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# Securitising Sovereignty? States, Refugees, and the Regionalisation of International Law

Gregor Noll



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## Securitizing sovereignty? States, refugees, and the regionalization of international law

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*Gregor Noll*

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### The structural disadvantages of refugee law

At first sight, international law seems to uphold both state sovereignty and individual sovereignty. The existence and autonomy of a state are secured by the obligation on other states to respect its territorial integrity and the prohibition on intervening in other states' domestic affairs. At the individual level, internationally guaranteed human rights serve comparable functions: they secure a minimum of autonomy and even preserve an "exit" option, because each individual retains a right to leave any country, including his or her own.<sup>1</sup>

In the area of forced displacement, this ostensible harmony never existed in practice. Because the human right to emigration has not been matched by a corresponding right to immigration,<sup>2</sup> and international law recognizes the power of states to control the composition of their own population, refugees have regularly encountered difficulties in exercising their exit right. The "right to seek and enjoy asylum" laid down in Article 14 of the 1948 Universal Declaration of Human Rights<sup>3</sup> has largely remained a fictional privilege for refugees, mainly because it was designed to insulate states granting asylum from reproaches by countries of origin rather than to protect individuals. Moreover, Article 14 remains a norm without legally binding force, which limits its effects to the political and symbolic levels.<sup>4</sup>

The lack of entry rights is also reflected in the 1951 Convention on the

Status of Refugees, which is rightly regarded as the cornerstone of the modern refugee regime. Although it launched an abstract refugee definition and a basic norm of non-return (the so-called prohibition of *refoulement* in its Article 33), it fails to address the crucial question of access to an asylum state in an effective and unequivocal manner. To be protected by the Convention, the refugee needs to make contact with the territory of a potential asylum state. It could be described as the Achilles heel of the international refugee regime: states are at liberty to block access to their territory and thus avoid situations in which persons in need of protection could invoke the provisions of the 1951 Refugee Convention or of other protective norms of international human rights law.

The dynamics behind recent developments in refugee and migration law are an interplay between three factors: the number of refugees on state territory, the level of rights accorded to them, and the degree of solidarity between states in protecting them. Although there is a minimum level of rights in international law that states cannot undercut, international solidarity in refugee reception is largely absent, so host countries make every effort to reduce the number of refugees by systematically outlawing refugee migration and by blocking all possible avenues of access. Attempts to limit access can take many forms and affect the internal domain, the transit routes, and also the countries or regions of origin. A marked feature of these limitative dynamics is that they undercut both individual sovereignty and the sovereignty of other states. Let me provide some examples, all of which potentially affect the respect for international law.

- Destination states in the North are constantly redesigning their asylum systems in order to remove incentives for protection seekers (for example, by introducing voucher systems instead of cash benefits). They legislate new reasons to reject claims (an infamous example is return to so-called safe third countries, regardless of the availability of protection in such countries) and they attempt to make the return of rejected cases more efficient. This puts the protective provisions of international law under increasing pressure and challenges the principle of non-discrimination in a number of areas.
- Destination states in the North attempt to control the travel routes of protection seekers and to cut them off by administrative measures such as visa requirements, sanctions against carriers transporting aliens without documents, and externalized forms of border control (for example by placing immigration officers in third countries). Such policies affect the exercise of the human right to leave any country.
- As the examples of the US intervention in Haiti and the NATO intervention in the province of Kosovo showed, the North's attempts to control refugee migration can even involve military intervention, which

may encroach upon the sovereignty of other states. But intervention may also take milder forms than the use of force. Transit states as well as countries of origin are increasingly coming under pressure to police their territory or their seaways in order to block refugee migration.

This dual strategy – limitations on individual sovereignty as well as on the sovereignty of other states – is the subject of this chapter. The analysis will proceed in three steps. First, I shall show that the language of “human security” is unhelpful and merely colludes in the losses for individual sovereignty that contemporary refugee policies entail. Second, I will depict the conflicts in international law that are a consequence of the dual strategy. To do so, I shall examine the whole gamut of responses ranging from outright rejection of protective obligations (*insulation*) via refugee reception (*palliation* of human rights violations) to enforcement action in the country of crisis (*intervention*). Isolation, palliation, and intervention raise different questions of international law, and the objective here is to demarcate the borderlines. Third, I will demonstrate that this dual strategy of limiting sovereignty is propelled by regional cooperation, and the examples of the European Union and the North Atlantic Treaty Organisation (NATO) will be used to illustrate this point. Lastly, I offer a concluding discussion on the significance of these developments.

### Questioning the security concept

The developments following 11 September 2001 have abundantly demonstrated that the security concept is not a neutral one that applies to states, citizens, and aliens in roughly the same manner. On the contrary; states have been drawing heavily on the security concept to justify a broad array of measures, ranging from the slashing of rights that protect individuals in hastily drafted domestic counter-terrorist laws to armed action in internal and international conflicts. In this crude argumentative framework, the security of the individual citizen is equated with the security of the state. In the following, I shall attempt to disentangle the various dimensions of the security concept.

In international law, the concept of security traditionally denotes the security of states. A pertinent example is the law of the UN Charter, which allocates certain competencies to the Security Council in situations where “international peace and security” are, or may be, threatened. However, modern international law extends beyond the regulation of inter-state relationships, and the security demands of quite a different actor have increasingly won recognition: human rights law, refugee law, and humanitarian law are concerned with another dimension of security, namely that of the individual. This dimension of law attempts, firstly, to

pacify the individual against the exercise of power by the state, and, secondly, even to oblige the state to take positive action for and to devote resources to a basic protection of the individuals subject to its power. The discourse on these individual-protective norms is complex and, at times, confusing for the outsider. For that reason, and perhaps also to match the dimension of “state security” with a convenient counterpart, this dimension has been labelled “human security.”<sup>5</sup>

It is easy to conceive of situations in which both security concepts are in tension, with the fight against terrorism being the most obvious example.<sup>6</sup> Therefore, a number of legal disputes have flared up regarding central concepts in the legal regulation of security. In the European debate on refugee law, the issue of protection from non-state agents of persecution, the relationship between full-blown refugee status and the rudimentary offer of temporary protection, as well as the question of exclusion from refugee status, are probably most pertinent today. The permissibility of the use of force in the absence of Security Council authorization and the issue of proportionality are, on the other hand, dominating the discourse on interventionist approaches.<sup>7</sup>

Labels matter. The concept of “security” is not a neutral label, allowing us to shuttle back and forth between the interests of individuals threatened with a violation of their rights and those of communities or states. As already stated, “security” has predominantly collective connotations in the discourse of international law. The concept of security is closely related to the concepts of “emergency,” “the exceptional,” and the legitimacy of force. The “securitization” of migration and flight<sup>8</sup> entails a parallel militarization and a move away from civil society discourse. A further characteristic of the security concept is its trump function: invoking security concerns seemingly reduces the legal constraints put on actors and increases the leeway for discretion. Thus, “securitizing” the discourse on flight and protection means introducing a bias that ultimately works against the individual.

The usefulness of the security concept is questionable for other reasons as well. In the discourse on persecution, flight, and protection, the security concept is employed in an asymmetrical and ultimately paternalistic manner. At first sight, it appears attractive to denote the concerns of both individuals and states with one and the same concept, but this practice all too easily colludes in the enormous differences in power and autonomy between the two actors. States not only have the power to define and defend their own security interests; they also usurp the power to define the security interests of individuals (and, in certain cases, take measures to defend them). The individual, on the other hand, has little or no voice in the security discourse, and the autonomous power to defend individually defined security interests is extremely limited. Two examples will

illustrate this point – one related to would-be refugees, and the other to the electorates of potential host states.

First, industrialized states increasingly underscore the need to promote human rights in refugee-sending countries as a means of addressing forced displacement.<sup>9</sup> At first sight, this seems to cater for the security interests of the very states promoting that policy, as well as those held by the potential victims of persecution and other threats. However, the same industrialized states are simultaneously barring flight routes by ever more sophisticated means. What would appear as a fair trade-off to some – interventionist policies are swapped for the population's capability to vote with its feet – is de facto a net loss for individual security. At least in the short- and medium-term perspectives, the reach and efficiency of interventionist human rights policies are severely limited, and the “exit” option is extremely valuable for the individual's survival. Seen from the perspective of a would-be refugee's individual autonomy, this is a gross restriction of choices. This curtailment of individual autonomy contradicts a core assumption of liberal market economies, which otherwise allocate great importance to the “invisible hand” of individualized decision-making. At bottom, this trade-off is an illiberal paternalism on the part of the industrialized states practising such policies.

Secondly, however, the paternalistic features of the security concept also have an internal dimension. Taking the example of the European Union, it can be observed that its *demos*, and thus the object of security concerns, remains undefined after all these years, while its boundaries are vigorously enforced. This means that the “high politics” task of defining the content of these boundaries is delegated to the technicians of border control and security management at the legislative, administrative, and enforcement level. Ultimately, this practice is paternalistic vis-à-vis the electorates of the states, in whose name boundary enforcement is taking place.

Finally, one should be aware of the fact that attempts to securitize the enjoyment of human rights imply a breaking up of traditional legal terminology in the human rights field. To wit, human rights language normally employs the concept of security to describe the limits of individual rights. For example, after setting out a number of provisions on permissible limitations, the 1969 American Convention on Human Rights (ACHR)<sup>10</sup> addresses the issue of personal responsibilities in Article 32(2): “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” Article 27(2) of the 1981 African Charter on Human and Peoples' Rights<sup>11</sup> enunciates an analogous opposition between individual rights and collective security.<sup>12</sup> These quoted norms provide a graphic illustration of the dichotomy of rights and security in the human

rights law discourse. Combining the rights concept in an all-encompassing security concept risks the dilution of the precision already attained in legal language, and thereby of the individual interests one seeks to protect.

Any attempt to conceptualize state interests and the interests of protection seekers under the umbrella of “security” is doomed to be imprecise at best and collusive at worst. The “individual security” of the protection seeker is clearly subordinated to the “collective security” of states. Hence, taking into account the discursive presuppositions of international law, it is wiser to speak of the human rights of the individual rather than of his or her “human security.” In chapter 5 of this volume, Astri Suhrke introduces the concept of “vulnerability” as a more precise alternative to “human security.” In the discourse of international law, “vulnerability” is strongly linked to the situation of the individual (the protection of “vulnerable groups” has become a recurring topos in contemporary refugee law, which attempts to cater for the specific needs of children, traumatized persons, and women at risk). It is not burdened with the military heritage and the collectivist bias of the security concept.

In the following sections, I shall track the policies of potential host states to reduce their protective obligations vis-à-vis refugees, and single out possible conflicts with their obligations under international law.

### Three policy options: Insulation, palliation, and intervention

Three approaches can be distinguished when exploring a state’s choices when it observes the occurrence of human rights violations in another state. First, a bystander state can choose to insulate itself from the effects of refugee-inducing phenomena in third countries. In some cases, natural impediments – such as geographical distance – will prevent such violations affecting its interests. Remote states such as Iceland are naturally insulated, which contributes to relatively low numbers of asylum seekers.<sup>13</sup> This approach can be supported by deflection and deterrence. By way of example, the reinforcement of immigration control by EU member states since the late 1980s is a way of amplifying already existing natural impediments.<sup>14</sup> This approach may validly be termed *insulation*. It tends to keep would-be refugees within the borders of their state or in the region of origin. Hence, such policies exacerbate the security situation in the country of origin and its neighbouring countries, while insulating the states in the North from the effects of forced migration. In other words, the security of persons in need of protection is traded off against the security of Northern welfare societies. The loss is considerable – suffice it to recall the precarious situation of internally dis-

placed persons (IDPs). Whereas refugees are protected by a rudimentary international legal regime with binding protective norms, no such regime exists for IDPs, who remain at the mercy of the benevolent implementation of political guidelines.<sup>15</sup>

The second approach is *palliation*. During the Cold War, refugee reception abroad was seen as a major palliative for human rights violations by other states. After the Hungarian uprising in 1956, West European states swiftly offered asylum to a relatively comprehensive outflow – not least because the political symbolism of asylum could be exploited. In recent decades, however, the institution of asylum has increasingly come under pressure. Faced with the magnitude of the refugee problem, both developing and industrialized countries restrict access to their territories and attempt to promote early return, sometimes without due regard to norms of international law. Moreover, mechanisms of migration control have confined the reception of refugees in the immediate crisis region, leading to an overburdening of neighbouring states and a concomitant reduction of palliative capacity. Finally, the terrorist incidents of 11 September 2001 have been used by key actors in the North to amplify a restrictionist rhetoric and to call for measures to close the perceived security loopholes of asylum systems. The outcome of these developments remains to be seen, but it is worth recalling that none of the hijackers involved in the crimes of September 11 had used the asylum channel to enter their host countries.

In certain cases, these developments have been supported by a greater willingness on the part of some actors to intervene in the flight-inducing conflict – be it by means of diplomacy, humanitarian assistance, or military action. This brings us to the third approach, namely that of *intervention*. Relevant examples are the interventions in northern Iraq, Haiti, Somalia, Rwanda, Bosnia, and the province of Kosovo. Again, the relationship of such military humanitarianism to the norms of international law is problematic. The most recent example is the Kosovo intervention, which lacked authorization by the Security Council and is therefore held by some to violate international law.<sup>16</sup>

Thus, it may be concluded that none of the three options – insulation, palliation, and prevention – remains unaffected by the ramifications of international law. In the following, I shall give a brief survey of relevant norms.

### *Insulation*

As a matter of principle, two gradations of the insulative approach can be distinguished. First, a state may choose to remain completely passive vis-à-vis protection seekers, trusting natural impediments such as geo-



graphical distance to keep them away from its territory. Second, a state may actively seek to prevent protection seekers from reaching and remaining on its territory. Throughout the past two decades, industrialized states have devised ever more sophisticated means to do this, including interception on the high seas, visa requirements coupled with carrier sanctions, as well as externalized means of border control. Other measures purport to curtail the contact of protection seekers with state territory and to shift the responsibility to another state. These measures go under the label of “protection elsewhere.” Its pivotal elements are safe-third-country arrangements in domestic law coupled with readmission agreements between states. Finally, destination states also attempt to prevent migration by demanding that countries of transit and countries of origin exercise greater control over migratory movements. These kinds of policies – which can lead industrialized democracies to cooperate with regimes that do not respect human rights – must not be confused with policies encouraging the implementation of human rights in sending countries.

Without doubt, insulation policies are the expression of a defensive response to flight. They represent security thinking writ large. Therefore, the whole array of insulative measures described above has been heavily criticized by refugee advocates. However, it is not easy to discern the legal components of this criticism; concrete and specific arguments on why and how such measures violate international law are rare.

To address this gap, two questions should be asked. First, does the mere passivity of bystander states violate international law? Second, do active insulation measures violate international law?

#### *Mere passivity*

Starting with the legal qualification of “mere passivity,” it is hard to conceive viable and sufficiently precise arguments of illegality. To do that, it would be necessary to identify a strong positive obligation to assist persons in need of international protection outside state territory. This meets with considerable difficulties. To start with, many relevant norms are linked to a requirement of territorial presence. A central human rights instrument such as the International Covenant on Civil and Political Rights (ICCPR) is limited in its scope of application to the territory and jurisdiction of a specific contracting party.<sup>17</sup> Refugee law does not have much more to offer: explicit protections against *refoulement* in Article 33 of the European Convention on Human Rights (ECHR) and Article 3 of the 1984 Convention Against Torture (CAT) presuppose that the beneficiary is in touch with the territory of the potential host state.

Furthermore, general norms commanding states to promote human

rights are usually too abstract to allow for the derivation of specific duties to assist beyond the obligations set out in human rights treaties. A pertinent example is Article 56 of the UN Charter, by which UN member states have pledged to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set out in Article 55 of the UN Charter. However, it has been claimed that the purpose of promoting universal respect for human rights enunciated in Article 55(c) of the Charter is too unspecific to qualify as a legal norm and should rather be regarded as a programme for further action.<sup>18</sup> There is little or no chance of doing away with ambiguities in an interpretation process following Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VTC),<sup>19</sup> and the wide diversity of state practice and states' *opinio juris* would make it extremely difficult to identify some form of consensus on the precise content of such a hypothetical norm. The lack of uniformity in both areas would also bring down any attempts to construct a duty to assist in customary international law.

#### *Active insulation*

It is easier to problematize policies of active insulation in relation to human rights obligations. Such policies have drawn heavy fire from the perspective of moral philosophy.<sup>20</sup> But may they also qualify as partly or wholly illegal under international law? Undoubtedly, the doctrine of the sovereign power of a state to determine its population is a relevant backdrop, seemingly suffocating all arguments in favour of outsiders' protection interests. Most certainly, instruments requiring the territorial presence of beneficiaries cannot be invoked in this context. However, instruments obliging states to consider human rights in the exercise of their jurisdiction open new avenues for refugee lawyers. Lamentably, these avenues have so far been discussed to only a very limited extent.<sup>21</sup>

Active insulation impedes efforts by protection seekers to make contact with state territory by preventing their arrival. One of the more striking examples in recent history was the Australian government's determination not to allow the asylum seekers aboard the Norwegian vessel *Tampa* to land on Australian territory, unless other states made assurances that they would accept the applicants.<sup>22</sup> Although this incident exposed the thrust of active insulation policies, it is more representative to look at situations in which the would-be applicant does not even get close to the territory of the potential state of refuge.

Let us therefore consider the legal position of a person in need of protection who applies for an entry visa at a diplomatic representation of the goal state in due course. Normally, a visa would be denied if the visa officer became aware of the purpose of the visa request – namely, to seek asylum upon entry into the goal state. Elsewhere, I have shown that an

interpretation of Article 3 of the ECHR along the lines of Articles 31 and 32 of the VTC means that this article obliges states in certain situations to grant an entry visa through their diplomatic representations.<sup>23</sup> Such situations are characterized by a pressing need for protection by the state from which an entry visa is requested; reasonably, there would be no other options of protection accessible to the claimant. The goal state may be obliged to grant an entry visa because the processing of visa requests at embassies is within the jurisdiction of the sending state, and thus subject to the obligations flowing from the ECHR.

Why is that so? The ECHR requests in Article 1 that contracting parties “secure” the rights and freedoms enshrined in its Section I. This obligation is a positive one. Given a sufficiently large risk that a protection seeker would be subjected to treatment contrary to Article 3 of the ECHR if denied a visa, and thus denied the possibility of entering the state in question, the goal state is under an obligation to allow entry. This argument does not contend that visa requirements are illegal *per se*. Rather, it maintains that denying visas to a class of persons protected under positive obligations flowing from Article 3 of the ECHR is illegal. It should be noted that the above line of argument is applicable not only to Article 3 of the ECHR but in principle to all rights guaranteed by the ECHR and its protocols. The limitative element is the scope of the positive obligations under a specific right, which can be assessed only *in casu*.<sup>24</sup> It must be underscored that the granting of an entry visa is not equivalent to the grant of protection. The purpose of the entry visa is solely to avert the imminent risk and to allow the conduct of a proper determination procedure in a safe place – i.e. the goal country. Clearly, if no sufficient reasons for protection emerge during such determination procedures, the goal state is free to remove the applicant from its territory with due respect to other norms of international law.

*Mutatis mutandis*, the same line of argument could be invoked against other, individualized forms of insulation policies. Where migration liaison officers assist in the emigration procedures in third countries and thereby assist in the deflection of persons coming under the protective scope of Article 3 of the ECHR, this would engage the responsibility of an ECHR contracting party sending out the officers.

But the ECHR is not the only instrument whose scope is limited only by a requirement of the exercise of jurisdiction. The American Convention on Human Rights is constructed in the same fashion, and needs to be construed along the same lines. Article 1(1) spells out that states parties undertake “to ensure to all persons subject to their jurisdiction the free and full exercise of . . . rights and freedoms” recognized in the ACHR. Among these rights, we find a prohibition of torture and inhuman or degrading punishment or treatment (Article 5(2)).

The 1989 Convention on the Rights of the Child (CRC) provides a further example. Article 2(1) states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction.” Thus, there is no requirement that a child wishing to benefit from the positive obligations enshrined in the CRC be present on the territory of a state party from which these benefits are sought. To exemplify the source of such obligations, one may refer to Article 37 of the CRC, which contains a prohibition of torture and other forms of ill-treatment.

For children seeking an entry visa from the goal state’s diplomatic representation located in a *transit* country, Article 22(1) of the CRC may also be of relevance.<sup>25</sup> This provision reads as follows:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Thus, the minor visa claimant would benefit from a state obligation to “take appropriate measures to ensure that a child . . . receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.” Among these rights, we find, for example, the protection from torture and ill-treatment in Article 37 of CRC, mentioned earlier. An appropriate measure to ensure freedom from torture or other forms of ill-treatment in an imminent case of non-protection from such risks in the transit country could be to grant an entry visa into the goal country.

It should be noted that both the United Kingdom and Singapore introduced reservations upon ratification, which may make the interpretation expounded above inapplicable to them.<sup>26</sup> Germany introduced a declaration upon ratification, which was intended to safeguard the area of immigration control from being affected by the CRC.<sup>27</sup> However, both Germany and the United Kingdom would still have obligations under the ECHR, which offers an analogous protection not just to children but to everyone.

These arguments on the basis of the ECHR, the ACHR, and the CRC show that indiscriminate insulation by potential goal states risks violating international law. To avoid such risks, states must provide for protection-related entry visas in a manner conforming to the positive obligations under the said instruments. Thus, although international law knows of no explicitly stated right to entry for non-nationals, there is an obligation

based on human rights to grant provisional access to territory in exceptional situations.

To determine the precise extent of positive obligations, individual risks have to be weighed against the protective resources of the state. In the identification of protective resources, the protection demands of citizens and residents of the goal state shall also be taken into account. This is where so-called security interests enter into the conceptualization of positive obligations. This may baffle some who recall the non-derogable nature of the prohibition of torture and other forms of ill-treatment.<sup>28</sup> Non-derogability and absoluteness most certainly affect and delimit the negative obligations flowing from this prohibition, but they do not inform us about how far positive obligations extend. Thus, weighing and balancing remain a necessity when pondering the legality of active insulation policies, which, in turn, gives leeway to what have been termed security interests.

### *Palliation*

Even before 11 September 2001, the institution of asylum appeared to be under siege, and this assessment has been confirmed ever since. States in the North attempt to limit their obligations under the 1951 Refugee Convention and other relevant instruments of international law by testing and proliferating a battery of restrictive measures. These are aimed at blocking access to territory or asylum procedure, cutting short the length of stay, and slashing the packages of rights to which protection seekers are entitled. In the South, refugee protection has seen a number of grave crises in the past decade, with massive *refoulement* incidents following the Rwandan genocide, and mounting problems with the militarization of refugee camps. The dynamics behind these phenomena are grounded in the absence of regional and international responsibility-sharing arrangements, which makes defection from protection obligations an all too rational choice for would-be host states.

But the “asylum crisis” should not obscure the fact that palliation is still practised to a very large extent. It can take the form of full-blown refugee status under the 1951 Convention or of minimalist protection from *refoulement* on a short-term basis.<sup>29</sup> Although large groups of persons are declared not to be refugees or otherwise entitled to protection, industrialized states refrain from actually returning them, given the unstable situation in their country of origin. Although these cases figure as rejectees in the asylum statistics, they are *de facto* protected, although in a very precarious manner. Moreover, the example of Kosovo has shown that palliation is still regarded as a standard component of states’ dealings with massive human rights violations, although much of the physical protection was delegated to states in the immediate vicinity (the

Federal Republic of Yugoslavia, Macedonia, and Albania), some of which received considerable material assistance by more affluent states.

Restriction has triggered a counter-reaction by refugee advocates and therefore forced the legal discourse to move forward in the clarification of important borderline issues of refugee law. Because of the declining role of the 1951 Convention in practice, refugee advocates have increasingly relied on human rights law in the context of refugee protection. In the European context, the significance of the ECHR was constantly on the rise throughout the 1990s. If protection seekers seek the assistance of the European Court of Human Rights (ECtHR) when asserting their rights under Article 3 of ECHR, the Court almost routinely requests states to stay expulsion,<sup>30</sup> and has declared removal to contravene Article 3 of the ECHR in a number of landmark cases. By way of example, the ECtHR has taken a clear stand on an important issue of dispute, namely whether or not persons risking violations by non-state agents of persecution are entitled to protection, thus countering exclusionary interpretations by some European states. On a universal level, the CAT Committee has analogously challenged restrictionist readings of refugee law. Finally, the UN human rights machinery displayed greater willingness to deal with refugee-related questions during the 1990s.<sup>31</sup> Thus, refugee law and human rights law have come to overlap each other at a hitherto unprecedented level.

As we shall see below, this is reflected in regional developments. In the European Union, a common human-rights-related status reflecting the obligations flowing from the ECtHR and CAT is currently under deliberation.<sup>32</sup> Nonetheless, it would be inadequate to depict the current state of affairs as a newly won balance between restrictionist tendencies and the increasing impact of human rights law. Rather, the pendulum has swung in the opposite direction since 11 September 2001.

The sweeping rationale to fight terrorism incited states to redefine the asylum door as a security risk. In the absence of visible links between the asylum system and the terrorist acts that triggered counter-terrorism, this comes dangerously close to an official endorsement of xenophobic positions taken in domestic discourses.<sup>33</sup> UN Security Council Resolution 1373 of 28 September 2001<sup>34</sup> made an explicit linkage between asylum and terrorism by obliging states to

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;

and to

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

These obligations are legally binding, because the Council acted under Chapter VII of the UN Charter when adopting the Resolution.

True enough, they could be taken to represent a mere reiteration of existing obligations under Article 1F of the 1951 Refugee Convention, while underscoring that any repressive measure must be in conformity with human rights as well as international law at large. Taking into consideration that the international mobility of the terrorists of September 11 was based on migration channels other than asylum, it gives rise to concern that the Security Council chose to single out the asylum channel. In Europe, some states made extensive use of this linkage in their attempts to launch counter-terrorist legislation. By way of example, the German as well as the Danish draft laws were criticized for using terrorism as a pretext for clamping down on asylum.<sup>35</sup>

Although these moves exacerbate the opposition of host state community and asylum seekers in the political domain, it should be emphasized that the basic legal tenets of asylum remain untouched. It is reasonable to expect, though, that the interpretive battles fought over them will gain a new, and perhaps unprecedented, momentum. To exemplify, the European Commission has elaborated a "Working Document on the Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments" on the initiative of the EU Council. Although this document generally strikes a tone of moderation and caution, it nevertheless suggests the abolition of the principle of "inclusion before exclusion," implying that asylum seekers can be excluded from refugee status before a full assessment of the facts speaking for their inclusion in such a status has taken place.<sup>36</sup> This implies a marked downgrading of the applicants' legal standing. One may safely assume that this will intensify the debate on the precise interpretation of the obligations flowing from the Geneva Convention and especially its Article 1F. This shift of position of the Commission is a reminder that even generally protection-minded actors are repositioning themselves in line with the restrictionist signals sent out by states in the North.

### *Intervention*

After the dealignment of the bipolar structure in international relations after 1989, hitherto impracticable forms of interventionism again became

an option for powerful states. Without purporting to reflect the complex motives of the intervening states or coalitions in their entirety here, it is remarkable that the prevention of massive human rights violations and of ensuing refugee outflows was increasingly brought to the fore as a justification for the use of military means.<sup>37</sup> In the relevant resolutions adopted by the Security Council, a remarkable linkage was struck between massive displacement and the existence of a threat to international peace and security as a precondition for UN-mandated intervention. In terms of *realpolitik*, however, states rarely put their military resources at the disposal of crisis prevention and resolution if their own security interests are not at stake. So, restating a truism, the “international peace and security” alluded to are congruent not with refugee interests but with those of the intervening states.

Earlier examples of this new interventionism manifested themselves within the framework of the UN Charter. The Security Council adopted clear mandates for interventions in Somalia, Rwanda, and Haiti.<sup>38</sup> Although all three cases involved a considerable degree of forced displacement, the prevention or mitigation of a refugee crisis was not invoked by the relevant resolutions to justify intervention.<sup>39</sup> The Security Council mandate for the intervention in East Timor reproduced the same pattern; although there was an important component of displacement in reality, the authorizing resolution did not invoke it.<sup>40</sup>

By contrast, a second category is not so clear-cut. The imposition of no-fly zones over Iraq to protect Kurds from persecution in the wake of the conflict between Iraq and Kuwait is a pertinent example. By virtue of a resolution not taken under Chapter VII, the Security Council mandated the Secretary-General, and not member states, to use all means at his disposal to address the needs of refugees.<sup>41</sup> The actual imposition of a no-fly zone by states participating in the “coalition of the able and the willing” ended the repression of Kurds in northern Iraq, but obviously lacked an express mandate to do so. Because Turkey had closed its borders to potential refugees, the palliative response was simply unavailable, and the choice was between passivity and intervention. The no-fly zones have been upheld ever since, which indicates that interventionist responses are not necessarily of shorter duration than palliative ones.

In the cases of Kosovo and Afghanistan, however, the Security Council was bypassed, and the intervening states violated the UN Charter in doing so. The Kosovo intervention was expressly justified by the human rights violations, which were driving Kosovars into neighbouring countries. To what extent military action by NATO contributed to, or even triggered, persecution and refugee outflows was intensely discussed during and after the intervention. At present, it is not possible to see an end to the international presence in the province of Kosovo, again indicating



that interventionism cannot be reduced to military action in the narrow sense.

The intervention in Afghanistan adds another facet to the emerging picture. It drew on a counter-terrorist agenda, to which refugee interests were irrelevant, although persecution especially of women by the Taliban was named as a second-order justification for the action taken by the intervening powers. However, it was clear that the US and UK bombings caused flight and displacement in their own right. No international collaboration alleviated the considerable protective burdens of neighbouring countries, initially Iran and Pakistan, which promptly reacted by closing their borders. This stood in marked contrast to the Kosovo crisis: when Macedonia closed its borders, NATO states brought political pressure to bear on its government and international efforts were made to share the burdens of reception. As a result, the Macedonian government allowed refugees into its territory again.<sup>42</sup> In the case of Afghanistan, a comparable solution was not even debated in a serious manner, and the rhetoric of the intervening states concentrated mostly on post-conflict reconstruction.

### The dynamics of regionalization

Universally valid norms of international law have a disadvantage. The price of consensus in a large constituency is abstraction, and such abstraction tends to empty universal norms of content and enforceability. One way out is a limitation of the constituency, that is, the number of states whose consensus is needed. This is what regionalization is all about. In the area of human rights, regionalization is routinely associated with progress – more detailed rights, more muscle in monitoring, and, it is hoped, a more coherent pattern of norm compliance in state practice. The linkage of regionalization to progress is not self-evident, however. Rather than specifying and strengthening universal obligations, the steps taken by a regional grouping may also dilute and undermine such obligations. The following subsection on the harmonized asylum and migration policy of the EU member states attempts to illustrate that point.

Apart from the risk of diluting universal norms further, regionalization poses other risks. One is the risk of fragmenting international law at large, which would ultimately break up into a myriad disconnected or even contradictory regional norm systems. Such fragmentation contains additional risks – for example, that of a false universalism, which mistakenly ascribes universal validity to regional norms. At the core of such risks is the preservation of the international legal axiom of sovereign equality. Where inequality among states and state groupings is on the

rise, the state-centred model of international law will become obsolete and give way to an international law condoning empires. I shall attempt to illustrate the risk of false universalism by tracking recent developments in the mandate of NATO, which are closely connected to the issue of forced migration.

### *Palliation in the European Union*

The European harmonization of migration and asylum law was never intended to be a comprehensive solution to the problems of refugee protection. It was conceived as a technical consequence of the abolition of internal borders.<sup>43</sup> Drawing on the language employed by member states, one could validly claim that the harmonization of asylum law among member states is a flanking measure in response to the dismantling of internal border control. To a significant degree, this heritage still haunts the contemporary *acquis communautaire*, and, as we shall see below, it affects the conceptualization of security in the primary law of the European Union.

The EU framework for the harmonization of asylum and migration policies was reworked by the 1997 Treaty of Amsterdam, which brought a major reshuffle of competencies, a binding timetable for future integration, the integration of the Schengen *acquis*, and a protocol downgrading the legal standing of protection seekers who happen to be EU citizens.<sup>44</sup> At first sight, the most striking change brought about by the Amsterdam Treaty is a wholesale transfer of asylum and immigration matters from the third to the first pillar, implying augmented supra-national decision-making. Although the remaining intergovernmental elements have significantly reduced the impact of this transfer, new doors have been opened. The move to the first pillar makes available the powerful legislative tools of Article 251 of the Treaty on European Union (TEU) – that is, regulations, directives, and decisions – offering undisputed bindingness, justiciability, and, under certain preconditions, even direct effect. Henceforth, the Council may adopt legislation on a wide array of specified issues relating to asylum, external borders, and immigration, and not only on certain visa issues. Furthermore, scrutiny of adopted measures now comes under the ambit of the European Court of Justice (ECJ).

Technically, this has been achieved by inserting a new Title IV into the TEU. The portal provision of this title, Article 61, delimits the competencies of the Union under this title:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

- (a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;
- (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63.

The main ideas of the whole title are spelt out here. With the allusion to “an area of freedom, security and justice,” a new telos is introduced. Looking at Article 61 of the TEU only, one might think that such security serves insiders and outsiders alike: whereas paragraph (a) caters for EU citizens and denizens, paragraph (b) apparently seeks to provide a legal framework for protection seekers and third-country nationals. Such a reading was seemingly confirmed by the European Council in its Tampere Conclusions, which frame the area of freedom, security and justice as one not per se limited to EU citizens.<sup>45</sup> However, a thorough look at the structure of Title IV suggests that it is not endorsing a universal security concept, but prioritizes the security of insiders over that of outsiders.

To support this contention, we have to involve the obligations that Title IV links to the competencies meted out in Article 61 of TEU. The Council is assigned to adopt the following measures within a period of five years after the entry into force of the Treaty of Amsterdam:

- measures on the crossing of internal borders;<sup>46</sup>
- measures on the crossing of the external borders of the member states, establishing standards and procedures to be followed by member states in carrying out checks on persons at such borders<sup>47</sup> as well as rules on visas for intended stays of no more than three months;<sup>48</sup>
- measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the member states during a period of no more than three months;<sup>49</sup>
- criteria and mechanisms for determining which member state is responsible for considering an application for asylum submitted by a national of a third country in one of the member states;<sup>50</sup>
- minimum standards on the reception of asylum seekers in member states;<sup>51</sup>
- minimum standards with respect to the qualification of nationals of third countries as refugees;<sup>52</sup>
- minimum standards on procedures in member states for granting or withdrawing refugee status;<sup>53</sup>

- minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection;<sup>54</sup>
- measures on illegal immigration and illegal residence, including repatriation of illegal residents.<sup>55</sup>

For the sake of simplicity, I call these measures “the obligatory measures” in the following.

The temporal obligation is not merely a political one, but possesses legal character. If the Council fails to act, the member states and the other institutions of the Union may bring an action before the Court of Justice under Article 232 of the TEU.<sup>56</sup> However, the drafters could not agree to affix temporal obligations to all of the issues enumerated under Title IV. Strikingly, Article 63 of the TEU exempts three types of measures from the obligation to legislate within five years:

- measures promoting a balance of effort between member states in receiving and bearing the consequences of receiving refugees and displaced persons (burden-sharing);<sup>57</sup>
- measures on the conditions of entry and residence, and standards on procedures for the issue by member states of long-term visas and residence permits, including those for the purpose of family reunion (legal immigration);<sup>58</sup>
- measures defining the rights and conditions under which nationals of third countries who are legally resident in a member state may reside in other member states (mobility rights for legally present aliens).<sup>59</sup>

In doing so, the drafters created a hierarchy within the competencies of Article 63 of the TEU, dividing measures into an obligatory and a facultative group. Measures adopted earlier certainly set the parameters for those adopted later. For example, the exemption of burden-sharing from the list of obligatory measures is fatal for protection interests, because it makes restrictiveness in the drafting of the obligatory instruments rational state behaviour. Thus, control continues to enjoy a first mover’s advantage over protection. This illustrates graphically whom the “area of freedom, security and justice” is intended to protect – namely the insiders. It may be validly concluded that the security concept of Title IV is a particularist one.

A further underpinning of this contention can be derived from Article 64 of the TEU, prescribing that Title IV “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” Through this provision, member states have reserved the right to take unilateral measures, should they consider the Union measures insufficient to uphold internal security.<sup>60</sup> This adds another particularist layer to the whole construction of Title IV. Member states’ internal security is at the

top, followed by Union security. Subordinated to both, we find the security of the protection seeker.

*Interventionist self-empowerment: NATO and WEU*

Interventionist approaches to forced migration have been increasingly discussed throughout the past decade, so it is appropriate to ask whether this debate has left traces in the mandate of relevant international organizations in the area of defence. In this section, I shall look into the developing mandates of the North Atlantic Treaty Organisation (NATO) and the Western European Union (WEU). In doing so, special attention will be paid to the relationship between the mandates of both organizations and the framework for interventionist measures provided in the UN Charter.

The traditional security concept of NATO has focused on attacks on the territorial integrity of its members. Averting such attacks by forcible means had a clear basis in the international law doctrine of collective self-defence.<sup>61</sup> After the dismantling of the Warsaw Pact and the military threats flowing from it, the need to define a new role for the organization became apparent. As we shall see in the following, member states of NATO have accorded the organization the legal capacity to act “out of area,” with or without the mandate of the UN Security Council. Compared with the straightforward Cold War mandate, this raises questions about the legal basis in international law. The Security Council may indeed authorize regional organizations to take enforcement action under Article 53 of the UN Charter.<sup>62</sup> However, this article states unequivocally that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.” Thus, at face value, there is no legal basis for out-of-area tasks assumed by NATO without the prior and explicit authorization of the Security Council.<sup>63</sup>

Is there a link between out-of-area activities, involving the use of force, and forced migration? The answer is to be sought in the 1999 Strategic Concept adopted by NATO members’ heads of state. Although the Strategic Concept is not a treaty instrument, it nevertheless sheds light on the agreement of NATO members on how to construe the organization’s mandate. Against that backdrop, its importance should not be underestimated.

Paragraph 10 of the 1999 Strategic Concept divides the tasks of NATO into two categories. One is “fundamental” and covers the dimensions of security, consultations, and deterrence. The second provides for the areas of crisis management and partnership with other actors and aims at enhancing the security and stability of the Euro-Atlantic area. The task

of crisis management is described as follows: “[t]o stand ready, case-by-case and by consensus, in conformity with Article 7 of the Washington Treaty, to contribute to effective conflict prevention and to engage actively in crisis management, including crisis response operations.”

Paragraph 31 of the 1999 Strategic Concept clarifies the meaning of the term “crisis response operations” and puts it into the context of international law:

In pursuit of its policy of preserving peace, preventing war, and enhancing security and stability and as set out in the fundamental security tasks, NATO will seek, in cooperation with other organisations, to prevent conflict, or, should a crisis arise, to contribute to its effective management, consistent with international law, including through the possibility of conducting non-Article 5 crisis response operations.

More specifically, paragraph 24 of the 1999 Strategic Concept provides the link between crisis response and forced migration. This paragraph starts by alluding to the traditional mandate of territorial defence, and then moves on to an extension of this mandate to cover other risks, including that of migratory movements:

Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources. The uncontrolled movement of large numbers of people, particularly as a consequence of armed conflicts, can also pose problems for security and stability affecting the Alliance. Arrangements exist within the Alliance for consultation among the Allies under Article 4 of the Washington Treaty and, where appropriate, co-ordination of their efforts including their responses to risks of this kind.

The paragraph thus provides the link between migratory movements, consultations, and collective crisis response by NATO. It should be stressed that it is the uncontrolled movement of people, and not the causes behind it, that poses the security threat and thus the goal of crisis response. In spite of the Kosovo experience, no mention is made of massive human rights violations as a cause for flight movements. A careful reader cannot avoid the impression that NATO targets the symptom and not necessarily the disease.

Such crisis response activities are legally unproblematic, provided there is a clear mandate by the Security Council. However, the Strategic Concept does not make such an authorization a precondition for undertaking crisis response activities. In practice, the Alliance’s willingness to

take action outside or without a Security Council mandate was illustrated by its intervention in Bosnia–Herzegovina and in Kosovo.

The described developments within NATO have a parallel in those of the Western European Union. The WEU, founded in 1948, currently serves as an organizational framework for a common defence policy within the European Union.<sup>64</sup> In 1997, the WEU was given an explicit, treaty-based competence to deal with the so-called Petersberg tasks.<sup>65</sup> According to the Treaty on European Union, questions that may be dealt with in the framework of WEU “shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.”<sup>66</sup> Strikingly, there is no geographical limitation restraining WEU member states in the pursuit of Petersberg tasks.<sup>67</sup>

The question remains whether the assumption of such tasks presupposes prior authorization by the Security Council. Article 11(1) of the TEU sets out that the Union’s common foreign and security policy shall *inter alia* serve the following objectives:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; ...
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders.

On the other hand, Article 17(1) prescribes compatibility between NATO and WEU defence policies:

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

Thus, the WEU provides another regional mechanism, which has been explicitly mandated by its members to assume interventionist tasks. Although the terminology used in the NATO and WEU frameworks differs to some degree, there is a basic convergence: both organizations may act out of area invoking their members’ security interests, and both may use force in doing so. In both cases, relevant texts allude to the UN Charter, but do not make a prior authorization of interventionist measures by the Security Council a precondition for action. This is, of course,

a threat to the monopoly of the Security Council when it comes to authorizing international force beyond the realm of self-defence. In the current state of play, it is also a threat to the universality of international law.

### Regionalizing security and outlawing refugee migration

There are strong indications that the three responses to flight – insulation, palliation, and intervention – are currently undergoing a process of regionalization. Although global regimes exist when it comes both to refugee protection and to the use of force in international law, these regimes risk being sidelined by regional arrangements, all of which draw heavily on an expanded security concept.

Regionalization is certainly not an evil in itself. It may provide badly needed detail and momentum to vague and under-resourced global arrangements. But it may also undermine global arrangements and thus contribute to the fragmentation of international law and world order. Simply, much depends on the question of whether or not regional arrangements are strictly subsidiary to global ones. There are strong indications that the necessary subsidiarity is lacking. This is apparent in all three areas, where developments within the European Union and NATO indicate a marked ambiguity towards the question of subsidiarity. Especially when it comes to the use of force, the spectre of a *ius imperium* resurfaces, evoking unhappy memories of Carl Schmitt's regionalized conception of international law.<sup>68</sup>

When it comes to forced migration in general, the particularist concept of community security is no longer pursued by each state separately. A movement towards increased inter-state cooperation can be traced, and the particularist perception of security has infested the discourses of migration control and defence. Parallel to this movement, we observe an increasing tendency to outlaw refugee migration. The remainder of these conclusions will take a look at various manifestations of this tendency.

Because visa requirements, carrier sanctions, and externalized border control have increasingly blocked protection seekers' access to countries of asylum, irregular channels of migration have become ever more important, often providing the sole avenue to safety. Irregular channels are problematic per se: they force protection seekers to accept the considerable risks of being smuggled, and they rely on a market mechanism according to which protection is available not for the most needy but rather for the most affluent. Industrialized states bear a moral responsibility for promoting and expanding the market for human smuggling by designing indiscriminate insulation policies. Had the same states opened



alternative avenues to protection for those in need of it (for example by the device of humanitarian visas outlined above), interest in the services of human smugglers would have decreased proportionately, and the legitimacy of the fight against illegal migration would have been enhanced.

However, industrialized states have not been interested in a balanced approach. Rather, they have embarked on a wholesale criminalization of migration without documents. This criminalization is indiscriminate, because it does not distinguish between forced migration and other forms of migration. It associates assistance to protection seekers with human trafficking and the trading of illegal narcotic substances. This strategy works in two ways. First, it finds expression in a growing number of instruments addressing smuggling and trafficking, the UN Convention Against Transnational Organised Crime<sup>69</sup> being one of the most recent examples.<sup>70</sup> Second, criminalization influences the public perception of refugees. When all legal avenues to safe territories are blocked, the victims of human rights violations are transformed into law-breakers by virtue of their flight attempt. Moreover, there is a risk that states will abuse the discourse on smuggling as a way of diverting attention from the detrimental effects of their insulative policies. What remains is the image of refugees as the clients of criminals, with the concomitant guilt by association.

Beyond the measures against human smuggling and migration without documents, we find another dimension of the ongoing outlawing process. Because it is increasingly difficult to obtain formal protected status in any country, protection seekers are faced with deciding whether a formal application is worth while. The alternative is to rely on the informal networks at their disposal and to avoid all form of contact with the authorities, including the filing of a request for asylum. The disadvantage is that they lose access to the material and formal benefits linked to the seeking of asylum, but there are advantages as well, such as the avoidance of detention or forcible removal. There are good reasons to assume that this phenomenon is occurring on a significant scale in industrialized host states. To the extent that such underground migrants would be entitled to protection under international law, they represent the “outlaws” created by the ever more sophisticated restrictionism of asylum countries – disentitled, easy to exploit, and confirming the self-fulfilling prophecy of the bogus refugee.

## Notes

1. See Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171.

2. The construction of free movement rights has therefore been termed “asymmetrical.” For a discussion, see G. Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague: Martinus Nijhoff, 2000, pp. 416–432.
3. Universal Declaration of Human Rights (UDHR), GA Res. 217 (III) of 10 December 1948.
4. Noll, *Negotiating Asylum*, pp. 357–362.
5. Human security “means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in jobs, or in communities” (United Nations Development Programme, *Human Development Report*, Oxford: Oxford University Press, 1994, p. 23). As any observer will note, this concept is too abstract to have an impact on the opposition between refugee interests and host community interests.
6. In fact, the UNDP concept of “human security” is of little help in such clashes, because it accommodates both individual and community (i.e. state) interests. Both interests can be formulated so as to fit into the definition quoted above. It is particularly enlightening to compare this definition with the concept of “societal security” developed by Ole Wæver, an exponent of the Copenhagen School. Wæver defines societal security as concerning “the ability of a society to persist in its essential character under changing conditions and possible or actual threats. More specifically, it is about the sustainability, within acceptable conditions for evolution, of traditional patterns of language, culture, association, and religious and national identity and custom” (O. Wæver, “Societal Security: The Concept,” in O. Wæver et al., *Identity, Migration and the New Security Agenda in Europe*, London: Pinter, 1993, p. 23). Quite clearly the UNDP emphasis on “sudden disruptions” would be easy to colonize for the essentialist conception of security suggested by Wæver.
7. See, e.g., the discussion on the Kosovo intervention in the Editorial Comments by Louis Henkin, Ruth Wedgwood, Jonathan I. Charney, Christine M. Chinkin, Richard A. Falk, Thomas M. Frank, and W. Michael Reisman in *American Journal of International Law*, vol. 93, no. 4, October 1999, pp. 824–862. The present discussion on the legality of the US/UK intervention in Afghanistan also features an important component of proportionality in the context of self-defence.
8. For a good overview of EU policies in this regard, see Jef Huysmans, “The European Union and the Securitization of Migration,” *Journal of Common Market Studies*, vol. 38, no. 5, pp. 751–777.
9. See the mandate of the EU High Level Working Group on Asylum and Migration, established by a Council Decision on 8 December 1998. See Council of the European Union, “Terms of Reference of the High Level Working Group on Asylum and Migration; Preparation of Action Plans for the Most Important Countries of Origin and Transit of Asylum Seekers and Migrants,” 25 January 1999.
10. American Convention on Human Rights (ACHR), 22 November 1969, OAS Official Records, OEA/Ser.K/XVI/1.1.
11. African Charter on Human and Peoples’ Rights, 26 June 1981, ILM no. 21, p. 59.
12. Article 29(3) of the same instrument lays down an individual duty “[n]ot to compromise the security of the State whose national or resident he is.” This article turns on the specific relationship of loyalty between citizen and state, which brings it outside the scope of this text, which remains concerned with the relationship of non-citizens and potential host states.
13. In 2000, Iceland had 20 asylum applications (UN High Commissioner for Refugees, “Global Refugee Trends,” Geneva, May 2001).
14. The control strategy has combined a coordinated visa list with more than 120 country

entries, a common set of instructions for consular officers in issuing visas, the imposition of sanctions to discourage carriers from bringing aliens without documents to the Union, and the posting of migration liaison officers abroad to render pre-departure control more efficient. For a full description of the legal instruments employed, see Noll, *Negotiating Asylum*, pp. 161–182.

15. See chapter 8 in this volume on internally displaced persons by Erin D. Mooney.
16. See, for example, Peter Hilpold, “Humanitarian Intervention: Is There a Need for a Legal Reappraisal?” *European Journal of International Law*, vol. 12, no. 3, 2001, pp. 437–468; Ann Orford, “Muscular Humanitarianism: Reading the Narratives of the New Interventionism,” *European Journal of International Law*, vol. 10, no. 4, 1999, pp. 679–712; and Huysmans, “The European Union and the Securitization of Migration.”
17. See, e.g., Article 2(1) of the ICCPR, requiring that the individual be “within [the contracting party’s] territory and subject to its jurisdiction.” The 1950 European Convention on Human Rights (ECHR) provides the exception to this rule. Its Article 2 delimits the scope of application to everyone within the jurisdiction of a contracting party, omitting the demand for presence in that party’s territory. I shall return to the significance of this solution below.
18. K. J. Partsch, “Human Rights in General,” in R. Wolfrum, ed., *United Nations: Law, Policies and Practice*, Dordrecht: Martinus Nijhoff, 1995, p. 606, n14, referring to the Advisory Opinion on Namibia, ICJ Reports 1971, 16 (57).
19. For a brief introduction to the methodology of interpretation with further references, see Noll, *Negotiating Asylum*, pp. 379–382. See also Anthony Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2000, pp. 184–206.
20. One of the most carefully argued approaches may be found in J. Carens, “The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum,” in K. Hailbronner, D. Martin, and H. Motomura, eds., *Immigration Admissions: The Search for Workable Policies in Germany and the United States*, Oxford: Berghahn Books, 1997, pp. 3–50.
21. Article 3 of the ECHR might impose obligations to grant admission in specific situations, including the obligation to issue an entry visa.
22. The *Tampa* incident took place during the last week of August and the first weeks of September 2001, and triggered diplomatic representations by Norway, the flag state of the *Tampa*, to the Australian government. The asylum seekers aboard the *Tampa* had been rescued at sea, evoking memories of the “boat people” from Indo-China in the late 1970s.
23. Noll, *Negotiating Asylum*, pp. 441–446.
24. *Ibid.*, pp. 467–474.
25. A child seeking an entry visa at a diplomatic representation located in the country of origin would fall outside the scope of Article 22; because such a child is not outside its country of origin, it is not to be regarded as a refugee in the sense of Article 1 A.(2) GC.
26. The United Kingdom introduced the following reservation: “The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.”

Singapore introduced the following reservation: “Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such legislation and conditions concerning the entry into, stay in and departure from the Republic of Singapore of those who do not or who no longer have the right under the laws of the Republic of Singapore, to enter and remain in the Republic of Singapore, and to the

acquisition and possession of citizenship, as it may deem necessary from time to time and in accordance with the laws of the Republic of Singapore.”

Portugal and Sweden both objected to the reservations by the Republic of Singapore, considering that “reservations by which a State limits its responsibilities under the Convention by invoking general principles of national law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international law.” It could, of course, be asked why analogous objections have not been presented against the reservation by the United Kingdom, whose reference to domestic law is no less sweeping than that utilized in Singapore’s reservation.

27. Germany made the following declaration upon ratification: “Nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.”
28. See, e.g., ECHR Article 15.
29. This is the fragile protection accorded to would-be victims of non-state agents of persecution claiming protection in Germany. The T.I. vs. the U.K. case before the European Court of Human Rights (ECtHR) offered some graphic insights into the precarious status accorded to this class of protection seekers in one of the most affluent economies of the industrialized world. ECtHR (Third Chamber), *Decision as to the Admissibility of Application No. 43844/98 by T.I. against the U.K.*, 7 March 2000 (unpublished).
30. The ECtHR is competent to make such a demand under Rule 39 of its Rules of Procedures. Contracting parties to the ECHR usually comply with that request, although there is no explicit legal obligation to do so.
31. For a good overview, see G. Loescher, “Refugees: A Global Human Rights and Security Crisis,” in T. Dunne and N. Wheeler, *Human Rights in Global Politics*, Cambridge: Cambridge University Press, 1999, pp. 246–248.
32. This status has been termed “subsidiary protection” or “complementary protection.” The European Commission has presented the draft of a binding instrument defining the beneficiaries and rights under this status. European Commission, “Proposal for a Council Directive Laying down Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees, in Accordance with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, or as Persons Who Otherwise Need International Protection,” Brussels, 12 September 2001, COM 2001/510.
33. It should be noted, though, that some states explicitly stated that the action taken was not directed against Muslims or Islam generally, and distanced themselves from xenophobic tendencies. See, e.g., European Council, *Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001*, Brussels, 21 September 2001, SN 140/01.
34. UN Security Council Resolution 1373, 28 September 2001, S/Res/1373 (2001).
35. The German non-governmental organization Pro Asyl repeatedly voiced this criticism during the debate on the German draft law in autumn 2001 (see press releases of the period available at [www.pro-asyl.de](http://www.pro-asyl.de)), and the Danish Centre for Human Rights emphasized that much of the change to Danish aliens law proposed in the counter-terrorist draft legislation presented in October 2001 was unrelated to the struggle against terrorism (see English summary of the “Statement by the Danish Centre for Human Rights on the Anti Terror Package,” November 2001, available at [www.humanrights.dk](http://www.humanrights.dk)).
36. European Commission, “Working Document on the Relationship between Safeguard-

- ing Internal Security and Complying with International Protection Obligations and Instruments,” Brussels, 5 December 2001, COM (2001) 743 final, section 1.4.3.2.
37. For a critical assessment, see D. Chandler, “The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda,” *Human Rights Quarterly*, vol. 23, no. 3, 2001, pp. 678–700.
  38. See UN Security Council Resolution 794 (1992) of 3 December 1992 on Somalia, UN SC Resolution 929 (1994) of 22 June 1994 on Rwanda, and UN SC Resolution 940 (1994) of 31 July 1994 on Haiti.
  39. For an analysis, see F. Harhoff, “Unauthorized Humanitarian Interventions – Armed Violence in the Name of Humanity?” *Nordic Journal of International Law*, vol. 70, nos 1–2, pp. 65–199, at pp. 90–92.
  40. UN SC Resolution 1264 of 15 September 1999.
  41. UN SC Resolution 688 of 5 April 1991.
  42. See M. Barutciski and A. Suhrke, “Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing,” *Journal of Refugee Studies*, vol. 14, no. 2, 2001.
  43. This understanding was already explicitly endorsed in the mid-1980s. See, e.g., the “Political Declaration of the Member States on the Free Movement of Persons,” annexed to the Single European Act, OJ (1987) L 169/26.
  44. “Protocol on Asylum for Nationals of Member States of the European Union,” annexed to the Treaty on European Union and to the Treaty Establishing the European Community, 6 October 1997, Doc. no. CONF 4007/97, TA/P/en 24.
  45. European Council, *Presidency Conclusions*, Tampere European Council, 15/16 October 1999, paras. 2 and 3. It should be recalled that the Conclusions are not legally binding, whereas the TEU is.
  46. TEU Article 62(1).
  47. TEU Article 62(2)(a).
  48. TEU Article 62(2)(b).
  49. TEU Article 62(3).
  50. TEU Article 63(1)(a).
  51. TEU Article 63(1)(b).
  52. TEU Article 63(1)(c).
  53. TEU Article 63(1)(d).
  54. TEU Article 63(2)(a).
  55. TEU Article 63(3)(b).
  56. K. Hailbronner, “Die Neuregelung der Bereiche Freier Personenverkehr, Asylrecht und Einwanderung,” in W. Hummer, ed., *Die Europäische Union nach dem Vertrag von Amsterdam*, Vienna: Manz, 1998, p. 182.
  57. TEU Article 63(2)(b).
  58. TEU Article 63(3)(a).
  59. TEU Article 63(4).
  60. For an argument that TEU Article 64(1) does not prejudice the powers of the ECJ under Title IV, see G. Noll and J. Vedsted-Hansen, “Non-Communitarians: Refugee and Asylum Policies,” in P. Alston, ed., *The European Union and Human Rights*, Oxford: Oxford University Press, 1999, p. 374.
  61. Compare Article 5 of the Washington Treaty and Article 51 of the UN Charter.
  62. It is a moot point whether NATO is a regional organization in the technical sense or not.
  63. On the legal framework of the use of force in the context of so-called humanitarian interventions, see Jens Elo Rytter, “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond,” *Nordic Journal of International Law*, vol. 71, nos 1–2, 2001, pp. 212–160.

64. Although they are EU member states, Austria, Denmark, Finland, Ireland, and Sweden are not full-fledged members of the WEU.
65. WEU foreign and defence ministers met in 1992 in Petersberg, Germany, and agreed on a listing of WEU tasks:

“Apart from contributing to the common defence in accordance with Article 5 of the Washington Treaty and Article V of the modified Brussels Treaty respectively, military units of the Member States, acting under the authority of WEU, could be employed for

- Humanitarian and rescue tasks;
- Peace-keeping tasks;
- Tasks of combat forces in crisis management, including peacemaking”

See Fabrizio Pagani, “A New Gear in the CSFP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union,” *European Journal of International Law*, vol. 9, 1998, pp. 737–749.

66. TEU Article 17(2).
67. Pagani, “A New Gear in the CSFP Machinery,” p. 741.
68. In the early 1940s, Schmitt developed a theory of international law based on the concept of *Grossraum* and drawing on the Monroe doctrine. In this theory, the right to intervene in other countries is reserved for the hegemon power in the region, and powers external to the region are barred from intervening. Historically of little surprise, his theory fitted well with the imperialist aspirations of the German government at the time. Lamentably, international relations have not improved to a point making the *Grossraum* theory obsolete. Carl Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*, Berlin: Duncker & Humblot, 1941.
69. Signed by some 120 states on 15 December 2000 in Palermo, Italy. A Protocol Against the Smuggling of Migrants by Land, Sea and Air has been adopted together with this instrument. Measures include criminalization of traffickers and smugglers with appropriate penalties, protection of victims in receiving countries, and information-sharing between countries on trafficking methods. Increased border restrictions and the implementation of carrier sanctions are recommended.
70. After lobbying by the UN High Commissioner for Refugees, legal safeguards for refugees were included in this instrument, thus at least acknowledging the possibly negative effects of anti-smuggling instruments on the legitimate human rights interests of refugees. On the ground, however, such safeguards are of little help when it comes to preserving flight routes for protection seekers with no documents.