[93] The Refugee Convention was a response to this massive refugee problem. It defined who was eligible for protection and what this protection should entail. The definition of refugees and their rights also had implications for where refugees could ask for protection. Below, we will outline how the interests of the states and individuals concerned were balanced, both in the instruments that preceded the Refugee Convention and on which the drafters built, and in the negotiations and the resulting text of the Convention. The resulting system remained the framework for asylum until well into the 1980s. A number of new concepts modifying this framework have since been developed both in and outside Europe. After analysing the pre-war arrangements for refugees, we will analyse both the Refugee Convention and the later alternative concepts by distinguishing between qualifying for international protection (who), the substance of international protection (what) and the location of international protection (where).

4.2 Earliest international instruments on refugees[94]

Asylum, and hence asylum law, is a by-product of closed border policies. Before 1900, most European countries had open borders, thus allowing most migrants to enter and leave freely; a special legal regime for refugees was unnecessary. Around the time of the First World War, states started to close their borders and hence to control the presence of foreigners.[95] Some foreigners could not be expelled as no other state was willing to accept them. In response, a number of arrangements were concluded between various European and other states.

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91. Convention relating to the Status of Refugees, 189 U.N.T.S. 150.
92. C.D. Harris & G. Wülker, 'The Refugee Problem of Germany', 29 *Economic geography* 1953, pp. 20-25, at 10.
93. www.unhcr.org/pages/49c3646c1d.html, last accessed 27 April 2016.
94. Sections 4.2 and 4.3 are in part based on H. Battjes, 'De ontwikkeling van het begrip bescherming in het asielrecht' (The development of the notion of protection in asylum law) (inaugural lecture) 2012, available in Dutch at www.rechten.vu.nl/en/Images/oratie_20_mei_tcm248-747499.pdf, last accessed 31 March 2016.
95. A. MacKeown, *Melancholy order. Asian Migration and the Globalization of Borders*, New York: CUP 2011; M.E. Price, *Rethinking asylum – History, Purpose, and Limits*, Cambridge: CUP 2009.

These arrangements addressed the situation of specific groups — Russians who had fled the Communist seizure of power in 1917, Armenians who had fled Turkey and, after 1933, Germans who had fled Nazi Germany. These people were regarded as stateless, either *de jure* because their nationality had been withdrawn or *de facto* because they could not rely on diplomatic protection by their country of origin.[96] They had few or no legal entitlements under the domestic law of the states where they lived, given that most states' domestic law, including constitutional law, created entitlements only for nationals. In general, foreigners had to rely on residential rights laid down in treaties between the state of their nationality and the state where they lived.[97] If such a treaty was absent, or if people could not rely on it because of being stateless, they lived as illegally present foreigners under the constant threat of deportation.

These earlier arrangements served to address some of the needs of these refugees as stateless persons. Thus, arrangements for stateless Russian and Armenian refugees in 1922 and 1926[98] established a format for identity documents that would enable these refugees to travel and seek a better life in other states.[99] The Commissioner for Refugees of the League of Nations also sought a solution in the form of resettlement schemes.[100] In reality, however, entry to other states was hardly a viable solution in a world of closed borders, particularly after the economic crisis of 1929. A new approach was adopted in the 1930s. As resettlement proved impossible, the solution for the dire predicament of refugees was sought in the creation of residential rights in the host states. A new convention established entitlements such as access to courts, education and welfare for Russian and Armenian refugees.[101] Of

96. J. Hathaway, 'The Evolution of Refugee Status in International Law', *International Comparative Law Quarterly* 1984/33, pp. 358-359; see also L. Holborn, 'The League of Nations and the Refugee Problem', *The Annals of the American Academy of Political and Social Science* 1939/203, p. 126; C. Skran, 'Historical Development of International Refugee Law', in: A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, Oxford: OUP 2011, p. 9; A. Grahl-Madsen, *The Status of Refugees in International Law*. Volume I, Leiden: Sijthoff 1966, pp. 124 and 126.

97. A. MacKeown, *Melancholy order. Asian Migration and the Globalization of Borders*, New York: CUP 2011, pp. 94-96; see also N. Oudejans, *Asylum. A Philosophical Inquiry into the International Protection of Refugees* (diss. UvT), 2011, p. 46; *A Study of Statelessness,* New York: UN 1949, report by Secretary-General of the UN, DOC. E/1112 EN e/1112/Add1, p. 17*,* available at www.unhcr.org, last accessed 31 March 2016.

98. Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees, Geneva 5 July 1922, 355 LNTS 238, below ('the 1922 Arrangement'); the Plan for the Issue of a Certificate of Identity to Armenian Refugees ((1924) 5(7) LNOJ 967) made the 1922 Arrangement applicable to Armenians. Both arrangements were replaced in 1926 by the more extensive Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees of 12 May 1926, 89 LNTS 47 ('the 1926 Arrangement'). The Arrangement relating to the legal status of Russian and Armenian refugees, Geneva, 30 June 1928, 89 LNTS 2006 ('the 1928 Arrangement') extended the scope of application to Turks, Assyrians, Assyro-Chaldaeans, Syrians and Kurds who lacked protection from the state they formerly hailed from. These instruments are described in *A Study of Statelessness,* New York: UN 1949, report Secretary-General of the UN, DOC. E/1112 EN e/1112/Add1, p. 75 ff, available at www.unhcr.org, last accessed 31 March 2016.

99. C. Skran, 'Historical Development of International Refugee Law', in: A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, Oxford: OUP 2011, p. 7. The 1926 Arrangement contained a recommendation to include a return visa: the possibility to return the refugee to the state that had issued the document would help to increase the willingness of other states to let them enter.

100. C. Skran, 'Profiles of The First Two High Commissioners', 1 *Journal of Refugee Studies* 1988, p. 282.

101. Convention relating to the International Status of Refugees. Geneva 28 October 1933, 149 LNTS 3663 ('the 1933 Agreement'). When defining the refugee, Art. 1 referred to the 1926 and 1928 Arrangements. For a detailed discussion of the drafting process, see: R.J. Beck, 'Britain and the 1933 Refugee Convention: National or State Sovereignty?', 11 *International Journal of Refugee Law* 1999, pp. 597-624.

course states could create such entitlements by themselves, and so a convention may have seemed unnecessary. But setting a standard in an agreement helped to ensure that the states signing the treaty offered similar levels of protection, and thus helped prevent further influxes to those states that raised their standards.
The same approach was chosen with regard to a new group of refugees, Germans who lacked the protection of the Reich.[102] In view of concerns about abuse, the arrangement for Germans introduced a clause excluding persons who left the Reich 'for reasons of personal convenience'.[103] Thus, *de facto* statelessness could no longer be the sole ground for offering protection.
After the Second World War, the United Nations established the International Refugee Organisation (IRO) in order to deal with millions of displaced persons and refugees.[104] Refugees were defined in a way similar to the pre-war arrangements, by a listing of groups such as deported Jews, people who lacked assistance and protection from their country of origin, and war orphans. Although the IRO aimed to repatriate or resettle displaced persons and refugees, these people could refuse repatriation if they raised 'valid objections', such as 'persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions'.[105] This definition follows from that of Germans who left Germany other than for reasons of personal convenience, and it returned, in modified form, in the 1951 Convention.
The endeavours of the IRO and its successor, the UN High Commissioner for Refugees (established in 1950),[106] were not ultimately able to entirely resolve the refugee issue. These organizations had no say on the rights of people who would not or could not be resettled, or the rights of refugees after resettlement. These matters could only be resolved by states that already hosted or were able to resettle refugees. The UN consequently decided to address these issues in a Convention.
In summary, there was no generic definition of refugees before 1950. Instead, the pre-war arrangements and, in 1946, the IRO Constitution designated specific groups of people as being in need of protection on the grounds that they lacked diplomatic protection due to their statelessness. Two strategies were developed in an attempt to resolve the refugee issue. One was to encourage and facilitate onward migration to other states. The other was to grant entitlements to refugees who were already present in a territory. Laying down those entitlements in agreements served to ensure that the level of protection offered by various states was similar and, therefore, to facilitate a more balanced distribution.

102. The Provisional arrangement concerning the Status of Refugees coming from Germany, Geneva 4 July 1936, 171 LNTS 3952, followed by the Convention concerning the Status of Refugees coming from Germany, Geneva 10 February 1938, 192 LNTS 4461.
103. Art. 1 in both instruments.
104. The IRO was established by the Constitution of the International Refugee Organization (18 UNTS 1946, into effect in 1948; hereafter 'the IRO Constitution').
105. See IRO Constitution, Annex I under C (1) (a) (i).
106. See G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, Oxford: OUP 2007, pp. 20-21.

4.3 Qualification for international protection

4.3.1 Refugee Convention

In 1950, state delegates convened at a retreat on the shores of Lake Success in New York in order to draft a convention on the refugee issue. The drafters of the Refugee Convention had to address the situation of people displaced during or as a result of the war, and who could not or would not be repatriated. As the Soviet Union and its allies had withdrawn from the negotiations (allegedly because refugee protection was, in their view, just a false pretext for barring repatriation of their citizens),[107] the drafters could also include 'neo-refugees', i.e. people who had fled Communist Eastern Europe.

The first issue to be addressed was the definition of who is a refugee. Basically, two approaches were advocated. Some, in particular European, states favoured a very broad definition, such as 'unprotected persons'.[108] The representative of France explained that European states were already overburdened and were now seeing an influx of neo-refugees on top of that.[109] A broad definition would entail broad obligations for non-European states acceding to the Convention. For some European states, therefore, the definition was at least partially a tool for burden-sharing. Other states proposed continuing the pre-war method and so including only narrowly defined groups, e.g. Jews or victims of the Franco regime in Spain.[110] This approach was favoured by non-European states, especially the USA, that were anxious to limit their obligations and to avoid signing a 'blank cheque'.[111] Eventually, the representatives agreed on the following definition:

> For the purposes of the present Convention, the term 'refugee' shall apply to any person who […] as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[112]

Some parts of this definition reflect the narrow approach, while others the broad one. The part of the definition based on the IRO Constitution — a well-founded fear of being persecuted for reasons of race and so forth — was broad enough to apply to both old and neo-refugees. The part 'unable or unwilling to avail himself of the protection of that country', understood by the drafters to mean diplomatic

107. E/AC.32/SR.1, pp. 4-5; 159th EcoSoc meeting, session 6, UN Doc E/OR(VI), p. 310-311; General Assembly, 325th meeting, fifth session, 14 December 1950, A/OR/5, pp. 669-674.
108. Proposal by the United Kingdom; 'unprotected' was a person who had no nationality or lacked protection because the state of origin denied or because the person did not want that protection 'for good reasons' (E/AC.32/L2).
109. E/AC.32/SR.3, pp. 11-12; E/AC.32/SR.33, pp. 9-10.
110. See the US proposal for a new definition, E/AC.32/L.4; E/AC.32/SR.3, p. 13.
111. E/AC.32/SR.3, p. 9.
112. Art. 1A(2) Refugee Convention.

protection,[113] was a remnant of the pre-war arrangements and could also be applied to neo-refugees. But the temporal limitation ('events occurring before 1 January 1951') served to limit these obligations to known groups. Article 1B made it possible also to apply a geographical limitation. It stated that the events before 1951 could either mean events in Europe or events in Europe and elsewhere, thus offering states the possibility to exclude new refugees arriving as a result, for example, of decolonization conflicts. Eventually, the temporal and geographical limitations were removed, at least by those states that signed the 1967 Protocol to the Refugee Convention.[114] This Protocol abolished the temporal limitation (events occurring after 1951 could also be grounds for recognition of refugee status) and stated that states newly acceding to the Convention could not adopt the geographical limitation to events occurring in Europe. Only states that previously applied that limitation could continue to do so. At present, this limitation does not apply in any European state, but it does apply in Turkey.[115]

The other limitations in the definition remained. In general terms, therefore, some quite specific groups were excluded: Palestinians, for whom a separate arrangement had been made,[116] and ethnic Germans from Eastern Europe who had resettled in the Federal Republic.[117]

The requirements formulated in the broad part of the definition also impose limitations. A 'well-founded fear' means that only those who fled and still risked *future* persecution were eligible.[118] Accordingly, Article 1C stipulates that refugee protection should cease once the circumstances causing the foreigner to flee cease to exist. Furthermore, this fear for future harm needed to be well-founded. Although the term 'persecution' is in itself broad, it indicates that not each and every form of harm is included: a minimum level of severity is required.

What is maybe most conspicuous for present-day observers is that the definition further narrowed protection to those people whose fear of being persecuted is 'for reasons of' one of the specified grounds. Indeed, the drafters were well aware that victims of war or natural disasters were not included in this definition.[119] Accordingly, the Final Act of the Conference of Plenipotentiaries expressed the hope that

113. Mr. Robinson (Israel) states that de facto stateless people lack diplomatic protection (E/AC.32/SR.4, p. 3). In a study of statelessness the term addresses the exercise of competences and obligations of a state to a citizen abroad (pp. 32-33 and 68-69). Mr. Hoare (UK) calls a request for a passport as an example of invoking protection (A/CONF.2/SR.23, p. 19). Mr. Henkin, the US representative, remarked that '"protection" was a term of art, and meant diplomatic protection, which could only be given by the country of nationality and not by the country of habitual residence' (E/AC.7/SR.160, p. 6). In Art. 1A(2) and 1(C) 'protection' concerns only persons bearing the nationality of the state where persecution is feared; stateless persons must be unable or unwilling to return. See, for other examples from the travaux and from work of early commentators, such as Van Heuven Goedhart: A. Fortin, 'The Meaning of protection in the refugee definition', 12 *International Journal of Refugee Law* 2000, pp. 548-576.

114. UNTS 606, 267.

115. See UNTC at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en, last accessed 31 March 2016.

116. Art. 1D Refugee Convention; see M. Qafisheh & V. Azarov, 'Commentary on Article 1D, Refugee Convention 1951', in: Andreas Zimmermann (ed.), *Commentary on the Refugee Convention 1951* (Oxford: Oxford University Press 2010), p. 542-545, with extensive references to the travaux.

117. Art. 1E Refugee Convention; cf. A/CONF.2/SR.2 2, p. 8.

118. So in contrast, for example, to the valid objections against repatriation in the IRO Constitution, which included past persecution.

119. A/CONF.2/SR.22, p. 6.

the contracting states would extend Refugee Convention protection to persons 'not […] covered by the terms of the Convention'.
In summary, the definition of a refugee in Article 1 of the Refugee Convention could cover all refugees already present in the states party to it, and was also broad enough to cover new groups. At the same time, the drafters had carefully built in opportunities to limit future obligations, most conspicuously with regard to victims of war.

4.3.2 Alternatives for refugee protection

Until well into the 1980s, asylum law and policy in Europe were mostly based on the Refugee Convention. In the 1980s however, new approaches to protection arose in many countries: temporary protection and temporary refuge schemes and the development of ECtHR case law on expulsion, all of which have implications for the question of who is a refugee.

Temporary refuge

From 1985 onwards, many states (as well as UNHCR) had started introducing various forms of temporary refuge.[120] In the case of Europe, authors mention the civil war in Yugoslavia and the ensuing large influx of refugees to Western Europe as a watershed.[121] Although the various temporary refuge schemes differed in name and substance, what they had in common was that they applied to people who had fled generalized violence in civil wars. And, as the name implies, this protection was deemed to be temporary — when the war stopped, those benefiting from the refuge could return. Refugee status, by contrast, was seen as inherently more permanent, although the Refugee Convention foresees *ex lege* cessation of refugee status if the reasons for granting it no longer apply and is hence also temporary in nature. Some countries granted temporary status while the process of determining refugee status was suspended. So a person enjoying this temporary protection remained an asylum seeker for longer. In other countries, the temporary status was issued instead of refugee status.[122] Either way, people granted this type of protection enjoyed fewer rights than those recognized as refugees.
The relationship between temporary refuge and refugee status could be regarded in two ways. For some, it filled the gap in the refugee definition as regards protection for people who had fled violence that could not be linked to a ground specified in the Convention, and hence served as a *de facto* extended definition of refugee. According to others, however, victims of the violence in Yugoslavia did qualify as refugees as they feared persecution for reasons of, for example, ethnicity. Viewed from this angle, temporary protection schemes served to hollow out refugee protection. Whatever the case, we may note that the introduction of temporary refuge

120. See G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, Oxford: OUP 2007, pp. 289-296. This development had been preceded by the development of the B-status and other sub-statuses as of the early 1970s; see on the Dutch status carousel T.P. Spijkerboer & B.P. Vermeulen: *Vluchtelingenrecht*, Nederland Centrum Buitenlanders, Utrecht 1995, pp. 310-332.
121. H. Battjes, 'Subsidiary Protection and other Alternative Forms of Protection', in: V. Chetail & C. Bauloz (eds.), *Research Handbook on International Law and Migration,* Cheltenham: Edward Elgar 2014, p. 542 with further references.
122. G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, Oxford: OUP 2007, pp. 289-296.

at the expense of the application or, if one wishes, as an extension of the Refugee Convention amounted to a trade-off between protection and rights or, in the words of one author, bicycles for the many instead of Cadillacs for the few.[123]

Article 3 ECHR

ECtHR case law regarding expulsion has a similarly ambiguous relationship to Refugee Convention status. In 1989, the ECtHR ruled for the first time that Article 3 ECHR (the prohibition on torture and inhuman or degrading treatment or punishment) implies a prohibition of refoulement: it prohibits expulsion or extradition of a person who runs a real risk of being ill-treated in the country of origin, which is foreseeable at the moment of removal.[124] The Court reasoned that the expelling state was responsible for the foreseeable consequences of its own deeds. If it is foreseeable that ill-treatment will follow, expulsion amounts to knowingly delivering a person to the actors of harm. This reasoning hinges on the statement that the prohibition on exposing a person to torture or inhuman treatment is implicit in the general prohibition on torture and inhuman treatment.[125] Hence, this form of international protection is more, or at least more explicitly, than refugee protection linked to a domestic standard, and to that extent adds a new rationale for issuing protection: the moral integrity of the host state.
In some cases, Article 3 ECHR applied to situations where the Refugee Convention did not apply. Unlike the refugee definition, this provision does not require a link to a Convention ground (race, religion, nationality, membership of a particular social group or political opinion). The prohibition could potentially, therefore, cover cases not covered by the refugee definition and was hence potentially capable of covering war victims. In practice, the meaning of the provision remained somewhat limited for a time, partially due to a strict application of the requirement for a real risk. The ECtHR seemed to require personally individualizing circumstances, which excluded people who fled random violence.[126] Over a period of 30 years, however, the Court's case law evolved slowly but surely and finally, in 2008, embraced the possibility that Article 3 ECHR applies to all people who hail from a certain country, region or city where war is raging.[127]
In other cases, however, the ECtHR barred expulsions of persons who could very well have qualified for refugee status. This was partially due to its applying more lenient standards of proof than were applied by some member states. Medical evidence of torture, for example, was dismissed for some time as irrelevant in certain jurisdictions — a scar cannot tell who inflicted it and for what reason. But the ECtHR reasoned that if medical experts were convinced a scar was very likely to have been

123. J.C. Hathaway, 'Can International Refugee Law Be Made Relevant Again?', 41 *Law Quad. Notes* 1998, pp. 106-108.
124. ECtHR 7 July 1989, 14038/88 (*Soering v UK*).
125. ECtHR 7 July 1989, 14038/88 (*Soering v UK*), para. 91.
126. In one of its early cases on expulsion and Art. 3 ECHR, the Court ruled that the persons concerned had not shown that they would run a real risk of ill-treatment after expulsion as they had not shown 'special distinguishing features' setting them apart from others from the same country of origin (ECtHR 30 October 1991, 13163/87 (*Vilvarajah v UK*), para. 112). This phrase was long understood as meaning that a person must demonstrate that the authorities are targeting him or her in particular.
127. ECtHR 27 July 2008, 25904/07 (*Na v UK*), para. 113.

caused by the type of torture described by the applicant, it could and should count as evidence of that story.[128] In such cases, the protection of Article 3 did not extend the material scope of protection of the refugee definition — the same applicant would have been recognized as a refugee if medical evidence had counted. Instead, Article 3 ECHR protected more people because the Court applied a lower standard of proof than some states.
The growing reliance in some jurisdictions on Article 3 ECHR instead of the Refugee Convention, meant that in Europe the relevance of the latter diminished, sometimes because of the wider material scope, and in other cases because of the lower standard of proof.

4.4 Substance of international protection

4.4.1 Rights of refugees under the Refugee Convention[129]

Just like the earliest instruments for refugee protection, the Refugee Convention not only provides a legal definition of refugees and for protection against refoulement (in Article 33, which states that a refugee shall not be sent back to the country where he fears persecution), but also for residential rights of refugees in the host states. Articles 2-34 contain a fairly comprehensive catalogue of entitlements. These rights accrue to all persons who fulfil the refugee definition; formal recognition of refugee status by the authorities of the host state is not necessary. It is generally accepted in international refugee law that recognition as a refugee by the state of refuge has a declaratory rather than a constitutive character.[130] This means that persons who apply for asylum and who are subjected to a refugee status determination procedure also fall under the general scope of the Refugee Convention. Since asylum seekers may meet the definition of refugee as laid down in the Refugee Convention and may consequently be entitled to some of the benefits of the Convention from the moment they arrive in the host state, they have to be treated as refugees pending determination of their status. Otherwise, states run the risk of acting in violation of the Refugee Convention by withholding rights from genuine refugees.[131]
The way in which the rights laid down in Articles 2-34 of the Convention are formulated is evidence of the search for a balance between the needs of refugees and those of the host state. These competing interests are taken into account in two ways. First, the provisions laying down substantive rights for refugees apply different standards of treatment. With regard to some rights, refugees have to be treated the

128. ECtHR 5 September 2013, 61204/09 (*I v Sweden*).
129. This paragraph is partly based on: C.H. Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality,* Oxford: Hart Publishing 2014, pp. 105-107.
130. UNHCR Handbook 1992, para. 28; A. Grahl-Madsen, *The Status of Refugees in International Law.* Volume I, Leiden: Sijthoff 1966, pp. 340-341; J. Hathaway, *The Rights Of Refugees Under International Law,* Cambridge: CUP 2005, pp. 158-159; T.P. Spijkerboer & B.P. Vermeulen, *Vluchtelingenrecht*, Nijmegen: Ars Aequi 2005, p. 70; G. Stenberg, *Non-Expulsion and Non-Refoulement. The prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, Uppsala: Iustus Förlag 1989, p. 124.
131. H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff Publishers 2006, pp. 493-494; J. Hathaway, *The Rights Of Refugees Under International Law,* Cambridge: CUP 2005, pp. 156-157.

same as nationals,[132] most favoured aliens[133] or 'aliens generally',[134] while other Articles lay down absolute rights for refugees.[135] Whereas the 'aliens generally' standard does not provide much extra protection for refugees, and therefore met the concern of some states that they would have to treat refugees on a par with the citizens of special partner states,[136] the other standards set in the Refugee Convention provide a higher level of protection for refugees.

Secondly, these provisions apply different qualifying conditions. Essentially, the Refugee Convention designates four main categories of refugees for enjoying rights: refugees present in the territory, refugees lawfully in the territory, refugees residing in the territory and refugees lawfully staying in the territory.[137] Refugees who are simply present in the territory,[138] regardless of their legal status, are entitled to certain basic rights, including the right to acquire movable and immovable property,[139] the right to have free access to the courts of law in the territory[140] and the right to identity papers.[141] Refugees who are not merely physically, but also *lawfully* present in the territory are entitled to additional rights with regard to self-employment,[142] freedom of movement[143] and protection against expulsion.[144] Some provisions in the Refugee Convention confer rights on refugees who are *(habitually) residing* in a contracting party. These concern artistic and industrial property rights,[145] access to legal assistance[146] and administrative assistance.[147] Finally, refu-

132. For example, the right to public relief and assistance (Art. 23) and the right to social security (Art. 24).
133. For example, the right to engage in wage-earning employment (Art. 17).
134. For example, the right to self-employment (Art. 18) and the right to housing (Art. 21).
135. For example, the right to have free access to the courts of law (Art. 16) and the right to administrative assistance (Art. 25).
136. J. Hathaway, *The Rights Of Refugees Under International Law,* Cambridge: CUP 2005, p. 197.
137. For an analysis of the meaning of these different qualifying conditions, see: C.H. Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality,* Oxford: Hart Publishing 2014, pp. 109-132.
138. It is important to note that some Articles of the Refugee Convention refer to refugees without further qualification (e.g. Art. 3 on non-discrimination; Art. 16(1) on access to courts; Art. 20 on rationing systems; Art. 22(1) on elementary education; Art. 33 on the prohibition of refoulement), while others refer to refugees in the territory (e.g. Art. 4 on freedom of religion and Art. 27 on identity papers). However, as Grahl-Madsen observes, the Refugee Convention applies to refugees within the territorial jurisdiction of contracting states and most Articles formally applicable to 'all refugees' are 'meaningful only when applied to the relation between a refugee and the country in which he finds himself' (A. Grahl-Madsen, *The Status of Refugees in International Law. Volume II. Asylum, Entry and Sojourn,* Leiden: Sijthoff 1972, pp. 358-359). It is generally accepted that the rights laid down in the Refugee Convention for refugees in the territory, such as the prohibition of refoulement, also apply to refugees who apply for protection at the territorial border (see J. Hathaway, *The Rights Of Refugees Under International Law*, Cambridge: CUP 2005, p. 315; T.P. Spijkerboer & B.P. Vermeulen, *Vluchtelingenrecht*, Nijmegen: Ars Aequi 2005, pp. 71-72 with further references).
139. Art. 13 Refugee Convention.
140. Art. 16(1) Refugee Convention.
141. Art. 27 Refugee Convention.
142. Art. 18 Refugee Convention.
143. Art. 26 Refugee Convention.
144. Art. 32 Refugee Convention. Protection against expulsion should be distinguished from the prohibition of refoulement laid down in Art. 33 Refugee Convention, to which all refugees are entitled.
145. Art. 14 Refugee Convention.
146. Art. 16(2) and (3) Refugee Convention.
147. Art. 25 Refugee Convention. In addition, two provisions in the Convention confer rights on refugees who have completed *three years' residence* in the country. Under Art. 7(2), all refugees enjoy exemption from legislative reciprocity in the territory of the contracting states after three years' residence. Under Art. 17(2)(a), restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market may not be applied to a refugee who has completed three years' residence in the country.

gees who are *lawfully staying* in the territory of the host state are entitled to a number of important rights, including the right of association,[148] the right to engage in wage-earning employment, the right to public relief and assistance,[149] the right to protection under labour laws and social security[150] and the right to be granted travel documents.[151] Hence, these conditions indicate that refugees are entitled to some basic rights upon arrival and to a wider set of rights if their ties to the host state increase (also referred to as the 'incremental system').[152] As the UNHCR states, 'There does seem to have been a conscious attempt by the drafters to match the character of the various rights in question to the degree of residence required', whereby the latter depends on 'the degree to which the rights in question carry with them financial or social responsibilities or multilateral implications for the granting State'.[153]
As in the agreements of the 1930s, the Convention's inclusion of a common set of rights for refugees made protection in those states party to the Convention more or less similar, and this could facilitate equal distribution of refugees over states.

4.4.2 Rights of refugees under the ECHR

In light of some jurisdictions' growing reliance on Article 3 ECHR instead of the Refugee Convention, as explained above, the rather sophisticated and balanced system of rights laid down in the Refugee Convention does not apply to all persons recognized as being in need of international protection. Migrants whose expulsion is banned on the basis of Article 3 ECHR cannot always rely on the material rights listed in Articles 2-34 of the Refugee Convention. Instead, they fall under the scope of the general human rights laid down in the ECHR; rights not specifically tailored to the special situation of refugees.
Over time, however, ECtHR case law has developed a number of important rights for persons in need of international protection. The Court ruled, for example, that contracting parties act in violation of Article 3 ECHR if they intentionally[154] do not offer any kind of assistance to destitute asylum seekers living on the streets since asylum seekers are a vulnerable population group in need of special protection.[155] With regard to asylum seekers with minor children, the positive obligations on the state extend even further, in the light of their extreme vulnerability.[156] In addition, the Court has ruled that migrants lawfully residing in one of the contracting

148. Art. 15 Refugee Convention.
149. Art. 23 Refugee Convention.
150. Art. 24 Refugee Convention.
151. Art. 28 Refugee Convention.
152. H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff Publishers 2006, p. 449; J. Hathaway, *The Rights Of Refugees Under International Law*, Cambridge: CUP 2005, pp. 154-157; G. Stenberg, *Non-Expulsion and Non-Refoulement. The prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, Uppsala: Iustus Förlag 1989, p. 89.
153. UNHCR, 'Lawfully staying — a note on interpretation', 3 May 1988, p. 5.
154. The ECtHR requires culpable, negligent or intentional behaviour, such as not observing its own domestic and/or EU law obligations while being aware of people living on the streets in violation of these obligations. For more on this issue, see: C.H. Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality,* Oxford: Hart Publishing 2014, pp. 292-300.
155. ECtHR 21 January 2011, 30696/09 (*M.S.S. v Belgium and Greece*).
156. ECtHR 4 November 2014, 29217/12 (*Tarakhel v Switzerland).*

parties should be treated equally with nationals with regard to social security benefits.[157] With regard to access to education, the Court has held that, under certain circumstances, even migrants without a legal residence status cannot be treated differently from nationals.[158] While with regard to access to housing, the Court generally leaves contracting parties a large margin of appreciation for making distinctions based on migration status, this margin is much narrower if refugees or migrants in need of international protection are involved.[159]
Hence, it is possible to discern in the case law of the Court, as developed over time, a catalogue of rights for migrants who fled persecution that is quite similar to the catalogue laid down in the Refugee Convention. Some rights accrue specifically to refugees on the basis of their vulnerability, whereas other rights accruing to refugees, such as social security benefits, are relative to the rights of nationals. In the case of some rights, the Court also attaches weight to the legality of the residence, whereas this seems to be less relevant in the case of other rights. This catalogue is less sophisticated, however, than that laid down in the Refugee Convention, as it is developed on the basis of individual cases and specific circumstances. This makes it hard to base general claims on it. In addition, there is as yet no case law on all the rights laid down in the Refugee Convention.

4.5 Location of international protection

The Refugee Convention only very partially settled the issue of distribution of refugees. As observed above, by not sticking to a very narrow refugee definition, the Convention in a way facilitated migration of refugees: the broader definition entailed broader obligations for non-European states (see section 4.3.1). However, while states can resettle refugees present in other states if they choose to do so, even the beginning of a duty to do so is absent in the Convention. The Preamble merely observes that the granting of asylum may place 'unduly heavy burdens on certain countries' and calls for 'international cooperation'. The provision coming closest to a rights to asylum is Article 33:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This implies that if purported refugees reach the border of a signatory state, their presence and stay must be accepted provisionally, and the entitlements summed up in the Convention enter into play. To this extent, the Convention contains a sort of hidden right to asylum. But it is a qualified right: the state remains free to expel refugees to any territories where their life and freedom are not endangered. And the right to asylum itself, a claim to legal residence, is also absent.

157. ECtHR 16 September 1996, 17371/90 (*Gaygusuz v Austria*), ECtHR 30 September 2003, 40892 (*Koua Poirrez v France*), etc.
158. ECtHR 28 November 2011, 5335/05 (*Ponomaryovi v Bulgaria*).
159. ECtHR 27 September 2011, 56328/07 (*Bah v UK*), para. 47. In those cases, there is no element of choice involved in the migration status and it can be argued on the basis of this case, *a contrario,* that very weighty reasons are required for making a distinction on the basis of immigration status.

Article 33 furthermore implies that refugees can claim protection only from the state whose territory they manage to reach. As the claim to protection is conditional on a link to the territory, one way to prevent this claim from being made is simply to prevent territorial contact. As discussed in section 2, the EU has tried to do exactly this by making it virtually impossible for refugees to enter the EU legally, by requiring transport companies to control travellers' possession of visas and by cooperating with neighbouring states. These 'deflection policies' seek to bypass the international framework of refugee protection that has been in place since 1951. Indeed, European states have sought artificially to create for themselves the same position as the US and Canada had in 1951 vis-à-vis refugees from Europe. As we outlined, European states' wish to have those countries take refugees merely led to a call for cooperation with unduly burdened countries. Unlike the US and Canada since 1951, however, European countries do not use any substantial quotas for resettling refugees.[160]
We may also observe that although deflection policies do not breach international law as it currently stands,[161] they are grossly inconsistent with it. European states are willing to keep refugees in third countries they do not consider safe for the purpose of the prohibition of refoulement.
Deflection policies may also take the form of returning refugees to states they travelled through on their way to Europe. Since the mid-1970s, states started to view such onward migration as irregular and developed policies to return people to those third countries. Formalization of the principle of the country of first asylum as a ground for rejecting an asylum claim started in the Netherlands in 1977, with the introduction of the notion that asylum could be refused if applicants had enjoyed sufficient protection in another country, or could have enjoyed it had they applied for it.[162] The concept gained currency in Germany in the same period.[163]
Indicative is the development of the concept in the UN context, with the text of a failed convention of asylum ending up in a Conclusion of the Executive Committee of UNHCR from 1979:

> 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. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.[164]

As indicated above in section 4.2, one of the strategies of the pre-war arrangements on refugees was to encourage and facilitate onward migration to other states. One of the drafts of the Refugee Convention also contained a provision stipulating that the state parties 'shall to the fullest possible extent relieve the burden assumed by initial reception countries […]. They shall do so, *inter alia*, by agreeing to receive a

160. To what extent the EU-Turkey agreement of March 2016 implies significant resettlement remains to be seen.
161. To be precise, as discussed below, the prohibition of refoulement under Art. 3 ECHR has stretched state responsibility somewhat beyond the state borders.
162. K. Zwaan, *Veilig derde land* (diss. KUN), Nijmegen: GNI 2003, pp. 93-95.
163. K. Zwaan, *Veilig derde land* (diss. KUN), Nijmegen: GNI 2003, pp. 201-205; Reinhard Marx: 'Asylrecht', Vol. Asylrecht. 2: *Rechtsprechungssammlung mit Erläuterungen*, edn. 5, Baden-Baden: Nomos Verlagsgesellschaft, 1991, pp. 163-200.
164. ExCom Conclusion 15 (XXX) 1979, (h)(ii).

certain number of refugees in their territory.'[165] This provision was dropped because the concept of 'initial reception country' was considered too vague.[166] One of the representatives suggested a distinction between 'first asylum countries in Europe', 'second asylum countries in Europe' and 'final resettlement countries overseas'.[167] Although this distinction was not adopted by other representatives, a similar state of mind is expressed in the comment by another representative that refugees could acquire rights only in the final resettlement country, and not in the country of first asylum.[168]

This makes it clear that, also for the Refugee Convention, one of the main aims in the initial days was international cooperation in order to alleviate the burden of the countries of first asylum. The primary way of doing this was by resettling refugees overseas, i.e. outside Europe. This means that the core idea of the Refugee Convention was *not* that countries in the region should have an obligation to bear the burden of refugees or that refugees have an obligation to stay in countries in the region.

Nevertheless, Article 31 of the Refugee Convention contains a kernel of the idea that refugees do have to stay in the country of first asylum. It states that states shall not impose penalties on account of illegal entry or presence on refugees, provided that refugees (1) have presented themselves without delay to the authorities; (2) show good cause for their illegal entry or presence; and (3) come 'directly from a territory where their life or freedom was threatened' in the sense of the refugee definition. The representatives drafting the Convention wanted to exempt refugees from criminal sanctions for seeking asylum. However, if a refugee had found asylum in one country, they wanted to make it possible to impose criminal sanctions if that person entered another country without the required formalities.[169] The then UN High Commissioner for Refugees, Gerrit Jan van Heuven Goedhart, had been a resistance journalist in Nazi-occupied territory and had travelled illegally to London, where he became Minister of Justice in the Dutch government in exile. The summary record of the fourteenth session of the Conference of Plenipotentiaries, which fixed the final convention text, holds about his statement on Article 31:

> There were two main categories of refugee. First, there were refugees who, after leaving one country of persecution, arrived in another country where they might possibly remain unmolested for a certain period, but would then again be in danger of persecution. If, as a result, they moved on again and reached a country of true asylum, it might be claimed that they had not come direct from their country of origin. For example, in 1944, he had himself left the Netherlands on account of persecution and had hidden in Belgium for five days. As he had run the risk of further persecution in that country, he had been helped by the resistance movement to cross into France. From France he had gone on into Spain, and thence to Gibraltar. Thus, before reaching Gibraltar, he had traversed several countries in each of which the threat of persecution had existed. He

165. E/AC.32/2, p. 22.
166. E/AC.32/SR.7, p. 11.
167. E/AC.32/L.40, p. 12.
168. E/AC.32/SR.7, p. 12.
169. A/CONF.2/62.

> considered that it would be very unfortunate if a refugee in similar circumstances was penalized for not having proceeded direct to the country of asylum. […].
>
> Secondly, there were refugees who fled from a country of persecution direct to a country of asylum; they might not, however, be granted the right to settle there, even though the country in question was a contracting State. Thus a refugee might suffer if he arrived in a country which did not display a generous attitude. Such refugees might possibly be covered if the words 'and shows good cause' were amended to read 'or shows other good causes'. The fact that a refugee had fled from a country of persecution in itself constituted good cause for his entry into or presence in the country of asylum.[170]

Although one might argue that Article 31 is merely about criminal sanctions, it seems appropriate to acknowledge that the underlying notion is that refugees do not need to (and therefore should not) engage in irregular border crossing if they have found asylum. Van Heuven Goedhart's statement is interesting because it shows that some drafters themselves identified strongly with refugees, not out of sympathy or altruism, but because they knew what it was to be one. Van Heuven Goedhart does not focus on the question of which country was safe for him (Spain might have been, but was not discussed in this context), but instead on the aim of his trip, which was to liaise with the Dutch government in exile in London. The second part of his statement is directly relevant to the country of first asylum. Van Heuven Goedhart distinguishes between two kinds of countries: on the one hand a country where the refugee has been granted the right to settle, and on the other hand a state that is party to the Convention, but where the refugee has not been granted the right to settle; in other words a country that does not display a generous attitude. Van Heuven Goedhart is of the opinion that a refugee has good cause to leave the second kind of country in an irregular manner.

It is unclear to what extent the drafters of the Convention intended to incorporate Van Heuven Goedhart's view; and even if that were clear, the drafting history of a convention that is more than half a century old is precisely that: history. The point here is to indicate that the drafters of the Convention did not work with the idea that refugees had to stay in the country of first asylum or in the region, but found that refugees could have good cause to travel further or to apply for resettlement in another country. One of the ideas was that refugees had to be taken out of Europe (which was the region from which the refugees of concern to the drafters originated) and that states were supposed to make this possible. This is the presumption underlying Article 31, whereby either countries of first asylum will grant the right to settle, or other states will resettle the refugees. For that reason, it is not necessary for refugees to cross borders in an irregular manner; if, therefore, they do so, they may be subjected to criminal sanctions.

The question remains as to whether states can refuse refugees a right to enter and reside in their territory on the basis that they had or could have had protection in the first country of asylum. There is no clear framework in the Refugee Convention

170. A/CONF.2/SR.14, p. 5.

or other instruments of international law on this issue. As we saw above, Article 33 Refugee Convention and other provisions forbid expulsion to territories where the refugee fears persecution or torture, but they are silent on the question of expulsion to other states.[171]

Some requirements have nevertheless been developed in state practice and ECtHR case law.[172] Obviously a country may only be regarded as safe if there is no risk of persecution or other form of harm in that country. Furthermore, a country cannot be safe if there is a risk of chain refoulement to the country of origin, that is, if there is a risk that that country will send the asylum seeker back to the country of origin. Therefore, the asylum seeker must have the opportunity to request and receive protection in the third country. If a country is party to the ECHR and a member state of the EU, it may be assumed to be safe. Hence expulsion to such a country is in principle allowed. But, as also indicated in section 3.2, this presumption of safety can be rebutted. Since 2011, expulsions to Greece have been prohibited as the asylum procedures and reception conditions in that state are so poor that asylum seekers run a real risk of suffering inhuman or degrading treatment in that country.[173] In order to assume that a country is safe, it is not sufficient that it is party to the ECHR or even the Refugee Convention. A good track record on human rights and reception of refugees may still serve as proof that such a country is safe. However, the onus of proving the third country's safety lies with the state that wishes to expel an asylum seeker to it.[174] It will be hard for a European state to demonstrate that a country is safe if that country has not ratified the Refugee Convention or does not apply it correctly.

Apart from the safety of a third country, the level of residential rights provided to refugees is also relevant. As we saw, most of the entitlements for refugees laid down in the Convention should be provided on the same level as provided to nationals or other foreigners, and are not defined by fixed standards of living. A standard of living in the third country below that in the European state is therefore not an argument against reallocation. In general, this is also true with regard to Article 3 ECHR. The ECtHR has developed two different tests for deciding whether expulsion to dire humanitarian living conditions breaches Article 3 ECHR. If the poor humanitarian circumstances in the country of origin emanate from 'natural causes', such as illness, lack of sufficient resources, poverty or drought, expulsion will violate Article 3 only very exceptionally and on the basis of compelling grounds,[175] which is a very high threshold. If, however, the authorities in the country of origin can be held responsible for the poor conditions through intentional acts or omissions,[176] the general test will apply. Expulsion will in that case

171. Art. 32 Refugee Convention provides protection against expulsion to other states, but this Article only applies to refugees who are lawfully present on the territory.
172. ECtHR 23 February 2012, 27765/09 (*Hirsi Jamaa v Italy*) and ECtHR 22 September 2009, 30471/08 (*Abdolkhani and Karimnia*).
173. ECtHR 21 January 2011, 30696/09 (*M.S.S. v Greece and Belgium*).
174. See *inter alia* the cases mentioned in footnote 172.
175. ECtHR 27 May 2008, 26565/05 (*N v United Kingdom*).
176. This was established by the Court in the case of *Sufi and Elmi* (ECtHR 28 June 2011, 8319/07 and 11449/07). In this case, the Court concluded that the conditions in camps for refugees and internally displaced persons in Somalia were sufficiently dire as to amount to treatment reaching the threshold of Art. 3. The Court applied the regular test since it established that the poor living conditions in the camps emanated from the situation of general violence in Somalia, which was due to direct and indirect actions of the parties to the conflict. In addition, the Court attached considerable

violate Article 3 if the person concerned is unable to meet his most basic needs and if there is no prospect of the situation improving within a reasonable timeframe.[177]

In summary, the Refugee Convention secures protection for those who manage to reach its territory. Although resettlement was conceived of by the drafters as a solution for overburdened states, the Convention does not lay down any clear obligations in this regard, merely a Preamble recital hinting at the desirability of resettlement. At the same time, the Convention expresses, in Article 31, the notion that refugees finding asylum in one country should not migrate further. The instrument leaves open the possibility of sending asylum seekers to a first country of asylum or to another third country. Such third country must, however, meet a number of conditions: the refugee should not be threatened with inhuman treatment, nor with expulsion to the country of origin and should not be excluded from social rights that are granted to nationals of that country.

4.6 Conclusion

The Refugee Convention continues the approach to the refugee issue adopted in the arrangements of the 1930s in that it lays down entitlements for refugees vis-à-vis the states where they seek refuge. However, it contains two important innovations compared with the pre-war instruments. The first is a general definition of refugees, which proved to be sufficiently flexible to encompass new groups that had not been conceived of by the drafters. One example is those persecuted for belonging to the particular social group of LGBT[178] — in 1951, numerous signatory states themselves still prosecuted homosexuals. This ability to encompass new groups was enhanced by the 1967 New York Protocol Relating to the Status of Refugees. So the Refugee Convention embodies a rough consensus on *who* is to be protected as a refugee.

But it seems hard if not impossible to include people fleeing certain types of risk of severe suffering, like victims of indiscriminate violence.[179] In accordance with the recommendation in the final act to extend refugee protection to people other than those defined in Article 1,[180] it seems that, until the end of the 1980s, most European states applied an extended version of the refugee definition under do-

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weight to the fact that the situation had been greatly exacerbated by Al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control (para. 282).

177. The distinction between the regular test and the exceptional test was confirmed by the Court in ECtHR 29 January 2013, 60367/10 (*SHH v United Kingdom*).

178. As early as 1981 by the Dutch Judicial Division of the Council of State (13 August 1981, *Rechtspraak Vreemdelingenrecht* 1981, 5). For an overview see T. Spijkerboer (ed.), *Fleeing Homophobia. Sexual orientation, gender identity and asylum*, Routledge 2013.

179. On the initiative of the Organization of African Unity a convention was adopted in 1969 that extended the refugee definition to persons who had to flee 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order'. Likewise, the Cartagena Declaration urged the member states of the Organization of American States to extend refugee protection to persons who fled 'because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'. European states never signed a treaty extending refugee protection in this way.

180. Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UNTS 360, 117.

mestic law, hence including people who had fled war.[181] And the prohibition of refoulement as identified and developed in ECtHR case law since 1989 has finally filled this gap as far as expulsion is concerned.

The second important innovation was the introduction of Article 33 Refugee Convention, the prohibition of refoulement. Nowadays this is generally regarded as the cornerstone of refugee protection: it serves to secure that people will not be sent back to persecution. But in the absence of a system of resettlement, it also ensures that asylum remains territorial. Indeed, the Convention hardly marked any change from the approach — burden-sharing by facilitating onward migration — adopted before the Second World War. Instead it simply laid down conditions for burden-sharing by stating a common refugee definition and defining common standards of treatment. Indeed the limitation of states' obligations towards refugees in their territories is the main obstacle in international law to solving the issue of *where* refugees are entitled to asylum. This significant protection gap has remained by and large unresolved until this day.

Finally, we may observe the sophisticated manner in which the Convention seeks to balance the interests of refugees and those of receiving states. The refugee definition contains several elements that can be interpreted more broadly or more narrowly. It limits protection to risk of future harm, hence offering the possibility to cease protection once this is no longer needed. It also takes account of states' public order concerns by allowing an exception to the prohibition of refoulement in Article 33(2).[182] A similar sophistication can be perceived in *what* refugees are entitled to. Although all refugees are entitled to basic rights, numerous rights apply only after the refugee has settled in the host state, and states that need or wish to withhold certain entitlements from aliens in general need not grant them to refugees. The Convention thus offers quite some room for manoeuvre to states facing a growing influx of refugees, while, on the other hand, it grants a wide catalogue of rights to refugees, sometimes wider than the protection they derive from general human rights law.

As explained in section 4.4.2, one of the other protection gaps left by the Convention — the social and other residential rights of people fleeing war or other forms of indiscriminate violence — has been partially closed by the ECtHR on the basis of Article 3 ECHR. This issue has since been resolved more comprehensively by the EU Qualification Directive. The Qualification Directive lays down provisions for the substance of international protection. It contains a catalogue of rights that is fairly similar to the one laid down in the Refugee Convention, but this list does not apply only to persons with refugee status, but also to persons with subsidiary protection status. The latter status applies to people whose expulsion is prohibited under Article 3 ECHR, such as those fleeing war. With a few exceptions, therefore, the Qualification Directive in fact provides an extended refugee definition, as called

181. T. Spijkerboer, 'Full Circle? The personal scope of international protection in the Geneva Convention and the Draft Directive on qualification', in: C. Dias Urbano Sousa & P. De Bruycker (eds.), *The emergence of a European asylum policy*, Brussels: Bruylant 2004, pp. 167-181; G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, Oxford: OUP 2007, p. 287.

182. Art. 33(2) Refugee Convention: The benefit of the present provision may not, however, 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.

for in the Final Act of the Conference of Plenipotentiaries for the Refugee Convention in 1951.

Chapter 5

Lessons from Lake Success

What is experienced as the European refugee crisis is a crisis of European asylum and migration law and policy. European refugee and migration law turned the displacement of Syrians into a crisis externally, by prohibiting refugees from travelling legally to the EU, by cooperating with neighbouring countries in order to contain them and by refusing to make a contribution sufficient for an even remotely viable alternative in countries in the region. And internally, by setting up the Dublin system which leads to unfair allocation of asylum seekers in Europe, and which presumes a level of harmonization of asylum law which has not materialized. Rather than addressing these causes, the European Migration Agenda and the EU-Turkey agreement consist of more of the same deflection policies that have backfired so dramatically in recent years.

The same conclusion applies for distribution of asylum seekers over the member states: the hotspot approach is based on transfer of asylum seekers regardless of their will and regardless of the will of the member states, thus repeating the flaws of the Dublin system. This approach does not address the root cause of the problem: the enormous difference between *what*, say, Germany offers refugees as opposed to Bulgaria, and the enormous difference between *who* is protected in, say, Sweden as compared to France.

As to *who* is entitled to protection in Europe, the response has brought only one innovation. Under the EU-Turkey agreement, Syrians fleeing the civil war are granted entry in Turkey, whereas others travelling through Turkey, such as Afghans, who may well better fit the classical refugee concept of political persecution, are denied access. Ironically, therefore, the response to the refugee crisis of 2015 reflected a shift as to who should primarily be protected. Whereas the drafters of the 1951 Convention sought to exclude refugees from civil wars through the geographical limitation and focused on political persecution in the Communist bloc, civil war refugees now seem to be privileged over politically persecuted refugees.

As discussed in section 4, the Refugee Convention of 1951 was the outcome of a balancing of the interests of the individual and of the host state. In an implicit manner, it also balanced the interests of those states harbouring many refugees and those harbouring few. As to the personal scope of protection, the balancing act in the Refugee Convention resulted in a definition that was sufficiently broad to encompass many existing types of refugees (including new types) but that did not include people fleeing indiscriminate violence. In addition, people fleeing discriminate, but large-scale violence (as in civil wars) were excluded via the geographical limitation. The balancing act as regards rights resulted in a relatively finely tuned system that distinguished between refugees with greater or lesser ties with the country of refuge, and allowed states to differentiate as regards the level of treatment.

Notwithstanding the flaws and gaps identified in section 4, however, we should appreciate the fact that the drafters of the Refugee Convention managed to design

an instrument that addressed all the major issues — who, what and where — coherently and to a considerable extent. And this instrument has proved capable of offering solutions to refugee crises for the past 65 years. This is in stark contrast to the Common European Asylum System which succumbed when confronted with the first challenge in its existence. The Refugee Convention was least successful on the issue of where. It did not establish a system for burden sharing. The claim for protection is based on contact with the territory of the country of refuge. While this represented a step forward compared to the situation in the 1930s (when even contact with the territory was considered insufficient for activating non-refoulement), countries further away remained free to accept as many or as few refugees as they wanted. By closing their borders and risking a systemic violation of the prohibition of refoulement, European states risk doing away with even the limited achievement of the Convention on that point.

Could Europe repeat the feat of the drafters of the Refugee Convention? Arguably, crucial for Lake Success was the composition of the drafting committee. This contained representatives of the states that were most burdened by refugees, such as France and Belgium, as well as states such as the US and Canada, which, due to their geographical distance, had remained largely unaffected, and countries in-between, such as the United Kingdom. The only states not represented were the countries the neo-refugees came from — the Soviet Union and its allies. And despite all the differences in interests and preferences, the drafters created a compromise that all the parties could more or less live with. If Europe is to resolve the current crisis of its refugee law, it should therefore start by sitting down to discuss solutions with unaffected states, such as the US, most affected states — specifically Lebanon, Turkey and Jordan — and medium affected states such as the European states themselves. They should meet on equal footing so as to coherently address the core issues of who, what and where. It should also be kept in mind that it took a few years to draft the Convention, which runs contrary to the spectacle driven European summits where debates continuing over dinner are already seen as taking a lot of time. Such multilateral, open[183] and calm, time-consuming deliberations at a global level will not be helpful to tame today's popular unrest, win tomorrow's elections or to contain diphtheria in refugee camps in Greece. But they are absolutely necessary if Europe is to be better prepared for the next time a number of refugees seek asylum on its territory.

183. The meetings of the drafters of the Convention were public and the records are available, although sometimes emotions ran high: some passages had to be deleted from the minutes. See for example: 'An exchange took place at this point between Mr. Rochefort (France) and Mr. Herment (Belgium). They agreed, with the PRESIDENT'S consent, that it should not be reported in the summary records of the meeting', A/CONF.2/SR.20, p. 11.

Rede voorzitter Christen Juristen Vereniging

Inclusie

Prof. mr. S.E. Zijlstra

Haarlem, 27 mei 2016

In de jaren zeventig van de vorige eeuw, toen ik mij er bewust van werd dat er zoiets was als politiek, was een hot issue of sprake was van een zogeheten tweedeling in de samenleving, dan wel dat dit stond te gebeuren. Een tweedeling tussen de *haves* en de *have nots*, tussen kansarmen en kansrijken. Als we terugkijken, moeten we misschien wel zeggen dat Nederland nooit dichter bij een egalitaire samenleving is geweest dan toen. Dat is nu anders: die door velen gevreesde tweedeling heeft zich voltrokken of is zich aan het voltrekken. Wees gerust, verwacht van mij geen Thomas Piketty-achtige boodschap. Het gaat mij niet — althans niet in deze rede — om een eerlijke verdeling van rijkdom en welvaart. De jaarrede van uw voorzitter is niet bedoeld als zendtijd voor politieke partijen. Mij gaat het om de verdeling van *kansen:* kansen op welvaart en welzijn, om het zo maar eens samen te vatten. Zowel de sociaal-democratie als de christen-democratie als het liberalisme bepleiten, althans in ieder geval op papier, dat mensen gelijke kansen moeten hebben. Wat die politieke stromingen verdeeld houdt is hoe het zit als mensen die kansen om de een of andere reden niet benutten: wie daaraan schuldig is, en wat de consequentie van de beantwoording van die schuldvraag moet zijn. Ook kijken zij verschillend aan tegen de vraag wie ervoor moet zorgen dat iedereen gelijke kansen heeft: de overheid, de samenleving, of allebei. Mijn standpunt hierover is overigens dat het primair de samenleving is die moet zorgen dat publieke belangen, dus ook dit belang, tot verwerkelijking komen, maar dat de overheid bij tekortschieten van die samenleving een eigen verantwoordelijkheid heeft en die ook moet nemen. Ik heb dat standpunt uitgewerkt in mijn bewerking, samen met Raymond Schlössels, van het handboek *Bestuursrecht in de sociale rechtsstaat* van wijlen onze formidabele verenigingsgenoot Pieter de Haan en zijn medeauteurs Thijs Drupsteen en Roel Fernhout.
De tweedeling waarover ik sprak, de tweedeling in kansrijken en kanslozen, is zich als gezegd naar mijn waarneming in onze samenleving op dit moment aan het voltrekken.
Uit onderzoek van de Onderwijsinspectie[1] is recentelijk gebleken dat de kansen op een hoge opleiding sterk gerelateerd zijn aan de vraag of de ouders ook een hoge opleiding hebben genoten: hoe hoger de opleiding van de ouders, hoe groter de kans dat de kinderen een hoge opleiding zullen volgen. Daarbij speelt een veelheid van factoren een rol. Erfelijkheid, bijvoorbeeld. Maar ook dat ouders die zelf een academische studie hebben gevolgd, er vaker van uitgaan dat hun kind daarvoor ook de capaciteit zal hebben, en er alles aan doen om die verwachting te

1. Onderwijsinspectie, *De Staat van het Onderwijs*, april 2016.

zien uitkomen. Ook docenten gaan vaak uit van dergelijke verwachtingen. Wie in educatief opzicht voor een dubbeltje geboren is, wordt kennelijk geen kwartje. Een andere factor is de segregatie in het onderwijs. Kinderen die wel de capaciteit hebben om een academische studie te volgen maar op een school zitten waar dat niet de cultuur is, zien hun kansen op zo'n studie drastisch slinken in vergelijking met kinderen op scholen waar studeren wél de cultuur is.
Als ik het heb over segregatie, is dat natuurlijk een verwijzing naar het probleem van de witte en de zwarte scholen. Want de tweedeling van kansrijk en kansarm loopt in belangrijke mate ook langs de lijn tussen autochtoon en allochtoon. Ik citeer uit het eerdergenoemde rapport van de Onderwijsinspectie: 'Zowel in het basisonderwijs als in het voortgezet onderwijs zijn de prestaties van allochtone leerlingen lager dan die van autochtone leerlingen. En van de studenten met een niet-westerse achtergrond studeerde (in 2014) 16 procent minder af dan van de van oorsprong Nederlandse studenten. Deze verschillen zijn groter dan in andere landen.'[2] 'Er stromen bijvoorbeeld veel minder leerlingen uit kansarme (apc-)gebieden door naar het hbo dan leerlingen uit niet-kansarme gebieden. Met name de tweede generatie niet-westerse allochtone leerlingen stroomt minder vaak dan voorheen door naar het hoger onderwijs.'[3]
Maar hoe zit het als ze wél een onderwijsdiploma op zak hebben? Hoe staat het dán met hun kansen op de arbeidsmarkt? Opnieuw de Onderwijsinspectie: 'Opvallend is dat herkomst een belangrijke rol speelt voor het wel of niet hebben van een baan. Voor alle onderwijssectoren geldt dat autochtone schoolverlaters in het studiejaar 2012/2013 vaker direct een baan vinden dan westerse en niet-westerse allochtonen.'[4] Cijfers van Eurostat en de OESO uit 2015 lieten zien dat van de autochtone beroepsbevolking in Nederland op dat moment 77,1% betaald werk had, terwijl dat bij de allochtonen nog niet de helft (49,5%) was. Dit verschil van 27,6% is het op een na hoogste van Europa […]. In een vergelijkbare ranglijst over arbeidsparticipatie van de OESO met iets andere definities, is de kloof tussen buitenlanders en autochtonen in Nederland zelfs het grootst van alle OESO-leden. Meer niet-westerse allochtonen dan ooit zaten op dat moment in de bijstand: 234.000, 41.000 meer dan autochtonen. Eén op de 7 niet-westerse allochtonen tussen de 15 en 65 jaar had een bijstandsuitkering, onder autochtonen is dat één op de 44.[5]
Voor deze situatie zijn tal van oorzaken aan te voeren. Ook uit onderzoek blijkt dat het niet zelden gaat om regelrechte discriminatie. Ook onze premier erkent [ik citeer] 'dat het in Nederland nog veel voorkomt en het echt uitmaakt of je Mohammed of Jan heet als je solliciteert'. Maar hij zei dit probleem niet te kunnen oplossen. 'De paradox is [volgens Rutte] dat de oplossing bij Mohammed ligt. Nieuwkomers hebben zich altijd moeten aanpassen, en altijd te maken gehad met vooroordelen en discriminatie. Je moet je invechten.' [einde citaat][6] Volgens mij kan de inzet van wat undercoveragenten in combinatie met vervolging wegens schending van artikel 137g of 429quater van het Wetboek van Strafrecht hier ook geweldig werk doen, maar dat even terzijde. U weet van mijn jaarrede van vorig jaar over de bankencrisis dat ik een warm voorstander ben van meer inzetten van het straf-

2. Idem, p. 21.
3. Idem, p. 21.
4. Idem, p. 18.
5. *De Volkskrant* 21 maart 2015.
6. Idem.

recht.[7] Wat daar van zij, er zijn ongetwijfeld meer oorzaken aan te wijzen dan alleen discriminatie.
Maar ik wil het met u niet hebben over de onderwijs- en arbeidsmarktsituatie van allochtonen in het algemeen.
Ik beperk mij in het vervolg tot de wereld die ik het best ken, en die mij ook tot het onderwerp van deze rede heeft gebracht, te weten de universitaire wereld, in het bijzonder de rechtenfaculteit aan de Vrije Universiteit (waar de CJV trouwens van oudsher een sterke band mee heeft).
Onze faculteit heeft zoals u weet een relatief groot aantal allochtone studenten. Even tussendoor: de term allochtoon is omstreden, en terecht. Zij stigmatiseert, en gooit mensen met een totaal verschillende achtergrond op één hoop. Ik heb het vooral over Turkse en Marokkaanse Nederlanders. Ook daar generaliseer ik ongetwijfeld verschrikkelijk, maar ik meen toch goede redenen te hebben voor deze keuze.

Als gezegd, de VU heeft veel allochtone rechtenstudenten. Die hebben dus de belemmeringen die de Onderwijsinspectie signaleert weten te overbruggen, en hebben het tot het universitaire onderwijs geschopt. Net als bij autochtonen zitten er goede en minder goede studenten bij, en net als bij autochtonen is er uitval gedurende de studieperiode. Maar er studeren er toch ieder jaar weer een hoop af. Hoe staat het met hún kansen?
Heel algemeen: niet goed. Volgens de cijfers van Eurostat en de OESO zijn in Nederland hoogopgeleide allochtonen veel vaker werkloos dan autochtonen met hetzelfde opleidingsniveau.
Maar we hebben meer specifiek materiaal over juristen. In juni vorig jaar promoveerde Sylvia van der Raad aan de VU op een proefschrift met de titel *Othering and Inclusion of Ethnic Minority Professionals. A Study on Ethnic Diversity Discourses, Practices and Narratives in the Dutch Legal Workplace*.[8]
Haar onderzoek had als vertrekpunt de situatie in 2007. Toen ondertekenden de 26 grootste advocatenkantoren de zogeheten intentieverklaring 'diversiteitsbeleid'. Op dat moment had bijna 12% van de Nederlanders een niet-westerse achtergrond, bij advocatenkantoren was dat nog geen 2%. De kantoren wilden daar iets aan doen, en stelden speciale diversiteitsmanagers of diversiteitscommissies aan, die aan die verklaring invulling moesten geven.
Van der Raad heeft onderzocht wat er van die voornemens terecht is gekomen. De uitkomsten van haar onderzoek zijn duidelijk: het was een mooi streven maar het aantal advocaten uit een minderheidsgroep is nauwelijks toegenomen. Diezelfde conclusie kan overigens worden getrokken met betrekking tot de rechterlijke macht. 'Ondanks inspanningen om diversiteit bevorderende initiatieven te ontplooien blijft het aantal advocaten en rechters met een etnische minderheidsachtergrond verwaarloosbaar laag […]', aldus Van der Raad.[9]
Mijn eigen observaties sluiten bij het voorgaande aan. Ik probeer een beetje te volgen hoe het met mijn studenten gaat; dat doe ik met alle studenten van de VU

7. Zie mijn CJV-jaarrede 2015.
8. Sylvia van der Raad, *Othering and Inclusion of Ethnic Minority Professionals. A Study on Ethnic Diversity Discourses, Practices and Narratives in the Dutch Legal Workplace* (diss. Amsterdam VU), Amsterdam: VU University Press 2016.
9. Van der Raad 2016, p. 347.

omdat ik alumnidecaan ben, maar met de studenten die de afstudeerrichting Staats- en bestuursrecht doen in het bijzonder. Bovendien ben ik actief in tal van netwerken in de rechtspraktijk, dus ik kom mijn oud-studenten regelmatig tegen. Bij de Vereniging voor bestuursrecht, bij de NJV, bij de Vereniging voor wetgeving, bij ministeries, gemeenten, provincies, rechterlijke macht, advocatuur. Ik kom daar ook voortdurend alumni tegen, en het is altijd leuk te volgen hoe het hun vergaat. Vrijwel nooit kom ik daar allochtone alumni tegen. Dat kan toeval zijn, maar ik denk het niet.
Hoe komt dat? Ik heb er geen onderzoek naar gedaan, maar wil u een paar hypothesen voorleggen.

Taalproblemen?

De eerste is het taalprobleem. Zouden het echt in die zin minder kansrijke studenten zijn omdat ze ondanks hun bul te grote taalachterstanden hebben? Dat zou kunnen, maar dat geldt maar voor een deel, terwijl er — opnieuw naar eigen waarneming — voldoende allochtone studenten zijn die beter schrijven en spellen dan studenten die Diepenhorst of Scheltema heten. Dus dat kan nooit de *hele* verklaring zijn.

Discriminatie?

Zoals gezegd wordt er bij sollicitaties flink gediscrimineerd. Als je Mohammed of Tugce heet word je minder snel op gesprek uitgenodigd. Ik denk dat dat hier niet of nauwelijks speelt. Bij de overheid en de advocatuur is men juist op zoek naar diversiteit; zie ook de intentieverklaring 'diversiteitsbeleid' uit 2007 die het startpunt vormde voor het onderzoek van Van der Raad. Al bij de eerste schifting selecteren op naam doen ze volgens mij niet.
Wat is het dan wel?

O.s.m.[10] *-denken bij de werkgevers*

De eerste oorzaak is wat ik maar even noem *O.s.m.-denken bij de werkgevers*. Er is vaak sprake van een sterke cultuur van saamhorigheid bij organisaties, waar zij zeer aan hechten, en waar nieuwe medewerkers dus aan moeten voldoen. Dat sluit mensen uit die niet in dat plaatje passen. Van der Raad over de ervaringen van de diversiteitsmanagers: 'Minderheden werden geassocieerd met "gebrek". Ze gingen ervan uit dat Turks-Nederlandse en Marokkaans-Nederlandse juristen die solliciteerden niet bij een studentenvereniging hadden gezeten en dat ze de taal minder machtig waren. Ook speelden veel negatieve beelden over de islam een rol.'
Van dit punt ben ik redelijk zeker. De rest is speculatie, uitsluitend gebaseerd op indrukken van mijn kant.

10. 'Ons soort mensen'.

Uitsluiting als vicieuze cirkel

De tweede oorzaak duid ik aan als *uitsluiting als vicieuze cirkel.* Dat men er niet tussenkomt blijft bij de allochtone juristen natuurlijk niet onopgemerkt. Het kan zo zijn dat men wel denkt het te kunnen, maar dat men de moeite niet meer neemt omdat 'het toch niet lukt'. Ik heb vanwege mijn grote netwerk heel vaak de mogelijkheid studenten naar stageplekken en zelfs banen te geleiden. Daar krijg ik met name van de allochtone studenten weinig respons op, en als ik vraag waarom, is het antwoord regelmatig dat men denkt toch niet aangenomen te worden. Dan komen we natuurlijk in een vicieuze cirkel terecht.

Cultuurverschillen

Ook culturele verschillen kunnen op tal van manieren relevant zijn. In dat verband is interessant dat bij de jongste alumnibijeenkomst van de faculteit, die goed werd bezocht en dito gewaardeerd, heel weinig allochtone alumni aanwezig waren. Mijn eerste reactie was er een van verbazing: dit is een prima gelegenheid om aan je netwerk te werken, zowel wanneer je nog geen baan hebt als wanneer je vanuit een baan verder wilt kijken. Maar ik realiseerde me dat de opzet van die dag wel erg klassiek was. Had ik nagedacht over de vraag of dat een format is dat iedereen aanspreekt? Of dat type netwerken wel van deze tijd en voor iedereen geschikt is? En zijn er, juist onder degenen die ik natuurlijk ook wil bereiken, niet velen die niet naar bijeenkomsten willen of kunnen waar alcohol wordt geschonken?

Stof tot nadenken, dus. En reden tot actie.

Ik schetste eerder al de algemene situatie van allochtonen als het gaat om kansen op welvaart en welzijn. Die is bedroevend en onacceptabel. Zouden we er al niet uit morele overwegingen of een levensovertuiging iets aan willen doen, dan ten minste uit welbegrepen eigenbelang: een samenleving die bepaalde groepen stelselmatig buitensluit en daarmee het zelfrespect ontneemt, krijgt daar hoe dan ook op een zeker moment de rekening van gepresenteerd.
Uiteindelijk is het steeds een kwestie van iedereen de kans geven zich naar volle capaciteit te ontplooien. Dat gaat niet vanzelf, maar vergt aandacht en inspanning van alle betrokken actoren. Tot die aandacht en inspanning wil ik hier oproepen. De Vrije Universiteit heeft daarbij historisch gezien een bijzondere positie. De VU heeft een belangrijke rol gespeeld in de emancipatie van de gereformeerde kleine luyden. Zij kan die rol als emancipatie-universiteit opnieuw vervullen. Nagedacht moet worden hoe zij haar hele populatie kan bereiken, daarbij rekening houdend met culturele verschillen.
Wij als docenten moeten een scherp oog hebben voor de capaciteiten van onze studenten, en eraan bijdragen dat iedereen, ongeacht afkomst, tot volle verwerkelijking van die capaciteiten kan komen. Naar mijn mening is daarbij vooral een individuele benadering vruchtbaar: zeker in de masterfase is het mogelijk en wenselijk om met iedere student een gesprek te voeren en in kaart te brengen wat diens mogelijkheden, wensen en verwachtingen zijn. Wij kunnen er vervolgens aan bijdragen dat die mogelijkheden ten volle worden benut.

Overigens: van de collega's van belastingrecht begrijp ik dat op hun terrein wel degelijk een groot aantal allochtonen doorstroomt naar selectieve vervolgopleidingen. Het is de moeite waard te onderzoeken waarom het daar wél lukt.
Maar ook van de rechtspraktijk mag een inspanning worden gevraagd. Intentieverklaringen zijn prachtig, maar papier is geduldig. Wie zich aangesproken voelt door mijn betoog en een bijdrage wil leveren door stages of werkplekken, die melde zich.
Ten slotte mag een inspanning van de studenten zelf worden gevraagd. Uiteindelijk komt het er toch op aan de kansen te pakken die zich voordoen. Die verantwoordelijkheid heeft men niet alleen aan zichzelf, maar ook aan de samenleving.

Ik rond af. U zult wellicht denken: dit gaat over VU-rechtenstudenten, toch echt een microcosmos in vergelijking met de positie van allochtonen in de samenleving. Dat is ook zo, maar ik heb er toch voor gekozen dit uit te werken. Als wij kans zien hier een serieuze verbetering te brengen, komen er ieder jaar tientallen succesvolle allochtonen bij, die als rolmodel kunnen fungeren. En ieder mens is er weer één.