



**Must EU Borders Have Doors for Refugees?  
On the Compatibility of Schengen Visas with EU Member States'  
Obligations to Provide International Protection to Refugees**

*Violeta Moreno Lax*

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Université catholique de Louvain  
Faculté de droit  
Centre de philosophie du droit  
Cellule de recherche interdisciplinaire en droits de l'homme  
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***MUST EU BORDERS HAVE DOORS FOR REFUGEES?♦***  
(ON THE COMPATIBILITY OF SCHENGEN VISAS WITH EU MEMBER STATES'  
OBLIGATIONS TO PROVIDE INTERNATIONAL PROTECTION TO REFUGEES)  
by Violeta Moreno Lax\*

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♦ The original statement by Tim Finch, Director of Communications for the UK Refugee Council, on 13 February 2008 was: 'EU borders must have doors for refugees' (available at: [www.refugeecouncil.org.uk/news/press/2008/february/20080213.htm](http://www.refugeecouncil.org.uk/news/press/2008/february/20080213.htm).)

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<sup>1</sup> Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, §31.

<sup>2</sup> *Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to the ECtHR Saadi v Italy judgement.*

## I. INTRODUCTION:

In the course of the last decades, with the closure of borders to legal immigration only family reunification and asylum have been left for those willing to settle in wealthy democracies to enter in a regular fashion.<sup>3</sup> Therefore, the asylum channel appears to be routinely abused. To this misuse there has followed a progressive blurring of the lines between genuine refugees and irregular migrants in public perception. As a result, States of the North tend to distinguish less in their policies between immigration management and refugee<sup>4</sup> protection, the latter becoming subordinated to the imperatives of migration control.<sup>5</sup> This phenomenon becomes particularly visible (and noxious) at the stage of entry.

Currently, in western countries access to international protection has been made dependant 'not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of [the targeted State].'<sup>6</sup> Asylum systems start their functioning only once refugees are considered to have reached State territory. But *physical* access to protection is subordinated to admission according to general immigration laws. Measures of 'remote border control'<sup>7</sup> force refugees to make recourse to illegal means of migration.<sup>8</sup> Visa requirements coupled with carriers' sanctions have been described precisely as 'the most explicit blocking mechanism for asylum flows.'<sup>9</sup> To give univocal answers to all migrants, overlooking the mix character of the flows, neglects indeed refugees' entitlement 'to special protection on account of their position'.<sup>10</sup>

The situation within the EU appears, at first sight, to be no different.<sup>11</sup> Whereas a highly protective Common European Asylum System is being developed in purported compliance<sup>12</sup> with the Geneva Convention 1951,<sup>13</sup> Member States are also displaying growing reluctance to provide unhindered access to it to those in need.<sup>14</sup> The question of *physical* access to

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<sup>3</sup> J-Y Carlier, *La condition des personnes dans l'Union Européenne*, Larquier, 2007, p. 137ff.

<sup>4</sup> Here the notion of *refugee* is to be read widely, as encompassing not only recognised refugees but also asylum-seekers outside the country of their nationality, according to UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva, 1979 (*Handbook* hereinafter), §28: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition.'

<sup>5</sup> J. Van der Klaauw, 'Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?,' in: *Irregular Migration and Human Rights, Theoretical, European and International Perspectives*, Martinus Nijhoff, 2004, p. 116.

<sup>6</sup> UNHCR, 'Brief as Amicus Curiae,' filed 21 December 1992, in *McNary v. Haitian Centers Council Inc.*, US Supreme Court Case No. 92-344, §18.

<sup>7</sup> V. Guiraudon, 'Before the EU Border: Remote Control of the "Huddle Masses",' in: *In Search of Europe's Borders*, Kluwer Law International, 2002.

<sup>8</sup> Amnesty International, 'Spain: The Southern Border,' EUR 41/008/2005, p. 16-18.

<sup>9</sup> J. Morrison and B. Crosland, 'Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy,' UNHCR, *New Issues in Refugee Research*, Working Paper No. 39, 2001, p. 28.

<sup>10</sup> Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation 'D', *International co-operation in the field of asylum and resettlement*, Geneva, 28 July 1951.

<sup>11</sup> House of Lords Select Committee on the European Union, *Proposals for a European Border Guard*, Session 2002-3, 29<sup>th</sup> Report, §13, claiming that EU visa requirement plus carriers' sanctions have 'pushed back' the common external borders to the countries of origin.

<sup>12</sup> Article 63 and 307, EC Treaty and new Article 78, Treaty on the functioning of the Union (Lisbon Treaty). In this connection Article 32(2) VCLT becomes relevant as it rules that: 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'

<sup>13</sup> UN Convention Relating to the Status of Refugees, 1951 (*Geneva Convention* hereinafter). Throughout this study the Convention should be understood as comprising its additional Protocol of 1967 to which all EU Member States have acceded.

<sup>14</sup> See the recently launched EU Border Management Package by the European Commission: 'A comprehensive vision for an integrated European border Management System for the 21<sup>st</sup> Century,' Press Release, IP/08/215, 13 February 2008, available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/215&format=HTML&aged=0&language=EN&guiLanguage=en>. For ECRE's reaction see: [http://www.ecre.org/resources/press\\_releases/1028](http://www.ecre.org/resources/press_releases/1028); for the Refugee Council's position see: <http://www.refugeecouncil.org.uk/news/press/2008/february/20080213.htm>.

protection is ambiguously regulated in EU Law. On the one hand, it seems that entry to the Schengen zone has been designed disregarding refugees' needs. Prior to admission, refugees appear to have been assimilated to the broader class of (potentially illegal) immigrants and thus constrained to submit to general immigration conditions.<sup>15</sup> Refugees appear to be distinguished from the immigrant mass only once the asylum request has been filed<sup>16</sup> or the principle of non-refoulement finds territorial application.<sup>17</sup> On the other hand, some isolated EU Law rules give the impression that refugees should be exonerated, as a matter of legal obligation, from normal admittance requirements.<sup>18</sup> Thus it becomes critical to elucidate whether from Human Rights Law, of which Refugee Law makes part, there ensues an obligation for EU Member States, as a matter of legal duty, to distinguish refugees from other aliens seeking admittance at the frontiers of the EU *Single Protection Area*<sup>19</sup>. In such a case, the second set of EU rules should be furthered in a comprehensive manner.

This study deals precisely with the scrutiny of the EU visa and carrier sanctions' regime pondered against the requirements of the Geneva Convention 1951<sup>20</sup> and related Human Rights' instruments<sup>21</sup> 'in the light of present day conditions.'<sup>22</sup> A contextual,<sup>23</sup> evolutionary<sup>24</sup> and teleological<sup>25</sup> interpretation of the instruments concerned will provide the background to this analysis.

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

<sup>16</sup> 'Asylum seeker shall mean *any alien who has lodged an application for asylum* within the meaning of this Convention and in respect of which a final decision has not yet been taken' (emphasis added) in: Article 1, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ EC of 22 September 2000 (*CISA or Convention Implementing the Schengen Agreement* hereinafter).

<sup>17</sup> *Inter alia*, arguments of the French Government in: Eur. Ct. H. R., *Amuur v France*, Appl. No. 19776/92, 25 June 1996.

<sup>18</sup> Article 5(2), CISA: 'rules [on entry requirements to the territories of the Contracting Parties] shall not preclude the application of special provisions concerning the right of asylum;' entry won't be refused for non-compliance with entry conditions in the Schengen zone if a 'Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations;' Article 4(2) Council Directive 2001/51 on carriers sanctions foresees that Member States shall introduce penalties to carriers bringing illegal immigrants into the Union 'without prejudice to [their] obligations in cases where a third country national seeks international protection.'

<sup>19</sup> This is the expression used by the European Commission to denote the space within which the CEAS deploys its effects: 'Creating a Common European Asylum System as a constituent part of an Area of Freedom, Security and Justice emerged from the idea of making the European Union a *single protection area*, based on the full and inclusive application of the Geneva Convention and on the common humanitarian values shared by all Member States,' in: European Commission, *Green Paper on the Future Common European Asylum System*, COM(2007) 301 final of 06 June 2007, (*Green Paper on Asylum* hereinafter) p.2 (emphasis added).

<sup>20</sup> Articles 31 (principle of non-penalization for illegal entry) and 33 (principle of non-refoulement), Geneva Convention.

<sup>21</sup> Prohibition of ill-treatment (Article 7 ICCPR, Article 1 CAT and Article 3 ECHR) and right to leave any country including ones' own (Article 12 ICCPR and Article 2(2) Protocol 4 ECHR).

<sup>22</sup> Eur. Ct. H. R., *Tyrrer v. UK*, 25 April 1978, Series A, No. 26, §31.

<sup>23</sup> ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1994, p.6.

<sup>24</sup> ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, ICJ Reports 1971, p. 16.

<sup>25</sup> ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p.15.

## II. PRELIMINARY REMARKS ON THE INTERPRETATIVE METHOD APPLIED:

As indicated in the Vienna Convention on the Law of the Treaties,<sup>26</sup> the interpretation of International Law instruments needs to be contextual and purposive, rather than literal only.<sup>27</sup> The interpretation exercise, ‘does not stop when a meaning compatible with the wording is reached: this meaning has to be put against the backdrop of the object and purpose of the treaty concerned.’<sup>28</sup> The International Court of Justice has confirmed this approach, stating that ‘the rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.’<sup>29</sup> Indeed, ‘in accordance to customary international law [...] a treaty must be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms *in their context and in the light of its object and purpose*.’<sup>30</sup>

In addition, reliance on supplementary means of interpretation, as the *Travaux Préparatoires* are,<sup>31</sup> is to be cautious and subordinated to the interpretation according to text, context, object and purpose of the instrument under consideration. In truth, ‘mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the [interpreter] is bound to take into account the fact that the concepts embodied [in the instrument at hand] were *not static, but were by definition evolutionary* [...]. The Parties [to it] must consequently be deemed to have accepted them as such [...]. [The interpreter] must take into consideration the changes which have occurred in the supervening [time], and its interpretation cannot remain unaffected by the subsequent development of the law [...].’<sup>32</sup> The interpretation of any international treaty must thus be dynamic. ‘Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation,’<sup>33</sup> that is, taking account of ‘present day conditions.’<sup>34</sup>

Finally, for the purposes of construing international agreements of humanitarian content, account must be taken of their specific nature. The International Court of Justice first acknowledged the special quality of this type of international agreements in its 1951 Advisory Opinion on *Reservations to the Genocide Convention*. There, it established that ‘the Convention was manifestly adopted for a purely humanitarian and civilising purpose’ and that, therefore, ‘in such a Convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d’être* of the Convention.’<sup>35</sup> There appears to be a wide

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<sup>26</sup> Article 31, Vienna Convention on the Law of Treaties, 1969.

<sup>27</sup> For the opposite view refer, *inter alia*, to A.T. Naumik, ‘International Law and Detention of US Asylum Seekers: Contrasting *Matter of D-J-* with the United Nations Refugee Convention,’ *IJRL*, 2007, Vol. 19, No. 4, p. 674ff: ‘The Vienna Convention adopts the “textual approach”!’

<sup>28</sup> H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers, Leiden / Boston, 2006, p. 16.

<sup>29</sup> ICJ, *Arbitral Award of July 31, 1989*, 12 November 1991, ICJ Reports 1991, p. 53 and pp. 69-72.

<sup>30</sup> ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1991, p. 6 (emphasis added).

<sup>31</sup> Article 32, Vienna Convention on the Law of Treaties, 1969.

<sup>32</sup> ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, 21 June 1971, ICJ Reports 1971, p. 16.

<sup>33</sup> *Ibid.*

<sup>34</sup> Eur. Ct. H. R., *Tyrrer v. UK*, 25 April 1978, Series A, No. 26, §31.

<sup>35</sup> ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p.15, §23. An exception to treaty invalidity rules was accordingly codified in the Vienna Convention on the Law of Treaties. Article 60(5) stipulates that as regards the ‘provisions relating to the protection of the human person contained in treaties of a humanitarian character’ the general rule that a breach of provisions may be invoked by other parties to the treaty as to terminate or suspend its application does not apply.

consensus around the consideration of the Geneva Convention as an international treaty of this kind. The Preamble to the Convention records the recognition by signatory States of ‘the social and humanitarian nature of the problem of refugees.’<sup>36</sup> Subsequently, both the UNHCR Executive Committee and the UN General Assembly in their respective conclusions and resolutions have restated the humanitarian quality of the Convention.<sup>37</sup> This makes it possible to claim that the Geneva Convention pertains to the particular *species* of international treaties of humanitarian content, in the way the International Court of Justice underlines. It is thus to be teleologically interpreted, in accordance with its humanitarian purpose -namely, the provision of international protection for refugees,<sup>38</sup> which constitutes ‘the *raison d’être* of the Convention.’<sup>39</sup>

From this it ensues that a comprehensive interpretation of Human Rights instruments as the Refugee Convention, in accordance with the principle of good faith,<sup>40</sup> needs to be contextual, evolutionary and, pursuant to their humanitarian range, *predominantly* teleological. These are the three interpretative methods used here; applied ‘as an integrated or interdependent whole.’<sup>41</sup>

### III. VISAS AND CARRIERS’ SANCTIONS: INTERCEPTION MEASURES *FOR ALL*?

Although no generally established definition of ‘interception’ exists, it is accepted that the notion commonly denotes ‘measures applied by States outside their national boundaries which prevent, interrupt, or stop the movement of people without the necessary immigration documentation for crossing their borders by land, sea, or air.’<sup>42</sup> Interception may be physical or ‘active’, as it is in the case of interdiction of boats at sea, as well as administrative or ‘passive.’<sup>43</sup> Visa requirements and carriers’ sanctions, as they may thwart embarkation or continuation of journey, constitute examples of passive interception.

Interception practices are not new.<sup>44</sup> The last two centuries have witnessed the formation of the nation-states distinctively rooted in the belief that Statehood comprises the *right* to shape national communities. During that process, frontier management and admission policies have been regarded as key State prerogatives, linked to the interests of national sovereignty.<sup>45</sup> Control over entry, residence and expulsion of aliens was exercised when the circumstances

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<sup>36</sup> Recital 5, Preamble, Geneva Convention.

<sup>37</sup> S. E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement,’ in: *Refugee Protection in International Law - UNHCR Global Consultations on International Protection*, CUP, 2003, p. 106-107 and references therein.

<sup>38</sup> This can be inferred from the object and the purpose of the Convention, as reflected in its preamble. The Geneva Convention, taking account of the fact that ‘the Charter of the United Nations and the Universal Declaration of Human Rights [...] have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ (Recital 1) and that ‘the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms’ (Recital 2), has been adopted to ‘revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement’ (Recital 3) (emphasis added).

<sup>39</sup> ICJ, Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p.15, §23.

<sup>40</sup> Article 26, Vienna Convention on the Law of Treaties, 1969.

<sup>41</sup> This is the interpretation Elias makes as regards the four main elements of Article 31 VCLT, to refuse that a hierarchical criterion, whereby the text would in any manner prime over the context, the object and the purpose of the instrument under consideration, should be applied. Here the same expression is used, as to denote that contextual, dynamic and teleological interpretations are to be undergone as parts of the same interpretative whole. V. T. O. Elias, *The Modern Law of Treaties*, Oceana Publications Leiden/New York, 1974, pp. 74-75.

<sup>42</sup> G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3<sup>rd</sup> Ed., OUP, 2007, p. 371-372.

<sup>43</sup> *Ibid.*

<sup>44</sup> UNHCR, Executive Committee Conclusion No. 97, 2003.

<sup>45</sup> J. Torpey, ‘Coming and Going: On the State Monopolization of the “Legitimate Means of Movement”’, *Sociological Theory*, Vol. 16, No. 3, p. 239-259.

so required.<sup>46</sup> Marrus describes how visas were introduced in the interwar period to control undesired movement at some instances.<sup>47</sup> Even sooner, carriers were sporadically involved in immigration control. Already in the nineteenth century legislation was passed in the USA to restrain shipping companies from transporting ill or immoral passengers. Non-compliance opened the possibility for sanctions being imposed.<sup>48</sup> Today, however, these measures have acquired a new dimension. They have lost their exceptional character to become the *standard* migration policy tool in western democracies.<sup>49</sup>

In Europe, several States have introduced in the past two decades visa requirements for the nationals of countries perceived at risk of illegal immigration. The United Kingdom took the lead, imposing visa to citizens of Turkey and Sri Lanka in unhidden response to increased refugee claims of people originating from those countries.<sup>50</sup> In the 1990s, during the exodus of refugees from the war in ex-Yugoslavia, Benelux countries and Finland introduced visas for Bosnians. To better enforce those requirements, several European States subsequently enacted carriers' liability Acts. Private companies were thus made responsible to make sure that travellers without proper documentation would not be transported inland.<sup>51</sup>

The European Union has followed suit. As mandated by the Convention Implementing the Schengen Agreement (*CISA*),<sup>52</sup> short-term entry visas have been introduced.<sup>53</sup> They share a uniform format,<sup>54</sup> in order to prevent 'counterfeiting and falsification.'<sup>55</sup> The countries whose citizens need to be in possession of a visa when crossing the EU external border have been listed in Council Regulation (EC) No. 539/2001<sup>56</sup> together with the countries whose nationals are exempt from that requirement. Both the so-called 'black list' and 'white list' have been appended to the Regulation in Annex I and II respectively. Explicitly, no protection or persecution considerations have been bore in mind when dressing these lists. The preamble to the Regulation establishes that 'the determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating, *inter alia*, to illegal migration, public

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<sup>46</sup> US Supreme Court, *Chae Chan Ping v. United States*, 130 US 581 (1889).

<sup>47</sup> M. R. Marrus, *The Unwanted: European Refugees in the Twentieth Century*, OUP, 1985.

<sup>48</sup> A. R. Zolberg, 'The Archaeology of 'Remote Control'', in: *Migration Control in the North Atlantic World: the Evolution of State practices in Europe and the US from the French Revolution to the Inter-War Period*, OUP, 2003.

<sup>49</sup> Some authors claim that these practices are new in another sense too; in so far as they are now being used to 'circumvent legal constraints absent in the early twentieth century.' It is claimed that 'these measures aim at preventing unwanted migrants from accessing the system of legal protection and the asylum process, thereby avoiding the domestic and international legal norms that stand in the way of restricting migration flows,' in: V. Guiraudon, *op. cit.*, p. 195.

<sup>50</sup> S. Collison, 'Visa Requirements, Carriers Sanctions, 'Safe Third Countries' and 'Readmission': the Development of an Asylum 'Buffer Zone' in Europe,' *Transactions*, Vol. 21, No.1, 1996, pp. 76-90; see also Simon Brown LJ in *R v. Secretary of State for the Home Department, Ex parte Hoverspeed*, 1999, INLR 591, 594-595: 'it was intended to make it much more difficult for those who want to come to this country, but who have no valid grounds for doing so [...] It is also intended to stop abuse of asylum procedures by preventing people travelling here without valid documents and then claiming asylum before they can be returned.'

<sup>51</sup> S. Scholten, 'Carriers Sanctions: Third Party Involvement in Immigration Control,' paper presented at the annual LSA Conference, Berlin, 2007, p. 3 (on file with author); see also Simon Brown LJ in *R v. Secretary of State for the Home Department, Ex parte Hoverspeed*, 1999, INLR 591, 594-595: 'The logical necessity for carriers' liability to support a visa regime is surely self-evident. Why require visas from certain countries (and in particular those from which most bogus asylum seekers are found to come) unless its nationals can be prevented from reaching our shores? Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime. Without [the Carriers Liability Act] there would be little or no disincentive for carriers to bring them.'

<sup>52</sup> *Supra* n. 16.

<sup>53</sup> Article 10 CISA: 'a uniform visa valid for the entire territory of the Contracting Parties shall be introduced. This visa, [...] may be issued for visits not exceeding three months.'

<sup>54</sup> Council Regulation (EC) No. 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164/1 of 14 July 1995, amended by Council Regulation (EC) No. 334/2002 of 18 February 2002, OJ L 53/7 of 23 February 2002.

<sup>55</sup> *Ibid.*, Preamble, §6.

<sup>56</sup> *Supra* n. 15.



policy and security, and to the European Union's external relations with third countries.<sup>57</sup> As a result, a number of net refugee-producing countries have been blacklisted. Citizens originating from Afghanistan, Iraq, Somalia or Sudan are expected to avail to visa requirements. None of the *may* exceptions covered by Article 4 of the Regulation concerns refugees.<sup>58</sup> Far from that, *recognised* refugees are explicitly subject to visa conditions '[...] if the third country in which they are resident and which has issued them with their travel documents is a third country listed in Annex I [...].'<sup>59</sup> No express reference is made to *unrecognised* refugees in the Regulation, though. But the 'Common Consular Instructions,'<sup>60</sup> currently governing the procedures and conditions for the issuance of short-stay visas, leave no scope to doubt that they too are, in principle, subject to visa requirements if originating from a blacklisted country. The proposed 'Community Code on Visas' (CCV) makes this particularly plain.<sup>61</sup> Article 1 CCV establishes that 'rules for processing [short-term] visa applications [...] shall apply to any third country national, who must be in possession of a visa when crossing the external borders pursuant to Council Regulation (EC) No, 539/2001 [...].' Article 2 CCV specifies that 'third-country national' designates 'any person who is not a citizen of the Union [...].' In its 'Comments on the [CCV] Articles' the Commission further clarifies that 'the concept of "third-country national" [...] also *includes refugees and stateless persons*.'<sup>62</sup>

If among the conditions for delivery room had been left for the consideration of protection concerns as a matter of routine, the fact that refugees need to submit to visa requirements would entail a lesser distress. But, in so far as the issuance of a visa may determine subsequent responsibility for asylum,<sup>63</sup> States generally show little interest in covering those needs. In reality the EU visa regime has developed in disconnection of refugee matters. It has been standardized around the purpose of allowing short-term visits for tourism, business, study and like intent.<sup>64</sup> Hence, 'the main issues to borne in mind when examining visa applications are: the security of the [Schengen] Contracting Parties and the fight against illegal immigration.'<sup>65</sup> Key is to 'detect those applicants who are seeking to immigrate [...] using grounds such as tourism, business, study, work or family visits as a pretext.'<sup>66</sup> The

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<sup>57</sup> In spite of what the Preamble states, it is not at all evident that any thorough analysis has been done as to decide which country goes to the black list and which one to the white list and why. It appears that both the lists and the reasons have been inherited 'en bloc' from Schengen times. For a comprehensive critique of this point see E. Guild, 'The Border Abroad – Visas and Border Controls,' in: *In Search of Europe's Borders*, Kluwer Law International, 2003, p. 92ff.

<sup>58</sup> Article 4, Council Regulation (EC) No. 539/2001: '(1) A Member State may provide for exceptions from the visa requirement [...] as regards: (a) holders of diplomatic passports, official-duty passports and other official passports; (b) civilian air and sea crew; (c) the flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident; (d) the civilian crew of ships navigating in international waters; (e) the holders of laissez-passer issued by some intergovernmental international organizations to their officials. (2) A Member State may exempt from the visa requirement a school pupil having the nationality of a third country listed in Annex I who resides in a third country listed in Annex II and is traveling in the context of a school excursion as a member of a group of school pupils accompanied by a teacher from the school in question [...].'

<sup>59</sup> Article 3, Council Regulation (EC) No. 539/2001 and Article 1, Council Regulation (EC) No. 1932/2006.

<sup>60</sup> Council document, Common consular instructions for the diplomatic missions and consular posts, OJ C 326/1 of 22 December 2005 (CCI hereinafter).

<sup>61</sup> European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, 19 July 2006 (CCV hereinafter).

<sup>62</sup> *Ibid.*, p. 15 (emphasis added). The same definition of 'third-country national' is retained in Article 2(6) of the European Parliament and Council Regulation (EC) No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>63</sup> In case no relevant family ties can be identified in some other Member State, responsibility for examining an asylum application will lay with 'the Member State which issued the visa' (Article 9, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1 of 25 February 2003).

<sup>64</sup> *Specimen harmonised uniform visa application form*, Annex 16, CCI.

<sup>65</sup> *Basic criteria for examining applications*, V., CCI.

<sup>66</sup> *Ibid.*

documents normally required to proof good faith in the application therefore comprise valid travel papers, documents proving the purpose and the conditions of the planned journey, evidence of adequate means of subsistence during stay and proof of return at the end of the term.<sup>67</sup> Surely, these are conditions genuine refugees are unable to fulfil.<sup>68</sup>

Difficulties do not end here. Not only European Law expects refugees to comply with visa regulations, but measures have also been introduced to preclude irregular entry into the Union. Developing Article 26 CISA, the French proposal for the harmonisation of financial penalties on carriers transporting aliens lacking necessary documentation,<sup>69</sup> in spite of the European Parliament's opposition,<sup>70</sup> has finally been adopted.<sup>71</sup> Thereafter, 'Member States shall take the necessary measures to ensure that the penalties applicable to carriers [...] are dissuasive, effective and proportionate [...]'.<sup>72</sup> Motives are thus given to transporters to be cautious. To avoid penalties, carriers heading to the Union will need to refuse embarkation to any inadequately documented alien; refugees (presumably) included. Checks by carriers risk focusing solely on verifying papers, instead of inquiring into underlying motivations for undertaking travel.

The strictness of this regime and its apparent incongruence with refugee concerns, contrasts with what the CISA originally appeared to provide. Article 5(1) CISA enumerates general conditions aliens must fulfil to be allowed for three-month admissions into the Schengen Area.<sup>73</sup> These are conditions with which refugees are in no position to comply. On the other hand, Article 5(2) CISA contains a somewhat ambiguous special provision, modulating the general regime, which favours refugees. It establishes that 'an alien who does not fulfil the conditions [of Article 5(1)] must be refused entry into the territories of the Contracting Parties, unless a Contracting Party considers it *necessary to derogate* from that principle on humanitarian grounds, on grounds of national interest or *because of international obligations*.' The last indent of Article 5(2) CISA further provides that '[entry] rules shall not preclude the application of special provisions concerning the right of asylum [...]'.<sup>74</sup> In this line, Article 4(2) of the Carrier's Liability Directive indicates that the obligation to impose penalties onto carriers transporting illegal aliens into the Union 'is without prejudice to Member States' obligations in cases where a third country national seeks international protection.'<sup>75</sup> This is congruent with the idea stated already in Article 26(2) CISA,<sup>76</sup> which

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<sup>67</sup> 'Documents to be enclosed' and 'guarantees regarding return and means of subsistence,' III.2 and III.3., CCI.

<sup>68</sup> It is estimated that 90% of refugees rely on irregular means to gain access to the EU, in: European Council of Refugees and Exiles (ECRE), 'Broken Promises – Forgotten Principles: ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection', Tampere 1999 – Brussels 2004, June 2004, p. 17 (available at: [www.ecre.org](http://www.ecre.org)).

<sup>69</sup> Initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, OJ C269/8 of 20 September 2000 (*French proposal for a Carriers' Liability Directive* hereinafter).

<sup>70</sup> European Parliament, Report on the initiative of the French Republic for adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission (14074/2000 – C5-0005/2001 – 2000/0822(CNS)), A5-0069/2001 of 27 February 2001 and vote of 13 March 2001 (minutes available at: [www.europarl.europa.eu](http://www.europarl.europa.eu)).

<sup>71</sup> Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (*Carriers' Liability Directive* or *CLD* hereinafter), OJ L187/45 of 10 July 2001.

<sup>72</sup> Article 4(1), Carriers' Liability Directive.

<sup>73</sup> (a) A valid document authorising border-crossing; (b) a valid visa when required; (c) accreditation of the purpose and conditions of the intended stay and proof of sufficient means of subsistence, both for the stay and for the return; (d) no Schengen Alert; (e) no record of a public order/national security nature.

<sup>74</sup> Articles 5 and 13 of the Schengen Borders Code, which repeals Articles 2 to 8 CISA, reinstates the very same principle, adding that refusal of entry at the border 'shall be without prejudice to the application of special provisions concerning the *right of asylum and to international protection*,' (emphasis added).

<sup>75</sup> The original version of this provision established that penalties 'shall not apply if the third-country national is admitted to the territory for asylum purposes,' in: Article 4(3), French proposal for a Carriers' Liability Directive. The original

the Preamble restates, that the ‘application of this Directive is without prejudice to the obligations resulting from the Geneva Convention [...]’.<sup>77</sup> By the same token, the Schengen Borders Code establishes the overarching principle governing the movement of persons across the Schengen borders that controls ‘shall apply [...] without prejudice to [...] the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.’<sup>78</sup>

In the case a Member State would consider it *necessary* on protection grounds to derogate from common conditions to deliver Schengen visas, it *may* issue one with limited territorial validity (LTV), circumscribed to its own territory.<sup>79</sup> It is striking how European Law resolves that for a Member State to honour an overriding legal obligation to provide for an exception from normal entry rules it suffices to make it facultative to issue a LTV visa for the purpose.<sup>80</sup> The language here is contradictory, as are the two sets of rules we have examined so far. The first appears to require Member States to submit *everyone* stemming from blacklisted countries to visa requirements, while the second seems to oblige them to exempt refugees from the lot, provided that they consider it *necessary*, according to their international obligations. The question is then to determine when (if ever) and to what extent International Law imposes on Member States the obligation to derogate, as a matter of legal duty, from the principle that admission should be denied if entry conditions, including visa, are not fulfilled. *A contrario*, key is to establish whether and how the current regime of International Law compels Schengen Contracting Parties to grant entry to refugees.

#### IV. ANY ENTRY RIGHTS UNDER INTERNATIONAL LAW FOR REFUGEES?

##### A. REFUGEES AND MIGRANTS, SHARED *GENUS* BUT DIFFERENT *SPECIES* - THE GENEVA CONVENTION: REGULATING MIXED FLOWS THROUGH INTERNATIONAL *DEFERENCE*

While Convention refugees to be recognised as such<sup>81</sup> need to become *international migrants*,<sup>82</sup> this does not constitute their most distinctive characteristic. Above all, refugees comprise a specific category of victims<sup>83</sup> of most atrocious human rights’ violations, to which

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preambular statement indicated that ‘it is essential that the exercise of such provisions should not prejudice the exercise of the right to asylum. With this in mind, it is important that Member States should not apply the penalties which they are required to introduce under this Directive if the third-country national is admitted to the territory for asylum purposes,’ in: Preamble, §2, French proposal for a Carriers’ Liability Directive.

<sup>76</sup> Article 26(2) CISA requires Contracting Parties to ‘undertake, *subject to the obligations resulting from their accession to the Geneva Convention* [...], to impose penalties on carriers which transport aliens who do not possess the necessary travel documents.’

<sup>77</sup> Preamble, §3, Carrier’s Liability Directive.

<sup>78</sup> Article 3, Schengen Borders Code.

<sup>79</sup> Article 15 and 16, CISA and V.3., CCI.

<sup>80</sup> The Common Consular Instructions go even further; there is a direct discouragement to the Member States to issue LTVs! Annex 14 warns that ‘LTVs are issued by way of exception’ and therefore ‘it should not be expected that the Schengen Contracting Parties will use and abuse the possibility to issue LTVs; this would not be in keeping with the purpose and objectives of Schengen’. Reading this passage one wonders what then happens to the purpose and objectives of the Geneva Convention!

<sup>81</sup> Status determination is never constitutive but declarative only, see UNHCR, *Handbook*, §28: ‘a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.’

<sup>82</sup> They must find themselves ‘outside the country of (their) nationality,’ Article 1(A)(2), Geneva Convention.

<sup>83</sup> UNHCR, *Handbook*, §56: ‘[...] It should be recalled that a refugee is a victim –or potential victim- of injustice [...]’.

the international community owes special attention.<sup>84</sup> ‘Conceptually, refugeehood is unrelated to migration [...]. Refugeehood is one form of unprotected statelessness [...]. Alienage should be considered one manifestation of a broader phenomenon<sup>85</sup> of rights’ deprivation. Refugeehood shows the severance of the ordinary relationship linking the citizen to his State and the dispossession of the fundamental rights to which he is entitled and would otherwise be able to enjoy. Alienage is contingent to refugeehood; is a consequence rather than a cause of refugeehood. The discussions leading to draft the Preamble of the Geneva Convention illustrate precisely this idea: ‘a refugee who has been deprived of his nationality or who no longer enjoys the protection and assistance of the State to which he belongs nominally no longer has the advantages derived from the possession of nationality, to which everyone has the right.’<sup>86</sup> Refugeehood was considered to start as the membership to the body politic in the State of origin broke and the possibility of rights effectuation disappeared. Alienage was considered the addendum to that situation which justified international intervention.<sup>87</sup>

The notion of deference towards refugees, perceived as victims who deserve special treatment, had a wide impact in the drafting process of the Refugee Convention: Although it was considered that, in principle, every refugee was to conform to the laws and regulations of the asylum country,<sup>88</sup> ‘it had to be recognized that in certain cases refugees could not satisfy requirements identical with those provided for nationals.’<sup>89</sup> The will of acknowledging the ‘special circumstances of refugees’<sup>90</sup> led the Conference of Plenipotentiaries to adopt measures providing for their legal differentiation. As a result, Article 6 establishes ‘a duty to exempt refugees from insurmountable requirements’<sup>91</sup> by commanding that ‘any requirements [...] which the particular individual would have to fulfil for the enjoyment of [a] right, if he were not a refugee, must be fulfilled by him, *with the exception of requirements which by their nature a refugee is incapable of fulfilling.*’<sup>92</sup> The same impetus guided the Conference to exempt refugees from the requirements of reciprocity, regulating the standard of treatment States generally accorded to aliens.<sup>93</sup> ‘The notion of reciprocity was at the root of the idea of the juridical status of foreigners. The law considered [generally] a foreigner to be in normal circumstances, that is to say, a foreigner in possession of a nationality. The requirement of reciprocity of treatment placed the national of a foreign country in the same position in which his own country placed foreigners [...]. Since a stateless refugee was not a national of any State, the requirement of reciprocity loses, it was said, its *raison d’être* and its application to refugees would be a measure of severity. Refugees would be placed in an unjustifiable

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<sup>84</sup> G. Loescher, *Beyond Charity: International Co-operation and the Global Refugee Crisis*, OUP, 1993, p. 33.

<sup>85</sup> A. Shacknove, ‘Who is a Refugee?’, *Ethics*, 1985, p. 275.

<sup>86</sup> Draft prepared by the Secretariat as a basis of discussion for the *ad hoc* Committee, UN doc. E/AC.32/2.

<sup>87</sup> International protection is subsidiary to the national one; see UNHCR, *Handbook*, §88: ‘It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.’ During the drafting process of the Convention, ‘The problem of [international] protection arose because naturalization and repatriation could not provide a complete and immediate solution to the refugee problem’ (Comment by France in the Committee, in: P. Weis (Ed.), *The Refugee Convention, 1951*, Cambridge International Documents Series, Vol. 7, CUP, 1995, p. 24). In fact, ‘considering that until a refugee has been able either to return to his country of origin or to acquire the nationality of the country in which he has settled, he must be granted juridical status that will enable him to lead a normal and self-respecting life’ (Recital 5, Draft Preamble prepared by the Secretariat, UN doc. E/AC.32/2).

<sup>88</sup> Article 2, Geneva Convention.

<sup>89</sup> Contention on the meaning of ‘in the same circumstances’ (Article 6) by the Representative of Israel at the Conference of Plenipotentiaries, A/Conf.2/SR.5, pp.18-19.

<sup>90</sup> *Ibid.*

<sup>91</sup> J. C. Hathaway, *The Rights of Refugees under International Law*, CUP, 2005, p. 207.

<sup>92</sup> Article 6, Geneva Convention (emphasis added). In this sense, see joint-submission by Israeli and UK representatives, A/Conf.2/SR.84, pp.1-5: Article 6 works as an exception ‘intended to exclude conditions which a refugee, as such, is incapable of fulfilling.’

<sup>93</sup> Article 7, Geneva Convention.

position of inferiority [in comparison to other foreigners in the host country].<sup>94</sup> With the exception from reciprocity ‘it was merely intended to grant them [...] treatment commensurate with their special situation.’<sup>95</sup> In fact, ‘if it were to be posited that refugees should not have rights greater than those enjoyed by other aliens, the Convention seemed pointless, since its object was precisely to provide for specially favourable treatment to be accorded to refugees.’<sup>96</sup> The net result is a *system of deference* in which a fair balance between the general principle of assimilation of refugees to other aliens and the need for their protection<sup>97</sup> is struck. In this way the Convention ‘assure[s] refugees the widest possible exercise of [their] fundamental rights and freedoms.’<sup>98</sup>

According to the drafters’ first intention, when dealing with refugees today, the emphasis should not be placed on alienage but first and foremost on their ‘entitlement to special protection on account of their position.’<sup>99</sup> One may thus wonder whether the necessity to account for this privileged position that refugees enjoy amongst other aliens affects the way in which the Member States of the European Union can organize their common admission policies. As we have seen above, when dealing with entry management, the Union appears to focus on the refugee being a foreigner in lieu of considering him a particular kind of victim entitled to protection. No concrete measures have been adopted to systematically differentiate refugees from other migrants at all stages of the flow. But, is this problematic? In the next sections, an attempt is made to expound whether the Geneva Convention indeed requires, as it has been contended, that ‘Member States [...] establish effective protection-sensitive entry management systems.’<sup>100</sup>

#### A.1. EXTRATERRITORIAL *NON-REFOULEMENT* UNDER ‘PRESENT DAY CONDITIONS’.<sup>101</sup>

According to Hathaway, ‘the decision generally to constrain the application of rights on a territorial or other basis creates a presumption that no such limitation was intended to govern the applicability of the rights not subject to such textual limitations.’<sup>102</sup> ‘In each of these cases, the failure to stipulate a level of attachment was intentional, designed to grant refugees rights in places where they might never be physically present.’<sup>103</sup> Article 33(1) of the Convention ranges amongst those freestanding provisions detached from any territorial qualification. As such, when forbidding the expulsion or return of refugees *in any manner whatsoever* to the frontiers of territories where they may be persecuted, it benefits *all* refugees in *all* places subject to the jurisdiction of any signatory State.

As regards the scope of application *ratione personae* Article 33(1), as it emanates from the discussions leading to the adoption of the Geneva Convention, the safeguard against

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<sup>94</sup> Comments by the Secretariat on Draft Article 8 (current Article 7), in: P. Weis, *op. cit.*, p. 47-48.

<sup>95</sup> Comment by the representative of IRO, in P. Weis, *op. cit.*, p. 51.

<sup>96</sup> Comment by the representative of Austria, UN Doc. A/CONF.2/SR.6.

<sup>97</sup> Comment by UK representative on the proposed amendment to Recital 2 of the Preamble by its delegation: ‘Considering that the UN has [...] manifested its profound concern for refugees and *the need for their international protection*,’ in P. Weis, *op. cit.*, pp. 29-30 (emphasis added).

<sup>98</sup> Preamble, Geneva Convention, §2.

<sup>99</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation ‘D’, *International co-operation in the field of asylum and resettlement*, Geneva, 28 July 1951.

<sup>100</sup> European Commission, *Green Paper on Asylum*, p. 14. See also UNHCR, Executive Committee Conclusion No. 97, 2003: ‘States must take into account the fundamental differences between asylum seekers and other migrants’ in interception cases.

<sup>101</sup> Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, §31.

<sup>102</sup> J. C. Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, p. 161.

<sup>103</sup> *Ibid.*, p. 162.

refoulement applies not only to recognised refugees, but chiefly also ‘to *refugees seeking admission*, to refugees illegally in the country and to refugees admitted temporarily or conditionally.’<sup>104</sup> Protection from refoulement was made independent from formal qualification so that any refugee ‘as soon as he fulfils the criteria contained in the definition’<sup>105</sup> is entitled to protection against refoulement. Both the UNHCR Executive Committee and subsequent State applications come to confirm this approach.<sup>106</sup>

In relation to its field of application *ratione locii*, the drafters of the Convention, when prohibiting expulsion and return, considered that, ‘turning back a refugee to the frontier of the country where his life or liberty is threatened on account of his race, religion, nationality or political opinions [...], would be tantamount to delivering him into the hands of his persecutors.’<sup>107</sup> In fact, ‘There was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country.’<sup>108</sup> In this first sense, ‘although in a minimalist form of non-removal,’<sup>109</sup> Article 33(1) reflects some short of a right of entry for refugees. At a second level, despite claims advancing that ‘nothing in the Convention can be interpreted as an obligation to admit asylum seekers,’<sup>110</sup> the principle of non-refoulement appears to comprise not only a defence against expulsion but also a right of non-rejection at the border.<sup>111</sup> In fact, already when discussing the Draft Convention the representative of the Secretariat explained that ‘the practice known as refoulement in French did not exist in English language. In Belgium and France, however, there was a definite distinction between expulsion, which could only be carried out in pursuance of a decision of a judicial authority, and refoulement, which meant either deportation as a police measure or *non-admittance at the frontier*.’<sup>112</sup> Agreeing that the purpose of the Convention would be frustrated in the case rejection at the border could occur to genuine refugees, it was finally decided to retain the French wider notion of ‘refoulement,’ instead of that of ‘return’ alone. And so the word ‘refoulement’ was included in brackets beside the word ‘return’ in the English version of Article 33(1).<sup>113</sup>

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<sup>104</sup> Comment by UK representative, in: P. Weis, *op. cit.*, p.289-290 (emphasis added). The UK representative further remarked that, accordingly, ‘refugees who had been allowed to enter could be sent out only by expulsion,’ i.e. in pursuance of a decision of a judicial authority. This explains the different scope of application *ratione personae* of paragraphs 1 and 2 of Article 33. In this sense, the US representative remarked that ‘there should be no doubt that paragraph 1 applied to all refugees [...]. Concerning paragraph 2, those measures were certainly taken in accordance with a procedure provided by law.’ in: P. Weis, *op. cit.*, p.285.

<sup>105</sup> Status determination in the asylum State is never constitutive but declarative only. In fact, ‘a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.’ in: UNHCR, *Handbook*, §28.

<sup>106</sup> UNHCR, Executive Committee Conclusion No. 79, 1996, reaffirms ‘the fundamental importance of the principle of non-refoulement [...] *irrespective of whether or not individuals have been formally recognized as refugees*’ (emphasis added). The House of Lords has concluded that: ‘the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention’ (UKHL, *R. v. Secretary of State for the Home Department, ex Parte Sivakumaran*, 1989 (Lord Goff)).

<sup>107</sup> Comment by the Secretariat on Draft Article 31, in P. Weis, *op. cit.*, p. 279.

<sup>108</sup> Comment by the French representative on Draft Article 33, in P. Weis, *op. cit.*, p. 327.

<sup>109</sup> G. Noll, ‘Seeking Asylum at Embassies: A Right to Enter under International Law?’, *IJRL*, Vol. 17, No. 3, 2005, p. 548.

<sup>110</sup> K. Hailbronner, ‘Comments on the Right to Leave, Return and Remain,’ in: *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, 1996, p. 115.

<sup>111</sup> D. Alland and C. Teitgen-Colly, *Traité du droit d’asile*, PUF, Paris, 2002, p. 229: ‘L’expression française de « refoulement » vise à la fois l’éloignement du territoire et la non-admission à l’entrée.’ In the same direction : G. S. Goodwin-Gill and J. McAdam, *op. cit.*, p. 246.

<sup>112</sup> P. Weis, *op. cit.*, p. 289-290. The UN Declaration on Territorial Asylum, Resolution 2312(XXII) of 14 December 1967, which in its Article 3(1) stipulates that ‘no person referred to in Article 1(1) [i.e. persons entitled to invoke Article 14 UDHR] shall be subjected to measures such as *rejection at the frontier* [...],’ goes in this direction. In addition, High Contracting parties to the Geneva Convention have subsequently received the principle as encompassing non-rejection at the border (see S. E. Lauterpacht and D. Bethlehem, *op. cit.*, p.113-115).

<sup>113</sup> P. Weis, *op. cit.*, p. 335.

Beyond what the drafters expressly discussed more than fifty years ago, the problem today is to determine in the light of ‘present day conditions’<sup>114</sup> where borders begin and how jurisdiction is to be determined, so as to define when the protection against refoulement takes effect. In principle, ‘whether it [is] a question of closing the frontier to a refugee who asked admittance, or of turning him back after he [has] crossed the frontier, or even of expelling him after he has been admitted to residence in the territory, the problem [is] more or less the same. Whatever the case might be, whether the refugee [is] in a regular position, he must not be turned back to a country where his life and freedom could be threatened.’<sup>115</sup> The case of extraterritorial exclusion of refugees through interception measures should be treated the same way. In fact, ‘if States were able with impunity to reach out beyond their borders to force refugees back to the risk of being persecuted [...] the entire Refugee Convention [...] could [...] be rendered nugatory.’<sup>116</sup> It should then be accepted that non-refoulement operates regardless of *where* precisely the prohibited action takes place;<sup>117</sup> ‘an interpretation of Article 33(1) of the 1951 Refugee Convention based on its ordinary meaning indicates that the only geographic restriction regards the country where a refugee cannot be sent *to*, not the place where a refugee is sent *from*.’<sup>118</sup> However, States have often refused to assume responsibility in regard of their extraterritorial acts affecting refugees.<sup>119</sup> The emergence of administrative frontiers<sup>120</sup> and the exercise of authority and control beyond geographical dominium have not been accompanied by any overt recognition of correlate responsibilities in their regard. Such a mismatch seriously hinders access to protection.

In human rights circles, the limited approach of the State concerning itself only with its *territorial* human rights affairs has been questioned. There is a progressive disinclination to make the too easy link between the jurisdiction of the State and the limits of its territory, as designating the *only* ambit where it exercises its sovereignty. In truth, human rights preclude both municipal and international unacceptable behaviour. The opposite would lead to a double standard, whereby a State could be allowed to ‘perpetrate [human rights] violations [...] on the territory of another State, which violations it could not perpetrate on its own territory.’<sup>121</sup> The focus is thus gradually moving from the *locus* of the action towards its actual effects, be they intra- or extraterritorial.<sup>122</sup>

In the European context, the much criticized *Bankovic* decision of the European Court of Human Rights, although rejecting a *pure* ‘cause-effect notion of jurisdiction,’<sup>123</sup> nonetheless ruled that exceptional ‘recognised instances of the *extra-territorial exercise of jurisdiction* by

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<sup>114</sup> Eur. Ct. H. R., *Tyrer v. UK*, 25 April 1978, Series A, No. 26, §31.

<sup>115</sup> Statement by the American representative during the Drafting Ad Hoc Committee, E/AC.32/SR.20, §54.

<sup>116</sup> J. C. Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, p. 164.

<sup>117</sup> For the opposite opinion see UKHL, *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 55, 2005.

<sup>118</sup> ECRE, *Defending Refugees' Access to Protection in Europe*, December 2007, p.20 (available at: [www.ecre.org](http://www.ecre.org)); J-Y Carlier notes in this regard that: ‘Les tenants de la territorialité du principe de non-refoulement confondent la territorialité de l'ordre juridique lié par la convention de Genève qui ne permettra pas de se prévaloir de la convention contre un Etat ne l'ayant pas ratifié, avec l'étendue spatiale des obligations de l'Etat lié,’ in: *La condition des personnes dans l'Union Européenne*, *op. cit.*, p. 178.

<sup>119</sup> See *inter alia*, US Supreme Court, *Sale, Acting Commissioner, INS v Haitian Centers Council* (1993) 113 S. Ct 2549; High Court of Australia, *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 294 CLR 1, HCA 55 and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, HCA 14.

<sup>120</sup> G. Noll, ‘Seeking Asylum at Embassies,’ *op. cit.*, p. 548.

<sup>121</sup> HRC, *Lopez Burgos v. Uruguay*, Communication No. R. 12/52, UN doc. A/36/40, 1981, §12; see too *Celiberti de Casariego v. Uruguay*, Communication No. R 13/56, UN doc. A/36/40, 1981, §10 and General Comment No. 31, 2004, §10.

<sup>122</sup> O. De Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights,’ *Baltic Yearbook of International Law*, Vol. 6, 2006, pp. 185-247.

<sup>123</sup> Eur. Ct. H. R. (Inadmiss. Dec.), *Bankovic and Others v. Belgium and Others*, Appl. No. 52207/99, 12 December 2001, §75.

a State [...] include cases *involving the activities of its diplomatic or consular agents abroad* [...]. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.<sup>124</sup> Subsequently, *Issa and Others v. Turkey* came to establish that ‘a State may [...] be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s *authority and control* through its agents operating –whether lawfully or unlawfully– in the latter State [...] Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.’<sup>125</sup> The European Commission of Human Rights, as early as in 1974, had already recognized, in this line, that ‘authorised agents of a State, *including diplomatic and consular agents* and armed forces, not only remain under its jurisdiction when abroad but *bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.*’<sup>126</sup> On account of this jurisprudence, De Schutter argues that the term “within the jurisdiction” does not refer exclusively to a geographical space, but to an administrative boundary, [...] [which suggests that] the administrative reach of a State exceeds its territorial borders.’<sup>127</sup> He further notes that where States expand their jurisdiction beyond national territory, they remain under an obligation to respect the rights of the individuals who are under the effective control of its organs.<sup>128</sup> As the extraterritorial exercise of sovereignty attracts the individual towards the sphere of State *authority and control*,<sup>129</sup> to the expansion of State power there follows an extension of its correlate obligations.<sup>130</sup>

As borders are controlled remotely, if non-refoulement ‘is to guarantee not rights that are theoretical or illusory but rights that are practical and effective,’<sup>131</sup> its application is to commence accordingly. In Hathaway’s opinion, ‘the fact that the drafters assumed that refoulement was likely to occur at, or from within, a state’s borders –and therefore did not expressly proscribe extraterritorial acts which lead to a refugee’s return to be persecuted– simply reflects the empirical reality that when the Convention was drafted, no country had ever attempted to deter refugees other than from within, or at, its own borders [...] There was certainly no historical precedent of a policy of proactive deterrence, encompassing affirmative actions intended specifically to take jurisdiction over refugees [...] without a concomitant assumption of responsibility [...] A construction which excludes actions that would actually deliver a refugee back to his or her persecutors [...] is in fact the plainest and most obvious breach of the duty conceived by the drafters, namely to prohibit measures which would cause

<sup>124</sup> *Ibid.*, §73.

<sup>125</sup> Eur. Ct. H. R., *Issa and Others v. Turkey*, Appl. No. 31821/96, 16 November 2004, §71.

<sup>126</sup> Eur. Comm. H. R., *Cyprus v. Turkey*, Appl. No. 6780/74 and 6950/75, 26 May 1975, 2 DR 136 (emphasis added); see also Eur. Comm. H. R., *Ilse Hess v. UK*, Appl. No. 6231/73, 28 May 1975, 2 DR 73.

<sup>127</sup> Inter-Amer. Comm. H. R., *Coard et al. v the USA*, Case No. 10951, 29 September 1999, Report No. 109/99.

<sup>128</sup> O. De Schutter, ‘Irregular Migration and Human Rights,’ paper presented to the UniDem Campus Seminar: Management of Irregular Migration in Europe and Strategies to Combat Trafficking in Human Beings, Trieste, 9-12 October 2006, p. 6. In his opinion, the exercise by refugees of their right to asylum falls within the scope of the obligations States are to honour when acting abroad.

<sup>129</sup> Eur. Ct. H. R., *Issa and Others v. Turkey*, *op. cit.*, §71.

<sup>130</sup> For the opposite opinion see House of Lords, *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 2005, UKHL 55, § 64 (Lord Steyn): ‘The conclusion must be that steps which are taken to control the movements of such people who have not yet reached the State’s frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and the purpose of the Treaty is to argue for the *enlargement of the obligations* which are to be found in the Convention. [...], I am not persuaded this is the way in which the principle of good faith can operate’ (emphasis added).

<sup>131</sup> See *inter alia*, Eur. Ct. H.R., *Airey v. Ireland*, 9 October 1979, Appl. No. 6289/73, §24.



refugees to be “pushed back into the arms of their persecutors”.<sup>132</sup> This is the lens through which the imposition by EU policies of visa requirements on refugees to be enforced by private carriers is to be scrutinized.

As regards visas, the State granting them has full sovereign command over the procedure. When entry depends on a visa, the State has complete *authority and control* to interfere with the regular admission to its territory of any particular alien concerned. The grant or denial of visas cannot but be considered an act of jurisdiction of the State requiring them, with a potential to hamper the effectiveness of the prohibition of non-refoulement.<sup>133</sup> However, if visas are denied while refugees are still in their countries of origin, the teleological interpretation of Article 33(1) clashes with the criteria for qualification for refugee status contained in Article 1 of the Convention –namely with the requisite of being ‘outside the country of [own] nationality’.<sup>134</sup> In such a stance, it could be claimed that attaching too much importance to the wording of Article 1 ‘results in a meaning incompatible with the spirit, purpose and context [of the Convention]’ and that, accordingly, ‘no reliance can be validly placed on it.’<sup>135</sup> This would certainly take better account of the ‘humanitarian and civilising purpose’ of the Convention and the need to privilege the spirit over the letter of its provisions.<sup>136</sup> Political declarations in the European regional context appear to come in support of such a construction. In 1967, the Committee of Ministers of the Council of Europe aware of the fact that refoulement could occur in any unforeseeable ways, protection against it should too be provided in *any manner whatsoever*. It thus recommended that Member States ‘ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or *any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution* [...]’.<sup>137</sup> Should this reasoning be retained, to ‘metaphorical borders’<sup>138</sup> there would respond a metaphorical prohibition of non-refoulement. A perfect equilibrium would be established between extraterritorial jurisdiction and extraterritorial protection against wrongful acts. This would require interpreting “‘outside his country of origin’ in a legal, jurisdictional sense, rather than a physical, territorial sense”<sup>139</sup> against the original wording of the Convention. Although international interpreters of human rights obligations have already made exceptional recourse to this technique of interpretation,<sup>140</sup> in the specific case of the Geneva Convention the

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<sup>132</sup> J. C. Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, p. 337-338.

<sup>133</sup> In *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 2005, UKHL 55, the House of Lords has recognised, in §45, that pre-clear operations actually ‘purport to exercise governmental *authority*’ over those targeted. In §28 the equivalence between pre-clear operations and visas is avowed. Lord Steyn observes that: ‘had a visa regime been imposed, the effect on the appellants, so far as concerned their applications for asylum, would have been no different [than the one achieved through the pre-clearance procedure].’ If pre-clearance procedures are a manifestation of the State ‘*authority and control*’ and visas are tantamount to pre-clearance procedures, it must logically follow that the imposition of a visa regime too constitutes an exercise of jurisdiction capable of triggering a State’s extraterritorial responsibility.

<sup>134</sup> In *ibid.*, §18 and 19, Lord Bingham of Cornhill maintains that: ‘however generous and purposive its approach to interpretation, the Court’s task remains one of interpreting the written document to which the contracting States have committed themselves. It must interpret what they have agreed; [...] [nothing] significantly greater than or different from what they agreed to do.’

<sup>135</sup> ICJ, *Arbitral Award of July 31, 1989*, 12 November 1991, ICJ Reports 1991, p. 53 and pp. 69-72: ‘the rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.’

<sup>136</sup> ICJ Advisory Opinion, *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, ICJ Reports 1951, p.15, §23.

<sup>137</sup> Committee of Ministers of the Council of Europe, Resolution No. (67) 14 on Asylum to Persons in Danger of Persecution, 29 September 1967, §2 (emphasis added).

<sup>138</sup> This paraphrases the expression Lord Bingham of Cornhill uses in §26 of the UKHL *Prague Airport* case.

<sup>139</sup> G. S. Goodwin-Gill and J. McAdam, *op. cit.*, p. 250.

<sup>140</sup> In spite of the fact that Article 2(1) ICCPR is clearly worded ‘each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present

argument has by and large been rejected.<sup>141</sup> Accepted is that if the refugee finds himself still within his country of origin, the protection of Article 33(1) cannot be triggered. Article 33(1) applies *ipso facto* to those meeting the qualification conditions. Being ‘outside the country of his nationality’ is therefore essential.<sup>142</sup>

On the other hand, visas may be refused in a neighbouring country to that of the nationality of the refugee.<sup>143</sup> Provided that in those territories his life or freedom would be threatened in the sense banned by the Convention, rejecting the extraterritorial applicability of Article 33(1) becomes problematic.<sup>144</sup>

In relation to carriers, it may happen that they detect defects in documentation already at the point of embarkation in the country of origin. In such a scenario, the applicability of Article 33(1) would, as in the case of visas, be blocked by refugee qualification criteria. However, if defects are identified when already in transit, the interception of a refugee ‘outside the country of his nationality,’ provided it entails return of the person to the territories of prospective persecution, may well amount to a violation of Article 33(1). Since ‘States cannot contract out or ‘privatize’ their legal obligations,’<sup>145</sup> the conduct of the carrier would undeniably engage its (extraterritorial) responsibility<sup>146</sup> and the prohibition of non-refoulement in Article 33(1) would necessarily deploy its entire effects.

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Covenant [...]’ (emphasis added), the HRC in its General Comment No. 31, 2004, taking account of today’s context and in order to avoid the development of double standards in the level of human rights obligations of States, decides to favour the spirit of the Covenant over its actual wording and rules, in §10, that: ‘States Parties are required by Article 2(1) to respect and to ensure the Covenant rights to all persons who may be within the territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, *even if not situated within the territory of the State Party*’ (emphasis added).

<sup>141</sup> Both the most littered doctrine and national jurisprudence have considered this reading to depart too far away from the original intentions of the drafters (see, *inter alia*, G. S. Goodwin-Gill and J. McAdam, *op. cit.*, p. 250 and references therein).

<sup>142</sup> UNHCR, *Handbook*, §88.

<sup>143</sup> Taking account of the rules contained in the CCI, it is probable that Schengen Member States be reluctant to issue visas to non residents, see *Visa applications lodged by non-residents*, II.3., CCI: ‘When an application is lodged with a State which is not the applicant’s State of residence and there are doubts concerning the person’s intentions (in particular where there is evidence pointing to illegal immigration), the visa shall be issued only after consultation with the diplomatic mission or consular post of the applicant’s State of residence and/or its central authority.’ Furthermore, these consultations may expose the refugee to further peril, in the event the persecution from which he tries to escape emanates from official authorities of the State of origin.

<sup>144</sup> The reasoning of the House of Lords in its *Prague Airport case* appears to recognise this possibility. The only hindrance to the extraterritorial application of Article 33 of the Geneva Convention identified by the Lords was that the appellants never left the Czech Republic. Since the extraterritorial applicability of both English municipal and international obligations in regard of the principle of non-discrimination was accepted, if interception would have occurred *en route*, in the case it would have entailed devolution to the country of persecution, it is difficult to see how the House would have been capable of maintaining the inapplicability of the Geneva Convention to the case.

<sup>145</sup> In the context of private detention centres the HRC stressed that: ‘The Committee is concerned that the practice of the State party in contracting out to the private commercial sector core State activities [...] weakens the protection of rights under the Covenant. The Committee stresses that the State remains responsible in all circumstances for adherence to all articles of the Covenant’ in: HRC, Comments on the 4<sup>th</sup> UK Periodic Report, 27 July 1995, UN Doc. CCPR/C/79/Add.55, §16.

<sup>146</sup> ICL, *Articles on the Responsibility of States for Internationally Wrongful Acts*, UNGA res.56/83, 12 December 2001. These articles, in spite of not being binding yet, they show accepted international practice. Two of them are particularly relevant to our purposes, Articles 5 and 8. Article 5 stipulates that: ‘the conduct of a person or entity, which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’ Article 8 establishes that: ‘the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’

## A.2. CONTEXTUALISING ARTICLE 31 IN GOOD FAITH: VISAS AND CARRIER SANCTIONS AS DUE REQUISITES FOR FIRST ADMISSION OR UNDUE 'PENALTIES' FORCLOSING QUALIFICATION?

The Geneva Convention does not contain any provision clearly dealing with the question of first-admittance to the country of refuge. Nowhere it is made explicit whether refugees, before arrival, are supposed to submit to general immigration rules and the commentaries of those partaking in the drafting process lead to no unambiguous conclusion on this point. The necessity to regulate first admission in the Convention was not perceived with any urgency, but it is not clear whether this was due to the general feeling that as a matter of course States would not lose their powers of interdiction or whether this lacuna is attributable to the deference with which refugees were regarded. The two possibilities remain open: either States expected, in principle, that refugees would comply with immigration requisites prior to their presentation for admission at the border and, exceptionally, illegal entry would be penalized when the conditions of Article 31 would be met; or States assumed *a priori* that refugees would be incapable of fulfilling such requirements and to make sure that any temptation to penalize them therefore would be eliminated, Article 31 enshrines a sufficient guarantee. Deference vis-à-vis refugees would translate in their exoneration from compliance with general immigration rules for the purpose of first admittance.

Several representatives of different countries made at various points of the negotiations leading to current Article 31 comments that could induce us to believe that refugees were generally intended to seek authorisation to enter legally the country of refuge. The discussions around the notion of 'without authorisation' in Article 31(1) go unequivocally in this direction.<sup>147</sup> The representative of Chile was amongst the firsts to point that '*if the authorities permit a foreigner whose life or liberty is endangered by political, racial or religious persecution, to enter the country in order to escape such persecution, they will unquestionably refrain from imposing penalties or sanctions on him for failure to produce the documents usually required from those entering the territory of the State.*' In the same line, the delegate from Belgium wanted to make clear that his delegation understood that 'the words "who enters or is present in their territory without authorization" do not cover refugees who had gained access to a territory illegally, *after authorization had been refused.*' The French representative added that: '"without authorization" might refer to a refugee who had made application and had been refused authorization, and still persisted in trying to remain in the country. [...] *If [...] it was decided [...] not to admit a refugee, and the refugee persisted in trying to remain in the territory, he would no longer come under [current Article 31], but under the ordinary national law.*'

On the other hand, evidence can also be traced of the opposite trend. The representative of the Secretariat, referring to 'the refugees *who did not come within the framework of the Convention,*' explained to the Committee that: 'It was they, and they alone, whom non-admittance measures should concern.' Therefore, '[i]t did not seem necessary to include those measures in a Convention which was to apply only to refugees authorized to reside regularly in the reception country.'<sup>148</sup> At a more advanced stage of the negotiations, the French representative realized that 'it had been argued that the Convention did not govern the question of admission, but continental countries had no choice in that matter. When faced with a flood of refugees upon their frontiers, they could not help but grant them asylum, and

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<sup>147</sup> P. Weis, *op. cit.*, p. 293-294.

<sup>148</sup> P. Weis, *op. cit.*, p. 285.

possibly refugee status.<sup>149</sup> Arguably, in the aftermath of the II World War, first admittance was regarded as an inescapable humanitarian duty. The general tenor during the Conference of Plenipotentiaries who finally adopted the definitive text of the Convention was that ‘it was unlikely that any State would in reality refuse admittance to a person obliged to leave his own country.’<sup>150</sup> In addition, at that time, preferred destination countries were overseas. In continental Europe first reception of refugees in view of further resettlement was felt to be unavoidable and, in a number of cases, temporary as well. Thus, one of the provisions more profoundly discussed by the drafters of the Convention was that on travel documents. Apparently, only once a refugee had been attached to the jurisdiction of a reception State, was he expected to submit to general immigration rules. Only once the anomaly of not detaining *effectively* any nationality would have been palliated through the issuance of new identity papers and travel documents by the first asylum country, would the refugee be in a position to comply with immigration requirements. Presumably, this is why subsequent travel after refuge in a first country of asylum was made *expressly* conditioned to the obtainment of the visa that a country of final destination could require. And this would be why ‘the issue of such visas may be refused on grounds which would justify refusal of a visa to any alien.’<sup>151</sup>

The general design of the Convention construed as a *system of deference* towards refugees comes in support of the latter reading. Although, as a matter of general rule, ‘every refugee has duties to *the country in which he finds himself*, which require in particular that he conforms to its laws and regulations,<sup>152</sup> the impossibility to which refugees were confronted as to comply with certain requirements was in the minds of the drafters too. When discussing the wording of current Article 6 on the standards of treatment to be accorded to (recognised) refugees, the drafters referred to ‘requirements as to length and conditions of sojourn or residence’ with which compliance would generally be required. Some of these requirements were identified in the debate as conditions which refugees would not be capable of fulfilling. Such conditions included ‘the production of a national passport or a nationality certificate.’<sup>153</sup> This is why it was decided that refugees, *once in* a country of asylum, were to be provided with identity papers.<sup>154</sup> Refugees *lawfully staying* in the territory of a Contracting State should in addition be issued ‘travel documents for the purpose of [onward] travel.’<sup>155</sup> It could from here be inferred that the drafters of the Convention did not await refugees to be able to flee carrying their identity and travel papers along. Actually it was expected that *destination* countries would substitute to their countries of origin in these chores.

The deferential impetus of the Convention did also reach Article 31. State power to impose penalties on account of illegal entry to refugees was strictly restrained. ‘There was no doubt that refugees must not be penalized because they were refugees.’<sup>156</sup> It was considered that ‘a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee.’<sup>157</sup> In the course of the negotiations, it was affirmed that ‘non-admission or expulsion had to be

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<sup>149</sup> P. Weis, *op. cit.*, p. 30.

<sup>150</sup> Comment by US representative on Draft Article 31, in P. Weis, *op. cit.*, p. 283.

<sup>151</sup> Paragraph 9, Schedule, Geneva Convention.

<sup>152</sup> Article 2, Geneva Convention.

<sup>153</sup> P. Weis, *op. cit.*, p. 46.

<sup>154</sup> Article 7, Geneva Convention.

<sup>155</sup> Article 28, Geneva Convention.

<sup>156</sup> Comment by French representative on Draft Article 7, in P. Weis, *op. cit.*, p. 52.

<sup>157</sup> Commentary on Draft Article 31 by the Secretariat, in P. Weis, *op. cit.*, p. 279.

regarded as sanctions.<sup>158</sup> Considering their severe nature, it was recommended that recourse be made as *ultima ratio*, ‘for very grave reasons, namely matters endangering national security or public order.’<sup>159</sup> Following profound discussion, expulsion and refoulement were detached from those penalties to be possibly imposed upon illegal entry, confined to separate articles and submitted to strict conditions of application. So, illegal entrants could neither be expelled nor remain unadmitted at the border on account of their (accomplished or just attempted) illegal entry.<sup>160</sup> Otherwise, ‘measures of expulsion or non-admittance at the frontier, intended to protect law and order, [would] achieve opposite results when an attempt [would be] made to apply them to refugees without taking into account their peculiar position.’<sup>161</sup> If one could subsume interception measures into the wider notion of refoulement, one should reach a similar conclusion: visas and carriers’ sanctions applied to refugees without considering their peculiar position reach the opposite result to the one sought by the Convention.

In any case, mindful as it might be to endeavour to unveil the true intentions of the drafters,<sup>162</sup> the systematic interpretation of the Convention reveals that Article 31 does not deal in any way with qualification criteria for refugee status.<sup>163</sup> Its field of application is circumscribed to the possibility to impose penalties to ‘refugees unlawfully in the country of refuge.’ Reading in Article 31 that legal admission constitutes a precondition for qualification would adjoin an extra condition to the definition of refugee, going beyond those enshrined in Article 1(A)(2) of the Convention. Such an addition would entail particularly noxious effects. It would lead to an aprioristic exclusion from status. Only *after recognition* can it be determined whether the claimant, according to Article 1, is to be disqualified from refugee status or whether he does not deserve the protection against refoulement Article 33 establishes. No anticipated exclusion can by any means be made prior to qualification<sup>164</sup> for reasons not even contemplated in the Convention.<sup>165</sup> That addition would further amount to a *de facto* reservation of Article 1, which is expressly prohibited with no exception by Article 42 of the Convention. The rule enshrined in Article 1(A)(2) establishes that ‘for the purposes of the Convention, the term “refugee” shall apply to *any person* who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’ The legal qualification the person receives under national laws is immaterial. The possession of a visa appears to be equally irrelevant. If the person meets the conditions of the definition, he becomes *ipso facto* a

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<sup>158</sup> Comment by French representative on Draft Article 31, in P. Weis, *op. cit.*, p. 294.

<sup>159</sup> Comment by representative of the Secretariat on Draft Articles 31, 32 and 33, in P. Weis, *op. cit.*, p. 285.

<sup>160</sup> If the principle enshrined in Article 31 is that *accomplished* illegal entries should not be penalised, provided that the conditions are fulfilled, the *attempted* illegal entry should be considered as being included in the exemption, as a lesser degree of fault.

<sup>161</sup> *Ibid.* see also ECtHR, *Harabi v The Netherlands*, 5 March 1986, Appl. No. 10798/84 (inadmissible): ‘the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention [...]. Such an issue may arise, a fortiori, if an alien is, over a long period of time, deported repeatedly from one country to another without any country taking measures to regularise this situation.’

<sup>162</sup> ICJ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, 21 June 1971, ICJ Reports 1971, p. 16.

<sup>163</sup> J. Vedsted-Hansen, ‘Non-admission Policies and the Right to Protection: Refugees’ Choice versus States’ Exclusion?’, in: *Refugee Rights and Realities – Evolving International Concepts and Regimes*, CUP, 1999, p. 278: ‘The provision [...] is very specific about the legal context to which [it] applies. [...] It refers to the scope of protection against *penalisation* for illegal entry or presence’ (emphasis in the original).

<sup>164</sup> Only after recognition can it be determined whether the claimant, according to Article 1, is to be disqualified from refugee status. Article 1 must be interpreted systematically. The analysis of inclusion under Article 1(A) must precede that of exclusion under Articles 1(D), (E) or (F), otherwise there is a serious danger that the relationship between principle and exception be reversed. Exceptions, in law, must be interpreted restrictively. If we first assess exclusion prior to inclusion, the relationship between rule and exception risks being inverted.

<sup>165</sup> See Article 1(D), (E), and (F), Geneva Convention.

refugee, whom the Contracting Party concerned needs to recognise as such if it is to fulfil its legal engagements in good faith.<sup>166</sup>

Regrettably, this reasoning finds no good reception in practice. On the contrary, it is routinely claimed that ‘States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory [...] States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual [...] is something which falls to each nation to resolve for itself.’<sup>167</sup> The Geneva Convention is deemed not to create any exception to this rule.<sup>168</sup> Domestic courts maintain that ‘steps which are taken to control the movements of such people who have not yet reached the state’s frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and the purpose of the Treaty is to argue for the enlargement of the obligations which are to be found in the Convention.’<sup>169</sup> In fact, the good faith argument that some scholars maintain has never been followed to this far extent. Nonetheless, together with Goodwin-Gill and McAdam,<sup>170</sup> one cannot but reaffirm that in so far as passive interception measures prevent the Geneva Convention from ever being triggered, States are at fault with their obligation to implement the Treaty in good faith. Visas and carrier sanctions have actually been designed to foreclose irregular arrivals in an *indiscriminate* manner, fatally penalizing refugees. ‘They do indirectly what it is not permitted to do directly’<sup>171</sup> and should therefore be reinvented as to consider refugees’ ‘entitlement to special protection on account of their position.’<sup>172</sup> In reality, the deterrence of refugees, be it acknowledged or *de facto*, is never acceptable. ‘[The interception of asylum seekers] for the purpose [or with the effect] of discouraging further arrivals cannot be justified’ as it ‘is contrary to the principles underlying the international refugee protection regime.’<sup>173</sup> The most fundamental purpose of the Geneva Convention is indeed to provide protection to refugees. Interception with the result of exclusion prevents refugees from

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<sup>166</sup> Since ‘none of the provisions of the Convention would apply unless the refugees were genuine,’ (Comment by UK representative) ‘it was essential first to determine whether a refugee was *bona fide*’ (Comment by US representative), in: P. Weis, *op. cit.*, p. 63 and 64. See also UNHCR, *Handbook*, §189: ‘It is obvious that, to enable State parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated [...] It is therefore left to each Contracting State to establish the procedure that it considers most appropriate.’ See also H. Battjes, *op. cit.*, p. 467: ‘the object and purpose and the obligation to perform treaty obligations in good faith imply an obligation to determine refugee status.’ See also ECtHR, *Amuur v France*, Appl. No. 19776/92, 25 June 1996, §43: ‘confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status’ (emphasis added). See also ICJ, *Libyan Arab Jamahiriya v. Chad*, 13 February 1994, ICJ Reports 1991, p. 6: international obligations must be interpreted in good faith.

<sup>167</sup> High Court of Australia, *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) 210 CLR 1, HCA 14, §44.

<sup>168</sup> *Ibid.*, McHugh and Gummow JJ in this connection claim that ‘[States] have refused to agree to international instruments which would impose on them duties to make grants of asylum.’

<sup>169</sup> UKHL, *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 55, 2005, §64.

<sup>170</sup> G. Goodwin-Gill and J. McAdam, *op. cit.*, p. 387-388: ‘This duty [of good faith] is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeat the object and purpose of a treaty [...] The duty requires parties to a treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty. Thus, a State lacks good faith when it seeks to avoid or to divert the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.’

<sup>171</sup> *Ibid.*

<sup>172</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation ‘D’, *International co-operation in the field of asylum and resettlement*, Geneva, 28 July 1951.

<sup>173</sup> UNHCR, Advisory Opinion/Letter to the Honourable John Ashcroft, Attorney General of the United States (UNHCR, Washington DC, 28 March 2003), quoted by A.T. Naumik, *op. cit.*, p. 689, referring to detention, but used here for interception.

seeking that protection. 'And, if the right to 'seek asylum' does exist, [interception] based [...] upon the exercise of that right arguably constitutes persecution.'<sup>174</sup>

## B. SEEKING REFUGE IN HUMAN RIGHTS:

After the human rights' *revolution*,<sup>175</sup> undergone through the drafting of the Universal Declaration of Human Rights and her *daughter* instruments, the 1951 Refugee Convention and the 1966 Human Rights Covenants, human rights obligations came to impose a humanitarian exception to the *right* of States to freely delineate their national communities. The unlimited power of States to control the entry, residence and removal of undesired immigration was from then on constrained by the recognition of rights inherent to the human person.

In the context of the Council of Europe, the European Court of Human Rights has followed this approach. The Strasbourg Court has consistently maintained that States, when combating illegal immigration, are still to honour their international obligations. The national interest of States to control access to their territories cannot deprive migrants of the rights they derive from the international regime. The Court expresses the necessity to conciliate the fundamental rights of migrants with the imperatives to which domestic immigration policies attempt to respond. Entry controls are to be exercised in accordance with Human Rights requisites.<sup>176</sup>

Certainly, the same goes in the case of refugees: 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by [human rights instruments].'<sup>177</sup> Significant is hence to underline that the status of refugees is determined not solely on the premises of International Refugee Law, but rather by the compendium of all different Human Rights' instruments relevant to any person in the same circumstances. It becomes particularly pertinent, in the context of *refugees to-be* (those still inside the country of own nationality), to analyse the compatibility of visas and carriers' sanctions with the requirements of everyone's right to leave any country, including his own,<sup>178</sup> as well as everyone's entitlement to be free from torture, inhuman or degrading treatment or punishment.<sup>179</sup>

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<sup>174</sup> This reasoning is borrowed from A.T. Naumik, *op. cit.*, p. 689. She makes it in the context of detention of refugees after arrival, whereas I think the same token is applicable to the case of interdiction before having managed to leave the country of origin. In this direction J-Y Carlier notices that: '[Si la Convention] n'impose pas aux Etats d'aller chercher des réfugiés dans le monde, il impose aux Etats de ne pas mettre en œuvre des mécanismes empêchant la fuite du réfugié. Si l'Etat n'a pas d'obligation de faire, il a, à tout le moins, une obligation de ne pas faire [...]', in: *La condition des personnes dans l'Union Européenne*, p. 178.

<sup>175</sup> S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Intersentia, 2006, p.4.

<sup>176</sup> See *inter alia*, Eur. Ct. H.R. *Cruz Varas and Others v. Sweden*, 20 March 1991, Appl. No. 15576/89; *Vilvarajah and Others v. UK*, 30 October 1991, Appl. No. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87; *Chahal v. UK*, 15 November 1996, Appl. No. 22414/93; *Amuur v. France*, 25 June 1996, Appl. No.19776/92; *H.L.R. v. France*, 29 April 1997, Appl. No. 24573/94; *D. v. UK*, 02 May 1997, Appl. No. 30240/96; *Jabari v. Turkey*, 11 July 2000, Appl. No. 40035/98; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, Appl. No.13178/03; *Saadi v. Italy*, 28 February 2008, Appl. No. 37201/06.

<sup>177</sup> ECtHR, *Amuur v France*, Appl. No. 19776/92, 25 June 1996, §43.

<sup>178</sup> Article 12(2), UN International Covenant on Civil and Political Rights, 1966 and Article 2(2), Protocol No. 4, European Convention on Human Rights, 1950.

<sup>179</sup> Article 7, UN International Covenant on Civil and Political Rights, 1966; Article 1, UN Convention Against Torture and Article 3, European Convention on Human Rights, 1950.

## B.1. EVERYONE'S RIGHT TO LEAVE ANY COUNTRY (TO SEEK ASYLUM):

The right to leave one's own country was not conceived as being absolute. Article 12(3) ICCPR expressly allows for restrictions for the sake of 'national security, public order, public health or morals or the rights and freedoms of others.' Restrictions, from their part, 'must be provided by law, must be necessary in a democratic society and must be consistent with all other rights recognized in the Covenant.'<sup>180</sup> The Human Rights Committee, scrutinizing restrictions imposed by countries of origin, requires, in addition, that 'the application of restrictions in any individual case [...] be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.'<sup>181</sup> In their practice, 'States should always be guided by the principle that the restrictions must not impair the essence of the right.'<sup>182</sup> 'Limits to the right to leave are permissible, but they must not render the right ineffective.'<sup>183</sup> Otherwise rights would become 'theoretical or illusory' instead of 'practical and effective.'<sup>184</sup>

On the other hand, the existence of a right to leave does not entail a right of free international movement. The European Court of Human Rights affirms, in relation to Article 2(2) of Protocol No.4 to the ECHR, that the right to leave 'implies a right to leave for such a country of the person's choice *to which he may be admitted*'.<sup>185</sup> In principle, if a foreigner wishes to enter a country different from his own, he will only be entitled to do so 'through legally permissible routes.'<sup>186</sup> So, in regard of interception measures from destination countries, the available international jurisprudence on this point appears to set a different standard than the one operating in relation to countries of origin. Whereas for countries of origin the presumption goes that exit visas are suspected of being disproportionate and the refusal to issue a passport considered inadmissible,<sup>187</sup> the same logic does not apply to interception measures imposed by countries of destination. The Human Rights Committee, although expressing its concern that such measures have a potential to compromise the right to leave in practice, it does not go so far as to openly condemning them.<sup>188</sup> The Strasbourg Court, for interception at sea, has taken an even more cautious approach. In *Xhavara v. Italy*<sup>189</sup> it considers that the interception by the Italian authorities of an Albanian boat trying to reach the Italian coast was not aimed at hindering the right to leave Albania, but at preventing irregular entry in Italy. The application was declared incompatible with the Convention *ratione materiae* on those grounds, as if the right to leave would not have any existence of its own in regard of destination countries.<sup>190</sup> This is a construction that neglects what Goodwin-Gill and

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<sup>180</sup> Article 12(3), UN International Covenant on Civil and Political Rights, 1966.

<sup>181</sup> HRC, General Comment No. 27, 1999, §16.

<sup>182</sup> *Ibid.*, §13.

<sup>183</sup> C. Harvey and R. P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law,' *IJRL*, Vol. 19, No. 1, 2007, p. 6.

<sup>184</sup> See *inter alia*, Eur. Ct. H.R., *Airey v. Ireland*, 9 October 1979, Appl. No. 6289/73, §24.

<sup>185</sup> ECtHR, *Peltonen v Finland*, 20 February 1995, Appl. No. 19583/92 (inadmissible); *KS v. Finland*, 24 May 1995, Appl. No. 21228/93 (inadmissible); *Napijalo v Croatia*, 13 November 2003, Appl. No. 66485/01.

<sup>186</sup> C. Harvey and R. P. Barnidge, 'The Right to Leave One's Own Country under International Law,' paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, p. 2 (available at: [www.gcim.org](http://www.gcim.org)).

<sup>187</sup> HRC, *Loubna El Ghar v Socialist People's Libyan Arab Jamahiriya*, Communication No. 1107/2002, §7.2: the Committee underscores the importance of passports *per se* as the vehicles of realization of the right to leave; as its *sine qua non*.

<sup>188</sup> HRC, General Comment No. 27, 1999, §10.

<sup>189</sup> ECtHR, *Xhavara v Italy*, 11 January 2001, Appl. No. 39473/98 (inadmissible).

<sup>190</sup> In regard of an eventual violation of Articles 2 and 3 ECHR the Court, taking account of the procedure pending in Italy against the captain of the warship *Sibilla*, declares the application inadmissible for non-exhaustion of 'all domestic remedies. In a *obiter dictum* the Court reminds nonetheless that: 'Les Etats non seulement à s'abstenir de provoquer la mort de manière volontaire et irrégulière mais aussi à prendre les mesures nécessaires à la protection de la vie des personnes relevant de leur juridiction.' [...] 'La procédure judiciaire contre X vise précisément à établir si la conduite prétendument négligente de l'accusé a exposé les passagers du *Kater I Rades* à un danger disproportionné par rapport au but légitime de la protection de la



McAdam call the *binary nature* of States' obligations. The right to leave is to be considered as 'a right engaging the responsibility of individual States, rather than the international community as a whole. The right to leave is not a right which other States need to 'complete' through a duty to admit; rather, it is simply a right each State must guarantee.'<sup>191</sup> States of the North cannot shield themselves behind a 'collectivized' reading of the right to leave as to negate its *Wirkung* in their regard, responsabilizing some other States with less means to deflect migration flows. *Each and every* Signatory State of a given instrument recognizing the right to leave, exercising power beyond its territorial jurisdiction, remains bound to its obligation to respect it and not to render it nugatory to everyone subject to its *authority and control*. Restrictions are permitted, but only in so far as the essential content of the right remains intact.<sup>192</sup>

If we submit visas and carriers' sanctions from destination countries to the proportionality test, we'll need to conclude with Carlier<sup>193</sup> that they cannot possibly resist the requirements of necessity and efficacy. Two main objectives have been advanced, in the case of the EU, as being those that the common visa policy intends to pursue: the prevention of crime and the fight against illegal immigration.<sup>194</sup> Accepting that both may be legitimate purposes, it remains to be seen whether the means at use to attain them can be considered to be proportionate. From the point of view of the principle of efficacy first, we could *a priori* assume that visas combined with carriers' sanctions are efficient ways of blocking irregular movement. However, in regard of cross-border crime, only a very tenuous link could be established between visas, as an adequate means, and crime prevention, as the ultimate objective to be achieved. For this purpose, visas should be rejected. It still remains to be determined whether visas could be considered as *necessary* means to control immigration. In the case other less intrusive means would be available, visas could not be retained as being rigorously *necessary*. And necessity is to be construed strictly. *Necessary* does not mean 'reasonable' nor 'convenient'.<sup>195</sup> Indeed, the measures adopted for a purpose 'must not be such as *tend to protect*'<sup>196</sup> the interests concerned, but must be objectively *necessary* to attain the

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sûreté nationale, et donc à déterminer *si les mesures visant le contrôle de l'immigration ont été appliquées de manière incompatible avec l'obligation qui pèse sur les Etats de protéger le droit à la vie de toute personne*' (emphasis added).

<sup>191</sup> I have interpolated from the original argument, which goes on: 'where a State refuses to let an individual depart because he or she does not possess the necessary documentation to enter a third State, then the right loses its binary State-individual focus and necessarily acquires an international dimension,' in: G. S. Goodwin-Gill and J. McAdam, *op. cit.*, p. 382. The authors appear to restrict the applicability of this argument to the country of departure that would police the requirements imposed by a third country of destination. This would be tantamount to sustaining a purely territorial conception of jurisdiction. Since the HRC has already established that the Covenant applies in an extraterritorial way as well (see General Comment No. 31, 2004), I do not see why this argument would not apply to any State of destination whose (extraterritorial) entry requirements/interception practices would be deemed disproportionate in the light of Article 12(2) of the Covenant.

<sup>192</sup> In support of this argument comes Article 26 of the Vienna Convention on the Law of Treaties as it rules that: 'Every treaty in force is binding upon the parties to it and must be performed *by them* in good faith.' The French version is even more telling: 'Tout traité en vigueur lie les parties et doit être exécuté *par elles* de bonne foi' (emphasis added). In addition, Article 27 establishes that: 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

<sup>193</sup> J-Y Carlier, 'L'Europe et les étrangers,' in: *Globalization, Migration and Human Rights: International Law under Review*, Vol. II, Bruylant, 2007, p. 272-273. See also C. Schmitter, F. Julien-Lafferrière and J-Y Carlier, 'Vers quelle politique communautaire des visas de court séjour?', in: *The Emergence of a European Immigration Policy*, Bruylant, 2003, pp. 97-169.

<sup>194</sup> Recital 5, Preamble, Council Regulation (EC) No. 539/2001, *supra* n. 15: 'the determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating, *inter alia*, to illegal migration, public policy and security, and to the European Union's external relations with third countries'; see also *basic criteria for examining applications*, V., CCI: 'The main issues to be borne in mind when examining visa applications are: the security of the Contracting Parties and the fight against illegal immigration.'

<sup>195</sup> A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. II, Sijthoff Leiden, 1972, p. 418, in the context of Article 31 of the Geneva Convention.

<sup>196</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, p.3; *Gabcikovo-Nagymoros Project Case*, ICJ Reports, 1997, p. 40-41; *Case Concerning Oil Platforms*, ICJ Reports, 2003, p. 43: In addition, 'whether a

expected aim. It is against this backdrop that findings as those arrived at by the European Commission are to be appraised. In its 2004 study on the link between legal and illegal immigration the Commission avowed that it is not certain ‘whether or not there is a direct link between the imposition of visa obligations and a slowing down of illegal immigration. On the contrary it seems difficult to prove a link between the lifting of subsequent requirements and the increase of illegal immigration.’<sup>197</sup> In this light, ‘the effects of visa requirements on irregular migration are not completely clear;’<sup>198</sup> it seems impossible then to maintaining the strict efficacy and objective necessity of short-term visas for the purpose of halting illegal immigration.

Taking into consideration refugees’ entitlement ‘to special protection on account of their position,’<sup>199</sup> to the right to leave any country must adhere their right to seek asylum from persecution.<sup>200</sup> The aggregate *right to leave to seek asylum* constitutes the *lex specialis* to be applied to *any person* seeking to undertake international flight to escape from persecution.<sup>201</sup> As Article 14 UDHR does not establish any other limitation to the right to flee than those arising from legitimate *prosecution*,<sup>202</sup> it appears that the aggregate right to leave to seek asylum imposes a stricter principle of proportionality, limiting the possibility for destination countries to impose interception measures even further than what does the right to leave operating alone. So, the question arises: ‘[...] We do know that the imposition of visa requirements on nationals of refugee-producing countries puts refugees [to-be] in the situation of having to resort to irregular forms of migration to [...] seek protection.’<sup>203</sup> This translates in their necessity to put their lives at further risk to undertake international flight. In this set-up,

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given measure is “necessary” is not purely a question for the subjective judgement of the party [...] and may thus be assessed by [a] Court.’ Judicial scrutiny must be made available therefore.

<sup>197</sup> European Commission, Communication study on the links between legal and illegal immigration, COM(2004) 412 final, 4 June 2004, §2.2.

<sup>198</sup> ECRE, *Defending Refugees' Access to Protection in Europe*, *op. cit.*, p.27.

<sup>199</sup> Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation ‘D’, *International co-operation in the field of asylum and resettlement*, Geneva, 28 July 1951.

<sup>200</sup> While it is true that international law does not expressly recognize a right to seek asylum in any legally binding form at the universal level and that no literal allusion to Article 14 UDHR can be traced in the body of the Geneva Convention, according to its spirit, every person is entitled to freedom from persecution. This is confirmed at various instances. First, the drafters of the Geneva Convention considered that ‘the right of asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it.’ The French delegation even suggested that ‘the right of asylum should be mentioned explicitly together with the reference to the Universal Declaration of Human Rights’ made in the Preamble and the ad hoc Committee eventually accepted the suggestion. Afterwards, delegates from other countries felt that then the same should be done for other articles of the UDHR as well, since the object and purpose of the Convention was ‘to ensure the widest possible exercise of all fundamental rights and freedoms.’ Plausibly, it was finally decided that any singling out of particular rights would have been done at the detriment of other rights not expressly referred to. Hence, a generally encompassing reference in general to the UDHR, i.e. to *all* the rights to which refugees were entitled, was preferred. Various regional agreements and national legal systems the world over have subsequently recognized a legally binding entitlement to seek and enjoy asylum from persecution as a fundamental human right. (See for the references to the *Travaux Préparatoires*, P. Weis, *op. cit.*, p. 6 and 296; as regards regional instruments see, for instance, Article 22(7) of the American Convention on Human Rights, Article XXVII of the American Declaration on Human Rights and Article 12(3) of the African Charter on Human and Peoples’ Rights; and for a list on the constitutional and legislative provisions transposing Geneva Convention obligations into the municipal Law of each State Party see S. E. Lauterpacht and D. Bethlehem, *op. cit.*, Annex 2.2. In the EU context, all Member States recognise the ‘fundamental right’ category of the ‘right to seek asylum’, see *inter alia*: F. Moderne, *Le droit constitutionnel d’asile dans les Etats de l’Union Européenne*, Economica, Presses Universitaires d’Aix-Marseille, 1997; D. Alland and C. Teitgen-Colly, *Traité du droit d’asile*, PUF, Paris, 2002. In 2002, ten out of the then fifteen Member States of the Union explicitly recognised a right to asylum and five of them laid down this right in their respective constitutions, see D. Bouteillet-Pacquet, ‘Subsidiary Protection: Progress or Set-back of Asylum in Europe? A critical Analysis of the Legislation of the Member States of the European Union,’ in: *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?*, Bruylant, 2002, pp. 221. Most importantly, Article 18 EUCFR enshrines explicitly a ‘right to asylum,’ whose legally binding effect is forthcoming).

<sup>201</sup> Note that Article 14(1) UDHR does not limit its scope of application *ratione personae* to Geneva Convention refugees, according to its wording: ‘*everyone* has the right to seek and to enjoy in other countries asylum from persecution’ (emphasis added).

<sup>202</sup> Article 14(2), UDHR (emphasis added).

<sup>203</sup> ECRE, *Defending Refugees' Access to Protection in Europe*, *op. cit.*, p.27.

only those persecuted assuming the extra amount of danger that a hazardous illegal route entail will find sanctuary in the wealthy democracies of the EU. Is this proportionate? The European Court of Human Rights, in a case predating *Xhavara* and concerning administrative detention of refugees in the international zone of an airport, seemingly integrated in its reasoning precisely the approach expounded here. Taking account of the special value the right to leave has for refugees, without condemning the French Republic directly on this ground, it anyway argued that: ‘the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on [...] *the right to leave any country, including one’s own* [...] This possibility *becomes theoretical if no other country* offering protection comparable to the protection they expect to find in the country where they are seeking asylum *is inclined or prepared to take them in.*’<sup>204</sup> From this, three consequences ensue: (1) In the case of the right to leave to seek asylum public order considerations play a lesser role than the one they may perform in the case of the right to leave let alone. (2) The underlying motives of the person undertaking international escape from persecution must be taken into account when designing policies of interception in destination countries. (3) The binary nature of legal obligations reaches everyone’s *right to leave to seek asylum*. The Preamble of the Geneva Convention may be construed as backing this interpretation. Its Recitals 4 and 5 request ‘international co-operation’ to cope with refugee crises and call on Contracting Parties to do ‘*everything within their power* to prevent this problem from becoming a cause of tension between States.’ Refugee deflection measures achieve opposite goals; imposed by States of destination, instead of fostering international co-operation, directly disrupt refugee flows.<sup>205</sup> Refugees to-be become invisible to those countries applying interception measures in an indiscriminately fashion, neglecting the fact that they freely contracted to respect *everyone’s* right to leave to seek asylum. To conclude: it is not that countries of destination need to go and rescue refugees in their countries of origin, but nor can they (actively or passively) entirely preclude (or even diminish) their chances to escape.<sup>206</sup>

## B.2. THE PROHIBITION OF TORTURE: ‘EVERYONE MEANS EVERYONE’<sup>207</sup>

The prohibition of torture, inhuman or degrading treatment or punishment is one essential feature of most Human Rights’ instruments.<sup>208</sup> A concrete definition of torture is provided by Article 1(1) of the International Convention against Torture, according to which ‘torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’ The Strasbourg Court has introduced a gradation between torture, inhuman treatment and degrading treatment. It maintains that ‘in order to determine whether any particular form of ill treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 [ECHR] between this notion and that of inhuman or degrading

<sup>204</sup> ECtHR, *Amuur v France*, Appl. No. 19776/92, 25 June 1996, §48.

<sup>205</sup> This argument, although adapted from the detention setting to that of extraterritorial exclusion of refugees, is borrowed from A.T. Naumik, op. cit., p. 689.

<sup>206</sup> J-Y Carlier, *La condition des personnes dans l’Union Européenne*, op. cit., p.178-179.

<sup>207</sup> *Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to the ECtHR Saadi v Italy judgement.*

<sup>208</sup> See *inter alia* Article 1 CAT, Article 7 CCPR, Article 3 ECHR.

treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious or cruel suffering.’<sup>209</sup> As regards ill treatment, the European Court of Human Rights retained in its *Greek case* that the notion comprises ‘at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.’<sup>210</sup> In turn, degrading treatment is that which ‘humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.’<sup>211</sup> As relates to punishment, which is inhuman or degrading, the concept refers to acts, which can be characterized as inhuman or degrading treatment and which are imposed as a retribution or penalty.<sup>212</sup>

Protection against torture is absolute; neither restrictions, nor derogations are allowed.<sup>213</sup> Indeed, as the European Court of Human Rights has very recently recalled, the prohibition of torture ‘enshrines one of the fundamental values of democratic societies. ‘Unlike most of the substantive clauses of the [ECHR], Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.’<sup>214</sup> Furthermore, acts such as extradition<sup>215</sup> and expulsion<sup>216</sup> may give rise to an indirect violation of the prohibition of ill treatment.<sup>217</sup> The fact that the prohibited action may be perpetrated by or in the receiving State, in no way diminishes the responsibility of the Contracting State. Actions and omissions of the Contracting States, be their effects territorial or extraterritorial, may amount to a violation of Article 3 ECHR. ‘In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the *exposure* of an individual to the risk of proscribed ill-treatment.’<sup>218</sup> In addition, the grounds on which such a treatment may be inflicted are irrelevant. No attachment is required of the behaviour of the perpetrator to ‘race, religion, nationality, membership of a particular group or political opinion.’<sup>219</sup> This is why ‘the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees.’<sup>220</sup> What is more, the conduct of the person concerned is equally

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<sup>209</sup> See *inter alia* ECtHR, *Aydin v Turkey*, 25 September 1997, Appl. No. 23178/94, §82; *Selmouni v France*, 28 July 1999, Appl. No. 25803/94, §96.

<sup>210</sup> ECtHR, *Greek Case*, 1969, 12 Yearbook 1, 186.

<sup>211</sup> See *inter alia* ECtHR, *Pretty v UK*, 29 April 2002, Appl. No. 2346/02, §52.

<sup>212</sup> R. Alleweldt, ‘Protection against Expulsion under Article 3 of the European Convention on Human Rights,’ *EJIL*, 4, 1993, p. 364 and references therein.

<sup>213</sup> See Article 4(2) ICCPR and Article 15(2) ECHR. In both instruments the prohibition of torture range amongst those provisions from which States can never derogate. No “§2” is provided either, according to which restrictions could ever be permitted.

<sup>214</sup> See *inter alia* ECtHR, *Ireland v UK*, 8 January 1978, Appl. No. 5310/71, §163; *Chahal v UK*, 15 November 1996, Appl. No. 22414/92, §79 and *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, §127.

<sup>215</sup> ECtHR, *Soering v UK*, 7 July 1979, Appl. No. 14038/88.

<sup>216</sup> See *inter alia* ECtHR, *Vilvarajah and Others v. UK*, 30 October 1991, Appl. No. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87; *Chahal v. UK*, 15 November 1996, Appl. No. 22414/93; *Amuur v. France*, 25 June 1996, Appl. No.19776/92; *H.L.R. v. France*, 29 April 1997, Appl. No. 24573/94; *D. v. UK*, 02 May 1997, Appl. No. 30240/96; *Jabari v. Turkey*, 11 July 2000, Appl. No. 40035/98; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, Appl. No.13178/03; *Salah Sheekh v The Netherlands*, 11 January 2007, Appl. No. 1948/04; *Saadi v. Italy*, 28 February 2008, Appl. No. 37201/06.

<sup>217</sup> In the same line, the Human Rights Committee ‘notes that it is not sufficient for the implementation of Article 7 to prohibit [ill-]treatment or punishment or to make it a crime. *States parties* should [...] *prevent* and punish acts of torture [...] States parties *must not expose individuals to the danger* of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their expulsion, extradition or refoulement,’ (emphasis added) in: HRC, General Comment No. 20, 1992, UN Doc. HRI/HEN/1/Rev.1, specially §8 – 9.

<sup>218</sup> See *inter alia*, ECtHR, *Saadi v. Italy*, 28 February 2008, Appl. No. 37201/06, §126 (emphasis added).

<sup>219</sup> Article 1(A), Geneva Convention.

<sup>220</sup> ECtHR, *Saadi v. Italy*, 28 February 2008, Appl. No. 37201/06, §138.

immaterial.<sup>221</sup> ‘The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 [...]’<sup>222</sup> No *quid pro quo* reasoning can alter the absolute nature of the prohibition of torture.<sup>223</sup> The Strasbourg Court has plainly rejected the arguments advanced by States that a weighing exercise should take place between the right of the individual not to be exposed to ill-treatment upon return to the receiving country and the interest of the sending State to expel him on account of the danger that the individual represents for the host community. It is simply not possible ‘to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3 [...]’ The conduct of the person concerned, however undesirable or dangerous, cannot be taken into account.<sup>224</sup> The Court preserves in this way both the absolute character and the binary nature (individual-Contracting State) of the legal obligation arising from Article 3 ECHR to which reference has been made earlier.

In order to transpose this reasoning to the specific case of refugees to-be, a few precisions need to be made. Firstly, it is worthy to remind that not only acts of extradition and acts of expulsion may amount to refoulement, but that ‘*any other measure* pursuing that aim’<sup>225</sup> or leading to the result of devolving the person to his persecutors<sup>226</sup> may qualify too. Secondly, in the case the kind of persecution feared by the individual could be equated to the type of ill treatment proscribed by Article 3 ECHR, protection against refoulement would not only be triggered while still inside the country of origin but it would also become indisputably absolute. Yet in International Law no commonly agreed definition of persecution exists nor immediate consensus on the equation of persecution and ill treatment or punishment. The UNHCR 1967 *Handbook on Procedures* provides some guidance in this respect. There, it is established that ‘a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.’<sup>227</sup> Indeed, it is generally accepted that the core of the notion includes the threat of deprivation of life or physical freedom. This does not readily amount to reduce persecution to acts of ill treatment; grave violations of other human rights may well qualify as persecution too: destitution, arbitrary arrest, rape, denial of justice, illegal imprisonment, deliberate imposition of substandard living conditions, racial segregation, systematic denial of access to employment, etc can under certain conditions be considered persecutory acts. However, in so far as acts of persecution to be characterised as such need to attain a certain level of severity, it might be possible to ascertain with Goodwin-Gill and MacAdam that ‘a person who fears “persecution” necessarily also fears *at least* inhuman or degrading treatment or punishment.’<sup>228</sup> Thirdly, accepting the equivalence between persecution and ill treatment, it would still be necessary to determine that there are ‘substantial grounds for believing’ that the denial of a visa by a State authority or the refusal of a *de facto* waiver by a private carrier at the point of embarkation would *expose* the individual to ‘a real risk of being subjected to treatment contrary to Article

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<sup>221</sup> ECtHR, *Chahal v. UK*, 15 November 1996, Appl. No. 22414/93, §79.

<sup>222</sup> See *inter alia*, ECtHR, *Saadi v. Italy*, 28 February 2008, Appl. No. 37201/06, §127.

<sup>223</sup> See *Concurring Opinion of Judge Zupancic to ECtHR Saadi v. Italy*, §2.

<sup>224</sup> *Ibid.*, §138; see also §139.

<sup>225</sup> ECtHR, *Jabari v. Turkey*, 11 July 2000, Appl. No. 40035/98, §39 (emphasis added).

<sup>226</sup> Committee of Ministers of the Council of Europe, Resolution (67) 14, 1967: ‘no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or *any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution*’ (emphasis added).

<sup>227</sup> UNHCR, *Handbook*, §51.

<sup>228</sup> G. S. Goodwin-Gill and J. MacAdam, *op. cit.*, p. 243. In support of this argument come the Comment by the French representative on Draft Article 33: ‘any possibility [...] of a genuine refugee being returned to his country of origin would not only be *absolutely inhuman*, but contrary to the very purpose of the Convention. [...] There was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country’ (emphasis added) in: P. Weis, *op. cit.*, p. 327.

3.<sup>229</sup> Should this link be established, the absolute protection of Article 3 ECHR would be triggered. A forth remark, relating to the conduct of the refugee to-be, becomes pertinent in this respect. His behaviour, as in the case of those suspected of the most hideous crimes,<sup>230</sup> is absolutely immaterial for the qualification of an act of the intercepting State as one raising an issue under Article 3 ECHR. It is irrelevant whether the individual tries intentionally to curb immigration controls. He cannot be penalized therefore. The State would not be less responsible for its actions, should the refugee to-be defeat the visa regime. The protection afforded by Article 3 ECHR cannot be overruled by the fact that he breaks (or tries to break) domestic immigration norms. Here again, no *quid pro quo* reasoning can be applied. While States may have an interest to control the entry, residence and removal of aliens, this cannot be balanced against the absolute right of the individual to be protected from torture. The exercise by States of their right to control immigration remains subject to their international obligations, including those arising from Article 3 ECHR vis-à-vis ‘everyone within their jurisdiction.’<sup>231</sup> And ‘everyone means everyone.’<sup>232</sup>

## V. CONCLUSIONS AND PROSPECTS FOR FURTHER RESEARCH:

From the foregoing analysis it stems that passive interception measures imposed onto refugees by States of destination may, under certain conditions, breach the requirements of Human Rights Law. If refugees are already outside the country of their nationality, visas refused in neighbouring States where the life or physical integrity of the refugee is endangered in a sense banned by Article 1 of the Geneva Convention may well amount to an act of refoulement under Article 33(1). Exclusion from embarkation or continuation of journey in transit by carriers would, in similar circumstances, lead to an equivalent effect. In regard of refugees to-be, those still within the territorial boundaries of the country of origin, the ‘right to leave to seek asylum’ covers special relevance, as does the absolute protection against refoulement that Article 3 ECHR, Article 7 ICCPR and Article 1 CAT afford. The principle of interpretation of law engagements in good faith together with the binary nature of legal obligations require States to take account of the human rights of refugees when making use of intercepting measures. A mechanical application of visa requirements, in obliteration of refugees’ special entitlement ‘to protection on account of their position’<sup>233</sup> amounts to arbitrariness,<sup>234</sup> a derogation from those Conventions entire.

Visas should therefore be reinvented or done away with. Maintaining visas would require that other channels are open so that refugees can ‘come to us.’<sup>235</sup> In that case the possibilities provided for by Articles 5(2) and 16 CISA as regards LTV visas and Article 26(2) CISA together with Article 4(2) of the Carriers’ Liability Directive in relation to carriers’ sanctions

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<sup>229</sup> ECtHR, *Chahal v. UK*, 15 November 1996, Appl. No. 22414/93, §80.

<sup>230</sup> ECtHR, *Chahal v. UK*, 15 November 1996, Appl. No. 22414/93, §79; *Saadi v. Italy*, 28 February 2008, Appl. No. 37201/06, §127.

<sup>231</sup> Article 1, ECHR.

<sup>232</sup> *Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to the ECtHR Saadi v Italy judgement.*

<sup>233</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimous recommendation ‘D’, *International co-operation in the field of asylum and resettlement*, Geneva, 28 July 1951.

<sup>234</sup> On the notion of arbitrariness, although circumscribed to Article 5 ECHR, but interpolable to the spirit of the entire system of Human Rights protection, see, *inter alia*, ECtHR, *Kemmache v France* (no.3), 24 November 1994, Appl. No. 17621/91, §42. Goodwin-Gill speaks of inadmissible ‘practices of containment without protection’ in: ‘The Right to Leave, Return and Remain,’ in: *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, 1996, p. 99.

<sup>235</sup> V. Statement by MEP Kaufmann (GUE/NGL), Parliamentary Debate on the *Report on the initiative of the French Republic for the adoption of a Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member states third-country nationals lacking the documents necessary for admission* (14074/2000 – C5-0005/2001– 2000/0822(CNS)), 13 March 2001, Strasbourg sitting.

need to be correctly exploited.<sup>236</sup> This leads the way to further research in the field of humanitarian visas, mechanisms of extraterritorial processing<sup>237</sup> and diplomatic asylum.<sup>238</sup> Compatibility with the entire Human Rights' system and with the deference required by the Geneva Convention in regard of refugees should be closely scrutinized, so that responsibility, enforceability and accountability for refugee protection remain intact.<sup>239</sup> The alternative would be to eliminate visas altogether. Carlier proposes a plan of action in this regard and demonstrates that life is possible without visas.<sup>240</sup> The phenomenon of irregular migration would in that case need to be dealt with using strategies with no impact upon refugee rights.<sup>241</sup>

From the system of deference enshrined in the Geneva Convention it ensues that refugees are entitled to privileged treatment *as soon as* they meet the definition. Immigration policies must take account of this fact. 'Measures to combat illegal immigration [...] should be implemented in a manner which does not deprive the right to asylum of its practical meaning.'<sup>242</sup> Systems of refugee protection are to be considered in a holistic way. Escape from persecution, admission to the country of asylum, procedural access to qualification procedures and enjoyment of status constitute inseparable components of the same continuum. All of these elements are to be bore in mind when designing measures of passive interception with the potential to impinge on the *effet utile* of the rights of refugees. Immigration deterrent policies can no longer disregard the difference between refugees and non-refugees<sup>243</sup> with the excuse that 'it is impossible to distinguish between persons who may be justified to claim a right or to be rejected or returned, and the large number of people seeking admission for other purposes.'<sup>244</sup> An attempt is to be made to find a system of curbing unwanted immigration which exempts refugees from the mix. 'Any dolphins alongside the sharks [cannot be] sacrificed.'<sup>245</sup> Illegal immigration may be combated, but not at all costs.<sup>246</sup>

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<sup>236</sup> The proposal by ECRE of 'suspending visa restrictions for a determined period of time [...] for nationals and residents whose country is experiencing a recognised significant upheaval or humanitarian crisis' (in: *Defending Refugees' Access to Protection in Europe*, op. cit., p.35) would not be the adequate way to go. A proper use of Articles 5(2) and 16 CISA would require the compulsory and systematic issue of LTV visas to refugees (to-be).

<sup>237</sup> Scholars and others have already shown their suspicion in this regard. Some believe that this could lead to 'refugee warehousing' see M. Smith, 'Warehousing Refugees: A Denial of Rights, A Waste of Humanity,' in: US Committee for Refugees, *World Refugee Survey 2004*, p.38; G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones,' *EJML*, Vol. 5, No.3, 2003, pp.303-341.

<sup>238</sup> G. Noll, 'Seeking Asylum at Embassies,' *op. cit.*

<sup>239</sup> Amnesty International shows its scepticism, believing that these practices would in reality serve to deny 'access to territory and [to shift] the asylum-seekers to processing zones outside the EU, where responsibility, enforceability and accountability for refugee protection would be weak,' in: 'UK/EU/UNHCR: Unlawful and Unworkable – Amnesty International's Views on Proposals for Extra-Territorial Processing of Asylum Claims,' 2003 (available at: [www.amnesty.org](http://www.amnesty.org)).

<sup>240</sup> J-Y Carlier, *La Condition des Personnes dans l'Union Européenne*, op. cit., p. 147- 152; see also C. Schmitter, F. Julien-Lafferrière and J-Y Carlier, 'Vers quelle politique communautaire des visas de court séjour?,' *op. cit.*, pp. 97-169.

<sup>241</sup> The European Commission proposes to impose sanctions against employers of irregular workers in its: Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249 final of 16 May 2007.

<sup>242</sup> European Commission, Green Paper on Asylum, p. 14.

<sup>243</sup> UNHCR, address to the European Parliament, February 2007, available at: [www.unhcr.org](http://www.unhcr.org)

<sup>244</sup> K. Hailbronner, *op. cit.*, p. 115.

<sup>245</sup> A.T. Naumik, *op. cit.*, p. 697.

<sup>246</sup> *Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky to ECtHR Saadi v Italy*: 'States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those "absolute" rights from which no derogation may be made even in times of emergency.'