

The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties

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SECTION 1 INTRODUCING THE DEBATE

Throughout the 1970s and 1980s, in parallel to changes in the volume and composition of asylum seeker flows¹, European Governments closed their borders to permanent settlers, discontinuing “guest workers” schemes and erecting barriers to family reunification². Humanitarian admission became virtually the only option for legal immigration in several States. Many were believed to misuse the asylum channel and the lines distinguishing refugees from other migrants started to blur³. Simultaneously the rise in asylum applications was perceived as a generalized abuse of status determination procedures. Although no conclusive statistical or other evidence was provided in support of this association⁴, the tendency to characterize asylum seekers as economic migrants in disguise took hold⁵. Thereafter, fearing to attract a

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1. On the assumption that *asylum seekers* may be *refugees*, both terms are used interchangeably. Regarding the declarative nature of status determination, see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/Eng/REV.1, re-edited January 1992 (Geneva, 1979), para. 28, available at: <http://www.unhcr.org/3d58e13b4.html>.

2. For analysis see D. Joly and R. Cohen, “Introduction: The ‘New Refugees’ of Europe”, in D. Joly and R. Cohen (eds.), *Reluctant Hosts: Europe and Its Refugees*, Aldershot, Avebury/Gower Publishing, 1990; and D. Joly, “A New Asylum Regime in Europe”, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities*, Cambridge, Cambridge University Press, 1999, p. 336.

3. J. Sztucki, “Who Is a Refugee?”, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities*, *supra* footnote 2, at 69.

4. On this point see G. S. Goodwin-Gill, “Editorial: Asylum 2001 – A Convention and a Purpose” (2001) 13 *IJRL* 1; and for further discussion refer to B. Leimsidor, “The Concept of ‘Safe Third Country’ in Asylum Legislation, Regulation and Practice: Political, Humanitarian and Practical Considerations”, in L. Zagato (ed.), *Verso una disciplina comune europea del diritto d’asilo*, Padua, edam, 2006, p. 39.

5. The General Affairs Council of Ministers of the EU introduced the term “illegal refugees” in its *Action Plan on the Influx of Migrants from Iraq and the Neighbouring Region*, Council doc. 5573/98, 26 January 1998.

disproportionate amount of unfounded claimants, many developed countries have introduced unilateral measures restricting access to both their territories and asylum systems⁶, disclaiming responsibility for the protection requests they received in certain circumstances. As a result, numerous refugees are put “in orbit”. Without being directly returned to persecution, but left without asylum, “they are shuttled from one country to another in a constant quest for protection”⁷.

The “safe third country” notion is one such measure, coined supposedly with a view to bringing the orbiting phenomenon to an end. It initially emerged as the “country of first asylum” idea in the legal systems of the Scandinavian countries in the mid-1980s. The amendments of October 1986 to the Danish Aliens Act constitute the first formal example⁸, but the principle spread rapidly during the 1990s to other European States, where it adopted different forms and nomenclature⁹. Thereafter, the concept has been implemented in other parts of the world and has also been formalized in a range of bilateral and multilateral instruments¹⁰.

6. A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford, Oxford University Press, 2009, Chap.1; T. Gammeltoft-Hansen, *Access to Asylum*, Cambridge, Cambridge University Press, 2011, Chap. 2.

7. Melander’s words are still current. See G. Melander, “Refugees in Orbit”, in G. Melander and P. Nobel (eds.), *African Refugees and the Law*, Stockholm, Almqvist, 1978, at p. 28. See also A. Grahl-Madsen, “Refugees in Orbit: Some Constructive Proposals” (1979), 26 *AWR Bull.* 118; and G. Melander, “Responsibility for Examining an Asylum Request” (1986), 20 *IMR* 220.

8. M. Kjaerum, “The Concept of Country of First Asylum” (1992), 4 *IJRL* 514.

9. Germany amended its Constitution in 1993, introducing the concept in Article 16 as a limit to the basic right to asylum. A system of designated “safe third country” lists was introduced too, whereby qualification procedures could be entirely dispensed with under certain conditions. For analysis see M. Wollenschlaeger and A. Schraml, “The Basic Right of Asylum in Germany after the Reform of 1993” (1994) 21 *Polish YbLL* 296. The German Constitutional Court upheld the amendment to the Constitution in 1996. On this point, refer to R. Marx and K. Lumpf, “The German Constitutional Court’s Decision of 14 May 1996 on the Concept of ‘Safe Third Countries’ – A Basis for Burden Sharing in Europe?” (1996), 8 *IJRL* 419; G. Noll, “The Non-Admission and Return of Protection Seekers in Germany” (1997), 9 *IJRL* 415. The United Kingdom introduced the notion in its Asylum and Immigration Bill in late 1995, thereby formalizing previous administrative practice. For commentary, see C. J. Harvey, “The Right to Seek Asylum in the United Kingdom and ‘Safe Third Countries’” (1996), *Public Law* 196. Several other European States followed suit.

10. The United States adopted the notion in s. 208 (a) (2) (A) of its Immigration and Nationality Act, as amended in 1996. See D. Anker, *Law of Asylum in the United States*, 3rd ed., Refugee Law Centre, Boston, 1999, at p. 453. Australia developed safe third country regulations for Indo-Chinese refugees covered by the Comprehensive Plan of Action in 1994 and generalized the application of the concept through the amendment of s. 36 of the 1958 Migration Act in 1999. For commentary see P. Mathew, “Safe for Whom? The Safe Third Country Concept Finds a Home in Australia”, in S. Kneebone (ed.), *The Refugee Convention 50 Years On: Globalisation and International Law*, Aldershot, Ashgate, 2003, p. 133. In Canada the rule has existed in the Immigration and Refugee Protection Act since 1989, but it was implemented only in 2003, when Canada concluded the so-called Safe Third Country Agreement with the United States. See N. Alburquerque Abell, “Safe Third Country Provisions in Canada and in the

The notion was born out of the conviction that the uneven distribution of asylum seekers across the European Union was due to “forum shopping” by applicants, who chose to travel to the Member State they perceived as more sympathetic to their plight¹¹. Without there being a generally accepted definition of the term, depending on the system, the principle serves as a rule of admissibility of protection claims, as a sort of exclusion clause from refugee status at the merits phase, or as both¹². Outside the procedural framework – and sometimes without any formal legal coverage, the notion is also used as an interdiction tool, justifying intervention for the purposes of blocking passage to those in transit or to summarily return those who have reached national territory, before they file a protection claim¹³. The notion thus permeates not only the asylum regime, but also the migration management systems of States in Europe and elsewhere, including border control and readmission policies. Its potential impact on access to asylum and *refoulement*, therefore, cannot be overstated.

The fundamental premise underlying the notion is that, given the silence of the 1951 Refugee Convention (CSR)¹⁴ concerning the allocation of responsibility for asylum claims and in the absence of an explicit requirement to recognize refugees and grant them permanent protection, States are free to send asylum seekers to safe countries, provided that their obligations under the Convention, and particularly the *non-refoulement* clause in Article 33 CSR, are observed.

Together with the work of UNHCR on “protection elsewhere”¹⁵, a very rich volume of literature examining the concept has accumulated since the early

European Union: A Critical Assessment” (1997), 31 *IMR* 569. South Africa, Tanzania and Botswana apparently apply the notion too. See R. Bonaventure, “The End of Asylum? The Changing Nature of Refugee Policies in Africa”, *New Issues in Refugee Research*, Working Paper No. 5 (UNHCR, 1999).

11. N. El-Enany, “The Safe Country Concept in European Union Asylum Law: In Safe Hands?” (2006), *CSLR* 1, at 6.

12. Several comparative surveys have been conducted in the past by a range of actors revealing serious divergences across countries in the legal conception and implementation of the notion. See ECRE, “Safe Third Countries: Myths and Realities” (1995), available at: <http://www.refworld.org/docid/403b5cbf4.html>; Danish Refugee Council, “‘Safe Third Country’: Policies in European Countries” (1997), available on request; S. Peers for ILPA and British Refugee Council, “Mind the Gap! Ineffective Member State Implementation of European Union Asylum Measures” (1998), available on request; European Commission, “Study on the Law and Practice on Safe Country Principles against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure” (2004), available at: http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/safe_countries_2004_en_en.pdf.

13. For a telling example, see the Italian push-back campaign in “The Facts” of ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012.

14. 1951 Convention relating to the Status of Refugees, 189 *UNTS* 150 (CSR hereinafter).

15. See, in particular, EXCOM Conclusions No. 15 (XXX) of 1979 on refugees without an asylum country and No. 58 (XL) of 1989 on the irregular movement of asylum-seekers, in *Compilation of Conclusions Adopted by the Executive Committee of the International Protection of Refugees: 1975-2004*, available at: <http://www.unhcr.org>.

1990s. Saving *non-refoulement* and the refugee definition, possibly no other single notion in refugee law has prompted such a heated and lasting debate. Although some commentators have taken a neutral position¹⁶, the overwhelming majority of writers show considerable uneasiness with the notion and the way in which it has been implemented by States. Very few authors have openly defended the legality and adequacy of the concept, with Hailbronner standing out as nearly the only proponent¹⁷. The overriding emphasis of the debate, however, has been on the determination of the circumstances in which “safe third country” *transfers* are legal, instead of engaging with the underlying question of whether the “safe third country” notion *itself* is compatible with international law¹⁸.

Consequently, research thus far has mainly concentrated on identifying the list of conditions necessary for a third country to be considered safe in accordance with the 1951 Convention. Once identified, numerous authors have pointed to the difficulties of guaranteeing these conditions on the ground¹⁹. Some among them have rejected the “safe third country” concept as unworkable *in practice*, on account of the removing State’s impossibility to ensure the fulfilment of its protection obligations *in or through* the third State in question, leaving, nonetheless, the underlying legality or illegality of the notion undetermined²⁰. Only a few have engaged in the analysis of the

org/41b041534.html; UNHCR, “The Concept of ‘Protection Elsewhere’” (1995), 7 *IJRL* 123; UNHCR, Lisbon Expert Roundtable, Lisbon 9-10 December 2002, “Summary Conclusions on the Concept of ‘Effective Protection’ in the Context of Secondary Movements of Refugees and Asylum Seekers”, February 2003, available at: <http://www.unhcr.org/protect/PROTECTION/3e5f323d7.pdf>.

16. R. Fernhout, “Status Determination and the Safe Third Country Principle”, in J.-Y. Carlier and D. Vanheule (eds.), *Europe and Refugees: A Challenge?*, The Hague/London/Boston, Kluwer, 1997, at p. 187; H. Battjes, *European Asylum Law and International Law*, Leiden/Boston, Martinus Nijhoff, 2006, at p. 397; J.-Y. Carlier, “Droit d’asile et des réfugiés: de la protection aux droits”, *Recueil des cours*, 2007, at p. 161; N. Coleman, *European Readmission Policy*, Leiden/Boston, Martinus Nijhoff, 2009, at pp. 223-316.

17. K. Hailbronner, “The Concept of ‘Safe Third Country’ and Expeditious Asylum Procedures” (1993), 5 *IJRL* 31; and S. Blay and A. Zimmermann, “Recent Changes in German Refugee Law: A Critical Assessment” (1994) 88 *AJIL* 361.

18. S. H. Legomsky, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection” (2003), 15 *IJRL* 567. The author limited the scope of his work to establishing “[w]hen . . . international law and . . . sound practice permit a country to return an asylum seeker to a third country”, at p. 573.

19. R. Marx, “*Non-Refoulement*, Access to Procedures, and Responsibility for Determining Refugee Claims” (1995), 7 *IJRL* 383; N. Albuquerque Abell, “The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees” (1999), 11 *IJRL* 60; P. Mathew, “Legal Issues concerning Interception” (2003), 17 *Geo. Imm. J.* 221.

20. J. van Selm, “Access to Procedures: ‘Safe Third Countries’, ‘Safe Countries of Origin’ and ‘Time Limits’”, Background paper for the Third Track discussions, Global Consultations on International Protection (UNHCR, 2001), para. 9:

lawfulness of the concept from an international refugee law and human rights perspective, but this without reaching a definite conclusion²¹. A common inference among commentators in this group, as reported by Foster, is that “the 1951 Convention neither expressly authorizes nor prohibits reliance on protection elsewhere policies” and that therefore the legality of the notion cannot be entirely excluded²².

Against this unsatisfactory backdrop of legal uncertainty, this chapter proposes a change of perspective, reframing the debate and redirecting attention to the scrutiny of the obligations of countries of destination under the 1951 Convention. Instead of investigating the legality of removals “elsewhere”, the proposed focus is on the obligations owed “here” by the country receiving a claim to refugee status and on whether “safe third country” strategies constitute a valid implementation of these obligations in light of universal rules of interpretation. This change in focus will lead to a conclusive determination of the legality, not of the ensuing removals, but of the “safe third country” notion itself, leading, in turn, to definite findings as for whether international co-operation as regards refugee protection requires burden-sharing arrangements founded on genuine international solidarity.

The proposed analysis proceeds in two steps to provide a holistic account. Section 2 reviews the “framing” of the discussion so far, mapping out the general characteristics of the “safe third country” notion, outlining its effects and deficiencies, and presenting three different (but converging)

“The goals of these . . . policy measures are not necessarily as objectionable in their origins as they are often portrayed to be. However, the *implementation* of the measures turns them into practices to which a range of objections can and must be raised, as they deny access to procedures to persons in need of protection, and may lead to *refoulement*.” (Emphasis added.)

Durieux also conveys the idea that “safe third country” policies “fail the protection test, simply because no State can guarantee the protection performance of another”. See J.-F. Durieux, “Protection Where? Or When?” (2009), 21 *IJRL* 75, at 77.

21. J. Crawford and P. Hyndman, “Three Heresies in the Application of the Refugee Convention” (1989), 1 *IJRL* 155; E. Kjaergaard, “The Concept of ‘Safe Third Country’ in Contemporary European Refugee Law” (1994), 6 *IJRL* 649; R. Byrne and A. Shacknove, “The Safe Country Notion in European Asylum Law” (1996), 9 *Harv. Hum. Rts. J.* 185; J. Vedsted-Hansen, “Non-Admission Policies and the Right to Protection: Refugees’ Choice versus States’ Exclusion?”, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities*, *supra* footnote 2, 269; S. Taylor, “Protection Elsewhere/Nowhere” (2006), 18 *IJRL* 283; M.-T. Gil-Bazo, “The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited” (2006), 18 *IJRL* 571; G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, p. 390.

22. M. Foster, “Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State” (2006-2007), 28 *Mich. J. Int. L.* 223, at p. 237. See the accompanying *Michigan Guidelines on Protection Elsewhere*, adopted on 3 January 2007 after a scholarly colloquium, at pp. 209-221. See also J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005, pp. 327 *et seq.*

practical configurations: the multilateral system of responsibility allocation established by the EU Dublin Regulation; the bilateral arrangement concluded between Canada and the United States in the form of the Safe Third Country Agreement; and the unilateral codification of the notion in Australian law and its implementation through the “Pacific Solution”. On this basis, Section 3 “reframes” the debate, assessing the notion from a dual perspective, on account of the Vienna Convention on the Law of Treaties²³. The vertical dimension is scrutinized first, measuring the legality of the concept against the obligations owed by the receiving State to the individual claimant, considering and contesting the most common bases adduced in support of “safe third country” policies, including Articles 1E, 31 and 33 of the Refugee Convention. The underlying rationale is a conception of protection obligations, not only as State duties, but also as enshrining individual rights that must be made effective. Then, the evaluation considers the horizontal dimension, examining the implications of inter-State obligations, not only with regard to the particular (safe) third country affected by a specific removal, but also vis-à-vis the other Contracting Parties to the 1951 Convention, according to general rules of treaty interpretation. Section 4 summarizes the findings, concluding that the “safe third country” notion in its present form(s) is not simply unworkable, but also unlawful, especially given that a genuine co-operative basis is lacking.

SECTION 2 **FRAMING: THEORY AND PRACTICE OF THE “SAFE THIRD COUNTRY” IDEA**

Paragraph 1 **The Conceptualization of the Notion: Identifying Gaps and Deficiencies**

The term “safe third country” is often used to denote a variety of situations. Leaving extra-procedural configurations aside²⁴, there are two main connotations²⁵. What is implied in UNHCR documentation, mainly in EXCOM Conclusion 58, has subsequently been referred to as the “country of first asylum” principle. This notion responds to the desire of combating the irregular movement of refugees who have already been granted protection in one country and decide subsequently to reach another country without authorization where they file a new asylum request. Adherents to this concept usually invoke Article 1E of the Refugee Convention as a basis of

23. 1969 Vienna Convention on the Law of Treaties, 1155 *UNTS* 331 (VCLT hereinafter).

24. The discussion on extra-procedural “safe third country” arrangements, on account of its richness and complexity, deserves a separate analysis that lies beyond the scope of this chapter.

25. For a similar classification see K. Landgren, “Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests”, *New Issues in Refugee Research*, Working Paper No. 10 (UNHCR, 1999).

support²⁶, so that those who have already found asylum in one country may be refused protection in the second State and returned there. In this version, the concept works similarly to an exclusion clause, which may be introduced at the admissibility phase or during the examination of the merits in the status determination procedure. It aims, in particular, at the prevention of successive or simultaneous claims for protection.

The “country of first asylum”, however, has evolved into the “host third country” variant, which is not predicated on the existence of a prior grant of protection by any other country. The mere possibility to obtain protection elsewhere is enough to justify return to a third State in which some form of protection might potentially be available, but which has not necessarily been accorded before. The “host third country” is a State with which the refugee is believed to have some prior connection (for example, transit) and in which the removing country considers he or she could have requested protection.

Under this form, the fundamental assumption underlying the notion is that certain asylum seekers may be returned to third countries if these can be considered safe. Several premises underpin this basic assumption. The first is that an obligation to recognize and protect refugees arises solely with regard to those in genuine need of protection²⁷; and only those who come “directly” from the country in which they fear persecution are believed to be real refugees. The supposition is that, being in genuine need, protection is sought in the geographically closest place. Therefore, those who choose to transit through intermediary countries after they escape to reach destinations afar are deemed not to be seeking protection but some form of improved living conditions and are hence considered liable to ordinary immigration rules; accordingly, their claims are handled as manifestly unfounded. On this reading, only *immediate* flight from persecution is covered by the exemption from penalties enshrined in Article 31 of the 1951 Convention²⁸ and this, in turn, is held to impact

26. Art. 1E, CSR, provides that:

“This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”

27. Recital 1 of the Asylum Procedures Directive, *infra* footnote 70, establishes that:

“A common policy on asylum . . . is a constituent part of the European Union’s objective of establishing progressively an area of freedom, security and justice open to those who, forced by the circumstances, *legitimately* seek protection in the Community.” (Emphasis added.)

28. Art. 31 (1), CSR, establishes that:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, *coming directly* from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” (Emphasis added.)

on the merits of the claim²⁹. Subsequent movement amounts to “asylum shopping” and is portrayed as an abuse of the protection system³⁰. This view entails as a corollary the negation of a right of the refugee to choose his or her country of destination. From a parallel perspective, the “safe third country notion” authorizes the removal by destination countries of indirect arrivals to a transit State without full scrutiny of their asylum requests. In the absence of a determinate rule apportioning responsibility for the examination of protection claims in the 1951 Convention, such allocation is articulated through a “prior connection” rule, normally determined by previous transit, according to which responsibility is predicated on the earlier presence of the refugee in the country concerned. Both authorized and undetected transit, regardless of the circumstances in which entry was procured, is unilaterally declared by destination States to trigger the responsibility of the previously transited State. The explicit consent of the third country in question to the establishment of its responsibility in this way is normally not required. This mechanism is supposed not only to pre-empt asylum shopping, but also to foster the even distribution of refugees and to help the realization of international solidarity and burden-sharing among the Contracting Parties of the 1951 Convention.

In this version, the notion operates generally as an admissibility filter, whereby the merits of the asylum application are left unexamined if the claimant can be sent to the transit State considered responsible by the destination country. Provided some conditions are present indicating the availability of “effective protection” there, the safety of the third country is presumed. Presumptions of safety, however, might not always be rebuttable in the particular circumstances. Some States have incorporated systems of lists of countries considered incontestably safe³¹. In addition, “safe third country”

29. Without further substantiation, K. Hailbronner opines that

“there may be a relation between irregular movement and weak claims. It can mean . . . that an asylum seeker, irrespective of a continuing danger of persecution in his or her home country, is not in such need of protection as someone who has made their way directly to the country in which they apply for asylum”, *supra* footnote 17, at p. 35.

30. In 1992 the EC Ministers responsible for Immigration adopted a “Resolution on Manifestly Unfounded Applications for Asylum”, precisely on the basis that “a rising number of applicants for asylum in the Member States are not in genuine need of protection”. They declared themselves “concerned that such manifestly unfounded applications overload asylum determination procedures, delay the recognition of refugees in genuine need of protection and jeopardize the integrity of the institution of asylum”. According to paragraph 1 (b) of the Resolution, “safe third country” applications are to be considered manifestly unfounded. The Resolution has not been published in the OJ, but is available at: <http://www.unhcr.org/refworld/topic,4565c22526,4565c25f311,3ae6b31d83,0.html>.

31. Article 16 of the German Constitution represents the earliest example of institutionalization of a system of blanket determinations of safety through lists of countries designated by law as being safe.

decisions are usually channelled through accelerated procedures, where claimants are granted reduced procedural safeguards, simplified appeals, and remedies with no automatic suspensive effect³². Instead of determining refugee status, the focus of these proceedings is on establishing the safety of the return³³. The forced removal of the applicant is then effected through readmission agreements concluded between the States concerned.

UNHCR has accepted the legality of “safe third country” returns, so long as the protection offered by the third country in question includes, at a minimum, compliance with basic human rights instruments; protection from *refoulement*; the provision of means of adequate subsistence; and access to status determination procedures with sufficient procedural guarantees³⁴. The key is the availability of “effective protection” for the third country to be labelled as “safe” and for the removal of the person to be considered in accordance with refugee law and human rights standards³⁵. Concerning the quality and degree of the protection to be provided “there”, UNHCR deems the distinction between a “first country of asylum” and a “host third country” to be “irrelevant”³⁶.

“Safe third country” policies produce distinctive effects. On the one hand, the impact on the rights of the individual refugee can be decisive. The concept indirectly creates an obligation to seek asylum in the geographically closest safe State, punishing non-compliance with forced removal and limiting self-determination as regards the choice of the country of refuge. As a multitude of authors have already observed, if this mechanism is not accompanied by adequate safeguards, the risk of orbiting and *refoulement* may be exponen-

32. See, for instance, Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, [1996] OJ C 274/13. This principle of reduced procedural rights in case of manifestly unfounded applications has been “imported” into the Asylum Procedures Directive, *infra* footnote 70.

33. For a critical analysis on this point see C. Costello, “The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?” (2005), 7 *EJML* 35. By the same author see also “The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles”, in A. Baldaccini, H. Toner and E. Guild (eds.), *Whose Freedom, Security and Justice?*, Oxford/Portland, Hart, 2007, p. 151.

34. UNHCR, “Position on a Harmonized Approach to Questions concerning Host Third Countries”, reprinted in *3rd International Symposium on the Protection of Refugees in Central Europe*, Geneva, UNCHR, 1997. See also EXCOM Conclusion No. 85 (XLIX) of 1998 on International Protection, para. (aa), stating that the country to which the asylum seeker is sent must treat him “in accordance with accepted international standards . . . ensure effective protection against *refoulement*, and . . . provide the asylum seeker . . . with the opportunity to seek and enjoy asylum”, in *Compilation of Conclusions*, *supra* footnote 15.

35. UNHCR, “Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures)”, EC/GC/01/12, 31 May 2001, at pp. 10 and 11, available at: <http://www.refworld.org/docid/3b36f2fca.html>.

36. UNHCR, Lisbon Expert Roundtable, *supra* footnote 15, para. 10.

tially increased³⁷. Kumin has spoken of a possible “domino effect”, where such arrangements spread eastwards and southwards from the European Union, creating a spiral of “chain *refoulement*” that pushes refugees ever closer to the countries they have fled³⁸.

“Safe third country” removals may also affect the enjoyment of other individual rights under the 1951 Convention and human rights instruments to which the refugee may be entitled. Although there is no full agreement with regard to the particular set of rights the non-observance of which would render removal illegal, there is an emerging consensus that other obligations beyond *non-refoulement* may equally be violated by “safe third country” expulsions³⁹. In particular, it seems to be increasingly accepted that such removals should not entail the dispossession of the rights acquired by the refugee through presence in the territory of the sending State⁴⁰.

On the other hand, “safe third country” expulsions affect inter-State relations as well. The notion constitutes a unilateral declaration by the removing State of the obligations owed by another country on implicit premises inferred from the terms of the 1951 Convention, but without the express agreement of the country in question to such interpretation. In the context of the pre-accession process, faced with resistance by Central and Eastern European countries to accept “transit” through their territories as the element triggering protection obligations, destination States in the European Union used readmission agreements, drafted in general terms, as the means indirectly to secure their collaboration⁴¹.

Considering this genealogy, it is difficult to maintain that “safe third country” mechanisms rest on pre-existing protection obligations accepted as such by the readmitting State or that such interpretation of protection responsibilities stands on firm ground. Nor does this situation reflect international co-operation

37. A. Hurwitz, *supra* footnote 6, Chap. 5.

38. J. Kumin, “Praxis der Drittstaatenregelung und Asyl in Europa”, paper presented at the meeting of the Diakonisches Werk in Bonn, 8 June 1994.

39. S. H. Legomsky, *supra* footnote 18.

40. M. Foster, *supra* footnote 22.

41. See, in particular, S. Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Budapest, Central European University Press, 1999, at pp. 76-89; and, by the same author, “Passing the Buck: European Union Refugee Policies towards Central and Eastern Europe” (1998), 11 *JRS* 126, at 130. See also R. Byrne, G. Noll and J. Vedsted-Hansen, “Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics”, in R. Byrne, G. Noll and J. Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, The Hague, Kluwer, 2002, at pp. 5-28. What is more, the pre-accession strategy included the “safe third country” notion as part of the EU *acquis* to be implemented by candidate countries prior to accession. See *Agenda 2000: For a Stronger and Wider Union*, EU Bull. Suppl. 5/97, at p. 13. For commentary see D. Joly, “Convergence towards a Single Asylum Regime: A Global Shift of Paradigm” (2001), 5 *IJHR* 1.

for the provision of asylum to refugees. The primary purpose of readmission agreements, as generally stated in their preambles, is “to strengthen cooperation in order to combat illegal immigration more effectively”⁴². “Safe third country” returns are hence more likely to be conducive to burden-shifting than burden-sharing. Their immediate result is not the diminution of the global numbers of asylum seekers, but the displacement of the responsibility to provide international protection, which, in the absence of specific guarantees, may lead to further orbiting and *refoulement*, feed legal uncertainty, and potentially defeat the purpose of the 1951 Convention, as discussed below.

Paragraph 2 **Discussing the Models : Converging “Safe Third Country” Practices**

A. A multilateral “safe third country” system : Dublin

Following the introduction of the “safe third country” notion in the domestic law of some European countries, the concept has been adopted in other regions of the world under different forms, but sharing the general characteristics outlined above. The first crystallization of the term in a multilateral instrument was in Chapter VII of the Convention for the Implementation of the Schengen Agreement (CISA) signed in 1990, outside the EC structure, by a group of Member States willing to pursue the construction of the Single Market as a borderless area⁴³. Parties to the agreement intended to create a system to apportion responsibility *inter se* for the adjudication of asylum requests lodged “within any one of their territories” in conformity with the 1951 Convention⁴⁴. The obligation to process protection claims, however, was considered “not [to] bind a Contracting Party to authorising all asylum seekers to enter or remain within its territory”. Each Contracting Party was supposed to “retain the right to refuse entry or to expel asylum seekers to a third State *on the basis of its national provisions* and in accordance with its international commitments”⁴⁵.

In 1997 the CISA was superseded by the so-called “Dublin Convention” within the European Union⁴⁶. Like the CISA, the Dublin Convention’s objective was to establish common criteria to determine the State responsible

42. Recital 1, European Union-Albania Readmission Agreement, *infra* footnote 260.

43. 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, [2000] OJ L 239/19 (CISA hereinafter).

44. Arts. 29 (1) and 28, CISA.

45. Art. 29 (2), CISA (emphasis added).

46. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, [1997] OJ C 254/1.

for examining applications for asylum lodged in one of the Member States, “in accordance with the terms of the Geneva Convention of 28 July 1951”⁴⁷. Member States declared themselves

“concerned to provide all applicants for asylum with a guarantee that their applications [would] be examined by one of the Member States and to ensure that applicants for asylum [were] not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum”⁴⁸.

State parties thus undertook the obligation to assess protection requests according to the agreed responsibility criteria⁴⁹, but with the caveat that they would “retain the right, *pursuant to [their] national laws*, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention”⁵⁰.

With the Treaty of Amsterdam, the then European Community gained competence to adopt legislative instruments in the fields of immigration, borders and asylum. The Dublin Convention was “communautarized” in what became the Dublin Regulation⁵¹.

Committed to ensuring continuity with the system established by the Dublin Convention⁵², the Regulation’s ambition is to lay down “the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national”⁵³, “so as to guarantee effective access to the procedures for determining refugee status”⁵⁴.

Responsibility for the assessment of a protection claim is established on the basis of a hierarchy of formal criteria. The system is based on the presumption that “Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals”⁵⁵. As EU Member States share a pledge to establish a Common European Asylum System, comprising harmonized protection standards⁵⁶, this has been considered relevant – albeit not sufficient *per se* – in establishing the safety of intra-EU

47. Recital 2, Dublin Convention.

48. Recital 4, Dublin Convention.

49. Arts. 2 and 3 (1), Dublin Convention.

50. Art. 3 (5), Dublin Convention (emphasis added).

51. 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, [2003] OJ L 50/1 (Dublin II Regulation hereinafter). See recast instrument in footnote 62, *infra*.

52. Recitals 10 and 5, Dublin II Regulation.

53. Art. 1, Dublin II Regulation (unchanged in recast version).

54. Recital 4, Dublin II Regulation.

55. Recital 2, Dublin II Regulation.

56. Art. 78, Treaty on the Functioning of the European Union, [2010] OJ C 83/47.

returns⁵⁷. Hence, when presented with an asylum claim for which it is not considered responsible according to the agreed criteria, a Member State may send the applicant to the responsible Member State through the “take back” or “take charge” procedures in the Regulation⁵⁸. Failure to reply to a “take charge” or “take back” request within the established deadlines is stipulated to mean that it has been tacitly accepted⁵⁹. The criteria, save for some humanitarian exceptions, are grounded in the so-called “authorization principle”, according to which the State responsible for examining the application is the one responsible for the refugee’s presence in the common territory, be it through legal authorization or unnoticed entry or stay⁶⁰. However, the system is open-ended. Every Member State retains a “right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention”⁶¹.

Although the instrument has been amended, introducing a number of improvements, the founding principles of the original Regulation have been maintained⁶². For our purposes the most noticeable addition is recast Article 3 (2), codifying the *N.S.* jurisprudence⁶³. Once in force, Dublin III will explicitly oblige Member States receiving an asylum application to assume responsibility for its examination in two situations: when no responsible Member State can be identified according to the hierarchy of criteria; and where the transfer of the applicant is not possible due to a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights in the Member State primarily designated as responsible⁶⁴.

However, the “safe third country” clause in Article 3 (3) has been kept.

57. ECtHR, *T.I. v. UK*, Appl. No. 43844/98, 7 March 2000; *K.R.S. v. UK*, Appl. No. 32733/08, 2 December 2008. Cf. *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011.

58. Chap. V, Dublin II Regulation (Chap. VI in recast version).

59. Art. 18 (7) for the “take charge” procedure and Art. 20 (1) (c) for the “take back” request (Arts. 22 (7) and 25 (2) in recast instrument).

60. Chapter III, Dublin II Regulation (unchanged in recast version).

61. Art. 3 (3), Dublin II Regulation (emphasis added) (the same in recast Regulation).

62. Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31. See, in particular, ~~draft recitals 9 and 29. The text has been officially adopted. See “Adoption of Legislative Act Following the European Parliament’s Second Reading”, Council doc. 10613/13, 14 June 2013.~~

63. CJEU, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, Judgment of 21 December 2011 (nry).

64. Charter of Fundamental Rights of the European Union, [2010] OJ C 83/389 (EUCFR hereinafter).

The relationship between the Dublin system and “safe third country” provisions in national law was already addressed in 1992. EU Ministers responsible for Immigration decided in a common Resolution that

“[t]he Member State in which the application for asylum has been lodged will examine whether or not the principle of the host third country can be applied. If that State decides to apply the principle, it will set in train the procedures necessary for sending the asylum applicant to the host third country *before* considering whether or not to transfer responsibility for examining the application for asylum to another Member State pursuant to the Dublin Convention.”⁶⁵

But even in the event of a Dublin transfer, the Member State designated as responsible would anyway retain the possibility to send the applicant to a third State, according to Article 3 (3) of the Regulation⁶⁶. Therefore, while the Dublin system may close the orbit as among EU Member States, it remains open between EU countries and the rest of the world by virtue of the “safe third country” clause.

The material conditions to be satisfied for a non-EU country to be considered safe have been the object of intense debate at EU level. Although a Resolution on a Harmonized Approach to Questions concerning Host Third Countries had been drawn up in 1992⁶⁷, this did not prevent the proliferation of different understandings among Member States. In view of the very dissimilar standards that had spread throughout Europe⁶⁸, the European Commission launched a discussion on the “lack of a common procedure” and the use of “underlying concepts” right after the *communautarization* of asylum policy⁶⁹. Regarding non-EU “safe third countries” the criteria were finally harmonized in the Asylum Procedures Directive after arduous negotiations⁷⁰.

Three different notions have been distinguished. According to Article 26, a “first country of asylum” is a country where the applicant has already been recognized as a refugee or where he or she could “otherwise enjoy sufficient protection . . . , including benefiting from the principle of *non-refoulement*”⁷¹,

65. “Resolution on a Harmonized Approach to Questions concerning Host Third Countries”, London, 30 November-1 December 1992, para. 3 (a). Not published in OJ but available at: <http://www.unhcr.org/refworld/publisher,COUNCIL,,,3f86c3094,0.html>.

66. *Ibid.*, para. 3 (b) and (c).

67. See *supra* footnote 65.

68. See *supra* footnote 12.

69. “Towards a Common Asylum Procedure and a Uniform Status Valid throughout the Union for Persons Granted Asylum”, COM(2000) 755 final, at p. 15.

70. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13 (“Asylum Procedures Directive” hereinafter). See recast instrument at footnote 73, *infra*.

71. Art. 26 (b), Asylum Procedures Directive.

provided that readmission to that country is guaranteed. A “safe third country”, pursuant to Article 27, is a country where life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; where *non-refoulement* is respected both in the sense of the 1951 Convention and pursuant to applicable international human rights instruments; where the possibility to request and receive protection as a refugee exists; and where readmission may be effected. Finally, the Procedures Directive also regulates the situation of “European safe third countries” in Article 36, which may operate when “the applicant for asylum is seeking to enter or has entered illegally” into the territory of the Member State concerned. “European safe third countries” are those European States, non-members of the European Union, that have ratified and observe in practice the provisions of both the 1951 Convention and the 1950 European Convention on Human Rights (ECHR)⁷², and have established asylum procedures in domestic law. All three provisions have been retained in the recast version of the Asylum Procedures Directive⁷³.

Each of these provisions – also in their recast form – produces similar procedural implications. A common effect is that Member States may be dispensed from assessing whether the applicant in question qualifies as a refugee; either because “it can be reasonably assumed that another country would do the examination or provide sufficient protection”, where a “first country of asylum” exists; or “where the applicant, due to a connection to a third country as defined in national law, can reasonably be expected to seek protection in [the] third country [concerned]”⁷⁴. Pursuant to Articles 25 and 28 of the Directive (Articles 32 and 33 of the recast text), in such circumstances the application may be considered inadmissible and unfounded and be decided in accelerated procedures⁷⁵. With regard to “safe third countries”, in particular, the Directive introduces a general *renvoi* to national law, allowing a large measure of discretion to the Member States⁷⁶. Thus, any required connection between the applicant and the third country in question and the methodology to establish the safety of the return, be it through case-by-case consideration or through blanket designation in country lists, follow domestic rules. The only limitation introduced by EU law is that the applicant should be allowed to challenge the presumption of safety on account of individual circum-

72. 1950 European Convention on Human Rights, *CETS* No. 194 (ECHR hereinafter).

73. Recast Arts. 35, 38 and 39, Directive 2013/32 of the European Parliament and of the Council of 26 June 2013, on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.

74. Recitals 22 and 23, Asylum Procedures Directive.

75. See also Art. 23 (3), Asylum Procedures Directive (Art. 31 (7) of the recast version).

76. Art. 27 (2), Asylum Procedures Directive (Art. 38 (2) of the recast version).

tances⁷⁷. If the challenge does not succeed, the implementing decision-maker shall notify the applicant accordingly and provide him or her with a document informing the authorities of the third State that the merits of the application have not been examined⁷⁸. In the event that the third country in issue does not permit the applicant to enter its territory, Member States must ensure access to a full determination procedure in their own territory⁷⁹. Within this framework, the responsibility of the Member States is “doubly subsidiary” – to the country of origin and the “safe third country” concerned, so that only where the claimant cannot be transferred elsewhere, will his or her application be examined in the European Union.

In the context of the Dublin system, the decision to remove the applicant to the responsible Member State may be subject to an appeal with no automatic suspensive effect⁸⁰. Insufficient protection conditions and risks of *refoulement* in the receiving State have led both domestic and international courts to suspend intra-EU returns obliging removing States to assume responsibility for the persons concerned⁸¹.

The European Court of Human Rights has delivered a Grand Chamber judgment on the issue, condemning Belgium for the violation of its *non-refoulement* obligations on account of a transfer to Greece and reminding EU Member States that

“[w]hen they apply the Dublin Regulation . . . [they] must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention”⁸².

77. Art. 27 (2) (c), Asylum Procedures Directive (Art. 38 (2) (c) of the recast version).

78. Art. 27 (3), Asylum Procedures Directive (Art. 38 (3) of the recast version).

79. Art. 27(4) Asylum Procedures Directive (Art. 38 (4) of the recast version).

80. Arts. 19 (2) and 20 (1) (e), Dublin II Regulation (Arts 26 (2) and 27 of the recast Regulation).

81. Several requests for interim relief pursuant to Rule 39 of the Rules of Procedure of the European Court of Human Rights have been approved in the past. See UNHCR, “The Dublin II Regulation – A Discussion Paper” (UNHCR, 2006), available at: <http://www.unhcr.org/refworld/docid/4445fe344.html>; ECRE, “Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered” (ECRE, 2008), available at: <http://www.ecre.org/topics/areas-of-work/introduction/134.html>; Dutch Council for Refugees *et al.*, *Complaint against Greece*, Amsterdam, 10 November 2009, at pp. 40-42, retrievable from: http://www.vluchtelingenwerk.nl/pdf-bibliotheek/NGOComplaint_vGreece_10November2009_copy_copy_copy_copy.pdf; Council of Europe Commissioner for Human Rights, Third Party Intervention in Appl. No. 26494/09 *Ahmed Ali v. The Netherlands and Greece* [etc.], CommDH(2010)9, 10 March 2010, available at: <http://www.unhcr.org/refworld/country,,,AMICUS,GRC,,4b9f85da2,0.html>.

82. ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, paras. 342.

Against this background, the Court has determined that it was for the Belgian authorities “not merely to assume that the applicant would be treated in conformity with the Convention standards but . . . to first verify how the Greek authorities applied their legislation on asylum *in practice*”⁸³, thereby rejecting the possibility of automatic reliance on the presumption of safety inscribed in the Dublin Regulation. The mere “existence of domestic laws and accession to international treaties . . . are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment . . .” and do not release the sending State from its Convention obligations⁸⁴. Most significantly, the Court established that not only were the risks arising from the deficiencies in the asylum procedure to be taken into account, but also those obtaining from poor detention and living conditions in Greece⁸⁵. The obligation for States to take positive steps to comply with their Article 3 obligations, particularly in situations where the reality in the receiving country is well known, has also been recognized. Where the lack of safety is “freely ascertainable from a wide number of sources”⁸⁶, knowledge of the circumstances is imputed so that it pertains to the sending State to disprove the risk of an Article 3 violation⁸⁷, regardless of whether the claimant explicitly seeks asylum or describes risks upon return as ill-treatment⁸⁸. The European Court of Justice has endorsed these findings in its *N.S.* decision, underlining that a conclusive presumption of safety is incompatible with fundamental rights and that there must be an effective opportunity to rebut it⁸⁹. However, the EU Court, in contrast to its Strasbourg counterpart⁹⁰, has not explicitly accepted that risks of violations of rights other than the prohibition of torture may give rise to an obligation to suspend a Dublin transfer⁹¹ – “minor infringements” of EU asylum law do not suffice in the eyes of the EU Court⁹². The importance attached to the

83. *Op. cit. supra* footnote 82, para. 359 (emphasis added).

84. *Ibid.*, para. 353.

85. *Ibid.*, para. 367.

86. *Ibid.*, paras. 366-367.

87. *Ibid.*, paras. 352, 358, 359 and 366.

88. *Ibid.*, para. 366: “it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece”. For an elaboration, see V. Moreno-Lax, “Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*” (2012), 14 *EJML* 1. The approach has been confirmed and expanded in *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012. For analysis, see V. Moreno-Lax, “*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?” (2012), 12 *HRLR* 574.

89. CJEU, Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, Judgment of 21 December 2011 (nyr), paras. 99 *et seq.*

90. See, e.g., *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012, accepting the *non-refoulement* potential of Art. 4, Prot. 4, ECHR (prohibition of collective expulsion); or *Othman (Abu Qatada) v. UK*, Appl. No. 8139/09, 17 January 2012, accepting the *non-refoulement* effect of Art. 6, ECHR (right to a fair hearing).

91. CJEU, Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, Judgment of 21 December 2011 (nyr), paras. 86, 94 and 106.

92. *Ibid.*, paras. 82 *et seq.*

“principle of mutual confidence” that underpins the Dublin system and justifies the “presumption of compliance” with fundamental rights has been strongly emphasized in this context⁹³. As mentioned already, this jurisprudence has been codified in the recast Dublin III Regulation⁹⁴.

According to Article 39 of the Procedures Directive – Article 46 in the recast version, decisions to remove outside the Dublin circuit must also be accompanied by effective remedies⁹⁵. Such removals are indeed routinely challenged before domestic courts across the European Union. The European Court of Human Rights has developed a vast body of case law in this regard, so that in the presence of a real risk of exposure to ill-treatment upon return the removal must be cancelled⁹⁶.

B. A bilateral mechanism: the United States-Canada Safe Third Country Agreement

Following the steps of the Dublin system, another example of codification of the “safe third country” rule has emerged at the international level with the bilateral United States-Canada Safe Third Country Agreement⁹⁷. Although the text has been subject to intense litigation by refugee advocacy groups in Canada challenging the underlying assumption that the United States may be considered a safe State, in September 2008 the Supreme Court of Canada⁹⁸ denied leave to appeal a previous decision by the Federal Court

93. *Op. cit. supra* footnote 92, paras. 78-80 and 83. For an elaboration on the principle of “mutual trust” in the context of the European Arrest Warrant see Case C-396/11, *Radu*, Judgment of 29 January 2013; and Case C-399/11, *Melloni*, Judgment of 26 February 2013.

94. See Arts. 26, 27 and 29, establishing a mechanism of suspension of transfers on the applicant’s request.

95. See also Art. 47, EUCFR; Arts. 3 and 1, ECHR, combined produce a similar effect in the context of the ECHR.

96. See, among many others, ECtHR, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 September 2009, considering that the deportation of the applicants either directly or indirectly to Iran by Turkey (via Iraq) would be in breach of Article 3; *R.C. v. Sweden*, Appl. No. 41827/07, 9 March 2010, ruling that the return of the applicant to Iran would be in violation of Article 3; *Trabelsi v. Italy*, Appl. No. 50163/08, 13 April 2010, determining that the decision to remove the applicant to Tunisia amounted to a violation of Article 3; *N v. Sweden*, Appl. No. 23505/09, 20 July 2010, establishing that a removal to Afganistan would constitute a breach of Article 3; and *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, paras. 288-293.

97. Agreement between the Government of Canada and the Government of the United States of America for co-operation in the examination of refugee status claims from nationals of third countries of 5 December 2002, available at: <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> (“US-Canada Safe Third Country Agreement” hereinafter).

98. Canadian Council for Refugees *et al.*. Application to the Supreme Court seeking leave to Appeal, available at: <http://ccrweb.ca/documents/STCA-SCC-leave.pdf>. See also Canadian Council for Refugees, Amnesty International, Canadian Council of Churches Media Release, “Supreme Court Denial to Leave on Safe Third Regretted”, 5 February 2009, available at: <http://ccrweb.ca/en/bulletin/09/02/05>.

of Appeal⁹⁹, rejecting the competence of that Court to decide whether there was compliance in the abstract with the 1951 Convention and other human rights instruments to which Canada is a party¹⁰⁰. The validity of the Agreement having been upheld, it is worth reviewing its text in some detail.

The common resolve of the parties is to establish a system for the “sharing of responsibility”, reaffirming “their obligation to provide protection for refugees on their territory in accordance with [the 1951 Convention and its 1967 Protocol]”¹⁰¹. “[C]onsistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced”, the objective is to “ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of *non-refoulement* are avoided”¹⁰². Thus, the immediate goal is

“to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the [1951] Convention . . . are effectively afforded”¹⁰³.

As a general rule, “transit” is the element determining responsibility in each individual case. Save in the presence of family links, in the case of unaccompanied minors, or where entry is based on valid admission, the “country of last presence” shall be deemed responsible to examine the merits of the protection claim¹⁰⁴. However, in case of individual risk of exposure to persecution or inhuman or degrading treatment or punishment in either Canada or the United States, the Agreement does not make provision for any individual guarantees. Replicating the original Dublin sovereignty clause, it simply establishes that, notwithstanding the terms of the Agreement, “either Party may *at its own discretion* examine any refugee status claim made to that Party where it determines that it is in its public interest to do so”¹⁰⁵. But there is no provision for appeals or any other remedies.

To ensure that refugee claimants have access to a status determination procedure, “the Parties shall not return . . . a refugee status claimant referred by either Party . . . to another country until an adjudication of the person’s refugee status claim has been made”. Moreover, neither the United States nor Canada

99. *H.M. the Queen v. Canadian Council for Refugees et al.*, 2008 FCA 229, 27 June 2008, available at: <http://decisions.fca-caf.gc.ca/en/2008/2008fca229/2008fca229.pdf>.

100. *Canadian Council for Refugees et al. v. H.M. the Queen*, 2007 FC 1262, 29 November 2007, available at: <http://www.unhcr.org/refworld/docid/474fe8d62.html>.

101. Recitals 8 and 1, US-Canada Safe Third Country Agreement.

102. Recitals 4 and 8, US-Canada Safe Third Country Agreement.

103. Recital 8, US-Canada Safe Third Country Agreement.

104. Arts. 4 and 5, US-Canada Safe Third Country Agreement.

105. Art. 6, US-Canada Safe Third Country Agreement (emphasis added).

may “remove a refugee status claimant returned to the country of last presence under the terms of [the] Agreement to another country pursuant to any other safe third country arrangement or regulatory designation”¹⁰⁶. Notwithstanding this apparent prohibition of external “safe third country” removals, as Carasco has pointed out, in the absence of specific legal safeguards, these provisions do not provide an absolute guarantee of non-deportation “on other grounds”¹⁰⁷. Indeed, both Canada and the United States have introduced statutory bars in national legislation denying access to eligibility procedures that may lead to expulsion under certain conditions prior to a full hearing on the merits of a refugee status claim¹⁰⁸. Hence, as in the case of the Dublin system, the full closure of the responsibility circle is not 100 per cent guaranteed.

C. A unilateral “safe third country” initiative: the Australian regime

Together with these bilateral and multilateral mechanisms of responsibility allocation, the Australian system provides an elaborate example of a “post-Dublin” unilateral “safe third country” arrangement. The concept was initially developed through case law by the Full Federal Court in *Thiyagarajah* and subsequent decisions, absolving Australia from substantively determining asylum applications under the 1951 Convention where the claimant had received protection from another country. *Thiyagarajah* concerned a Sri Lankan national who had been granted refugee status in France, which had also issued him a permanent residence permit and travel documents allowing re-entry.

Under these circumstances, on account of s. 36 of the Migration Act 1958 (Cth)¹⁰⁹, the Court considered that France would provide him with effective protection upon return¹¹⁰.

106. Art. 3, US-Canada Safe Third Country Agreement.

107. The author is particularly concerned with the fact that “there has been no written commitment that persons subject to the STCA will be exempt from expedited removal proceedings” in the United States. See E. Carasco, “Canada-United States ‘Safe Third Country’ Agreement: To What Purpose?” (2003), 41 *Can. YbIL* 305, at p. 324. Legomsky concurs on this point, stating that “[n]othing in the agreement . . . prohibits either state from returning the person directly to a safe third country rather than to the other state party”, *supra* footnote 18, at p. 585.

108. For an overview, see M.-T. Gil-Bazo, “Responses to Secondary Movements of Refugees: A Comparative Preliminary Study of State Practice in South Africa, Spain and the USA”, Discussion paper for a UNHCR Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Amman, 27-28 June 2011, at pp. 15-16, available at: <http://www.unhcr.org/4ef3321b9.html>.

109. The text and legal history of the Migration Act 1958 (Cth) is available at: <http://www.comlaw.gov.au/comlaw%5Cmanagement.nsf/lookupindexpagesbyid/IP200401592?OpenDocument>.

110. *Minister for Immigration and Multicultural Affairs v. Thiyagarajah*, [1997] 80 FCR 543, at 565: “As a matter of domestic and international law, Australia does

This reasoning has been qualified and extended to dissimilar situations in subsequent jurisprudence. In *Rajendran*, the Full Federal Court established that Australia did not have protection duties in a case where the applicant had not been granted refugee status, but held a long-term visa and was entitled to the issuance of a residence permit by the third country concerned¹¹¹. In *Gnanapiragasam*, the Court established that a temporary right to re-enter the safe third country in issue, while the applicant’s refugee status claim was being examined, was sufficient to establish the existence of effective protection there¹¹². Qualifying *Thiyagarajah, Al-Zafiry* considered that the right to enter, reside, and re-enter the country in question need not be a legally enforceable right if it exists in practice, so that “as a matter of practical reality and fact, the applicant *is likely* to be given effective protection” upon return¹¹³. *Al-Rahal* confirmed this approach, determining that concrete evidence of the existence in law of a right to enter the safe country in question was not required¹¹⁴. Accession to the 1951 Convention, although constituting a relevant element to determine the availability of effective protection, was considered not to be a decisive factor in *Al-Sallal*¹¹⁵.

According to Justice French in *Patto*, there were three situations in which an applicant could be safely returned to a third country without violating the principle of *non-refoulement*. First, return would be compatible with the 1951 Convention, if the person had a right of residence and was not subject to Convention persecution in the third country concerned. Second, removal would be allowed, whether or not the applicant had a right of residence in the third country, if that country was a party to the Refugee Convention and if it could be expected that it would observe its obligations in practice. And third, despite the claimant not having a right of residence and the third country concerned not being a party to the Convention, deportation would be considered in line with refugee law, if it could, nonetheless, be expected that that country would otherwise grant effective protection against threats to life and freedom¹¹⁶.

not owe protection obligations to the respondent as he is a person who has effective protection in France which has accorded him refugee status.”

111. *Rajendran v. Minister for Immigration and Multicultural Affairs*, [1998] 86 FCR 526.

112. *Minister for Immigration and Multicultural Affairs v. Gnanapiragasam*, [1998] 88 FCR 1.

113. *Al-Zafiry v. Minister for Immigration and Multicultural Affairs*, [1999] FCA 443, at 26 (emphasis added); confirmed by the Full Court in *Al-Zafiry v. Minister for Immigration and Multicultural Affairs*, [1999] 58 ALD 663.

114. *Al-Rahal v. Minister for Immigration and Multicultural Affairs*, [2001] 110 FCR 73, at 97.

115. *Minister for Immigration and Multicultural Affairs v. Al-Sallal* [1999] FCA 1332, at 47. See also *Al-Zafiry*, *supra* footnote 113.

116. *Patto v. Minister for Immigration and Multicultural Affairs*, [2000] 106 FCR 119, at 37.

As Mathew has observed, “[t]he cases had gradually progressed from returning a person who had found protection as a refugee in another country (*Thiyagarajah*) to the idea that a person could be returned even to a country that is not ~~even~~ a party to the Refugee Convention (*Al-Zafiry*)”¹¹⁷. Although this line of authority was contested by the High Court in *NAGV and NAGW* of 2002, where it was established that the wording of s. 36 (2) of the Migration Act 1958 could not sustain such a construction¹¹⁸, the law has been amended thereafter. In particular, the Border Protection Legislation Amendment Act 1999 (Cth) introduced subsections 36 (3) and 36 (7), expressly providing for an exemption of responsibility for protection obligations vis-à-vis certain applicants in particular circumstances, and sections 91M to 91Q, codifying the “safe third country” notion explicitly¹¹⁹.

Subsection 36 (3) provides that

“Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a *right* to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national”¹²⁰.

The only exceptions in which subsection 36 (3) does not apply, as introduced in ss. 36 (4) and 36 (5), are where the applicant has a well-founded fear of being persecuted in the safe third country concerned for a 1951 Convention reason or where there is a risk that that country will return the individual to a *fourth* country where he or she has a well-founded fear of persecution. Sections 91M to 91Q of the amended Act introduce further limitations to the grant of a protection visa. Where the applicant has a right to re-enter and reside in a third country (whether temporarily or permanently), if he or she has resided there

117. P. Mathew, “Safe for Whom?”, *supra* footnote 10, at p. 166 (references omitted).

118. *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6, at 29: “From the circumstance that Australia might not breach its international obligation under Art 33 (1) by sending the appellants to Israel, it does not follow that Australia had no protection obligations under the Convention.” See also para. 81 :

“The mere fact that sending the appellants to Israel might not of itself breach Australia’s obligations under Art 33 (1) of the Convention does not relieve Australia of the many other ‘protection obligations’ that remain to be fulfilled in respect of the appellants whilst they are in Australia and whilst s. 36 (2) is engaged in their case.”

119. The full text of the Border Protection Legislation Amendment Act 1999 (Cth) is retrievable from: <http://www.comlaw.gov.au/comlaw/Legislation/Act1.nsf/0/CC6E9223317DE9B5CA256F7200095AAF?OpenDocument>.

120. The Full Federal Court agreed that s. 36 (3) refers now unequivocally to a “legally enforceable” right to enter and reside in a particular country, overruling contrary case law. See *Minister for Immigration and Multicultural Affairs v. Applicant C*, [2001] 116 FCR 154 (emphasis added).

for at least seven days, and the Minister has made a declaration of safety with regard to that country, the applicant must seek the protection of that country before turning to Australia.

In parallel, the Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) was passed in the aftermath of the *MV Tampa* incident¹²¹ to ensure that boats headed for Australia could be interdicted and ejected from Australian waters. The Migration Amendment (Excision from the Migration Zone) Act 2001 (Cth) introduced a fiction, whereby a number of Australian islands were legally removed from the national “migration zone”, so that persons who entered Australia through these territories would have no access to ordinary status determination procedures. Instead, they would be directly brought to third countries declared incontestably safe for the processing of their claims¹²². Under the Amendment, the Minister could designate a country for the purposes of new s. 198A (3), by declaring that the country concerned afforded access to effective status determination procedures; provided protection pending determination of status; ensured protection pending voluntary repatriation or resettlement of those declared to be refugees; and met relevant human rights standards in providing that protection. Nauru and Papua New Guinea were “declared countries” under the Amendment. The procedure under s. 198A, whereby “offshore entry persons” were taken to those places, was known as the “Pacific Strategy”¹²³, which ran until February 2008, when the new Australian Government decided to discontinue returns outside Australian territory, without, however, excluding offshore processing in Australia’s excised Christmas Island¹²⁴. Nonetheless, the Labour Party’s position changed and in May 2013 the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 was passed, excising the entire mainland from the migration zone¹²⁵. This means that all asylum seekers arriving by boat will be subject to offshore processing in Nauru and Papua New Guinea from now on¹²⁶.

121. For an account of the facts of the case, see *Ruddock v. Vadarlis*, [2001] 110 FCR 491.

122. See s. 198A of the Migration Act, as inserted by the Migration Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001 (Cth).

123. For a recent account of the history of the “Pacific Strategy” and its ramifications after February 2008, concerning, in particular, migration detention, refer to *Plaintiff M61/2010E and Plaintiff M69/2010 v. Commonwealth of Australia*, [2010] HCA 41.

124. See Ministry for Immigration and Citizenship Press Release, “Last Refugees in Nauru”, 8 February 2008, available at: <http://www.minister.immi.gov.au/media/media-releases/2008/ce08014.htm>. For commentary, see A. Francis, “Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing” (2008), 20 *IJRL* 273.

125. K. Barlow, “Parliament Excises Mainland from Migration Zone”, *ABC News*, 17 May 2013, available at: <http://www.abc.net.au/news/2013-05-16/parliament-excises-mainland-from-migration-zone/4693940>.

126. “Mainland Excision Laws Pass Parliament”, *9News National*, 16 May 2013, available at: <http://news.ninensn.com.au/national/2013/05/16/10/26/senate-debates->

Under the current state of affairs, a “safe third country” under Australian law may include not only a country which has already granted effective protection in the past, but also countries from which the refugee claimant should have requested protection, which may possibly encompass countries to which the applicant has never travelled before¹²⁷. As a result, like the Dublin Regulation and the United States-Canada Safe Third Country Agreement, the Australian system, more than resolving the orbiting phenomenon, potentially expands it to its furthest extent.

SECTION 3 RE-FRAMING : A HOLISTIC ASSESSMENT FROM THE LAW OF TREATIES

Paragraph 1 The Vertical Dimension : The Removing Country/Individual Refugee Perspective

In contrast to what the Dublin, United States-Canada and Australian arrangements may induce us to believe, until the emergence of the “safe third country” notion the assumption appeared to be that responsibility to hear an asylum claim belonged to the country receiving it¹²⁸. Although it is not clear whether this practice followed from a definite legal conviction, generating the *opinio juris* necessary for the emergence of a norm of customary law, for the first decades after the Refugee Convention entered into force State practice reflected this understanding. With the appearance of the concept, States of “destination” started to claim that, although the existence of a right to seek and enjoy asylum had been nominally recognized in Article 14 of the Universal Declaration of Human Rights, a right to receive protection from a particular State had never been accepted¹²⁹. UNHCR has also contributed to the debate. Initially, EXCOM Conclusion No. 15 stipulated that asylum should

continent-excite-plan. For a critique see Australian Refugee Council, “Australia’s Expanded Excision Law : A New Low in Refugee Protection”, Press Release, 16 May 2013, available at : http://refugeecouncil.org.au/n/mr/130516_Excision.pdf.

127. On this point and for a detailed analysis of Australian law, see A. Hadaway, “Safe Third Countries in Australian Refugee Law : *NAGV v. Minister for Immigration and Multicultural Affairs*” (2005), 27 *Syd. LR* 726.

128. R. Fernhout and H. Meijers speak of two “basic principles” that were applied to all refugee applicants under the 1951 Convention until the appearance of the “safe third country” notion :

“(1) every asylum seeker who claim[ed] to be a refugee, ha[d] free access to a thorough procedure in which this claim [was] examined in order to consider if it [was] well-founded; (2) if the claim [was] considered well-founded, the State concerned grant[ed] the refugee asylum, unless he or she [was] assured of adequate protection by another State”, in “Asylum”, *A New Immigration Law for Europe ? The 1992 London and 1993 Copenhagen Rules on Immigration*, Utrecht, Dutch Centre for Immigrants, 1993, p. 8.

129. G. S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, Oxford University Press, 1996, at p. 88.

not be denied solely because it could be sought from another State and that the intentions of the refugee with regard to the country in which he or she wished to request asylum should be taken into account¹³⁰. But the language evolved and in Conclusion No. 58 the EXCOM expressed the idea that refugees “who have found protection” should normally not seek to move irregularly to other countries¹³¹. This language has been interpreted as endorsing both the “safe third country” concept and the notion that the individual has no entitlement to choose the country of refuge. Thereafter, several provisions in the 1951 Convention have been invoked to buttress the “safe third country” notion. Articles 31, 1E, 33 and 32 will be considered in turn.

A. Article 31, CSR: the “coming directly” clause

The “coming directly” clause in Article 31 (1) of the 1951 Convention¹³² has been adduced in support of the safe third country argumentation. As Hurwitz explains, States reason that if the prohibition of penalties it establishes applies only to refugees who come directly from a country of persecution, *a contrario*, refugees who travel through intermediary countries may be penalized. By analogy, States have considered that they have no duty to process a refugee claim in such circumstances and that they may return the individual to the intermediary country concerned¹³³. A focus on the travel route, rather than on the reasons motivating the flight, becomes the overriding factor in deciding whether protection will be granted. Article 1E, CSR¹³⁴, has also been referred to as backing the interpretation that a refugee is expected to seek asylum in the first safe country in which he or she arrives after fleeing. Consequently, “[a] refugee who, before arriving in the target country, has stayed in a ‘first country of asylum’ or ‘safe third country’ may be returned, as a rule, to that country”¹³⁵.

Both arguments deserve attention. Pursuant to the general rule of interpretation in the Vienna Convention on the Law of Treaties, a good faith construction of Article 31 (1), CSR, requires a reading of the ordinary meaning of its terms, in their particular context, and in light of the object and purpose of the treaty in which they are inscribed. The provision requires States parties

“not [to] impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or

130. EXCOM Conclusion No. 15 (XXX) of 1979, *supra* footnote 15, paras. (iii) and (iv).

131. EXCOM Conclusion No. 58 (XL) of 1989, *supra* footnote 15, para. (e).

132. *Supra* footnote 28.

133. A. Hurwitz, *supra* footnote 6, at p. 129 (references omitted).

134. *Supra* footnote 26.

135. H. Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries*, Dordrecht, Martinus Nijhoff, 1995. The author also states that “[a]s a matter of principle, a refugee cannot choose his country of asylum”, at pp. 91 and 98 respectively (emphasis added).

freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

As some authors have already observed, the legal context to which the “direct arrival” requirement applies is very specific¹³⁶. As follows from the wording, the object of Article 31, CSR, is the exemption from penalties of a certain category of refugees who enter or are present unlawfully in the country of refuge. Apparently, the final goal is to provide an incentive to the regularization of their status and to them adhering to asylum rules, instead of going underground¹³⁷.

A close examination of the *travaux préparatoires* shows that this requirement should not be interpreted too rigidly¹³⁸. As Hathaway has noted, there was an agreement among the drafters that, together with those coming straight from a country of persecution, two further categories of refugees should also be understood as “coming directly”: those transiting through or spending short periods of time in other countries as well as those compelled to leave a country of first asylum due to a threat of persecution¹³⁹. Goodwin-Gill illustrates how the drafting history confirms that the notion

“[was] not intended to deny protection to persons in analogous situations. On the contrary, [it] shows clearly only a small move from an ‘open’ provision on immunity . . ., to one of slightly more limited scope, incorporating references to refugees ‘coming directly from a territory where their life or freedom was threatened’ ”¹⁴⁰.

The clause was introduced to meet a concern by France that those “who had already found asylum” should not be allowed “to move freely from one

136. J. Vedsted-Hansen, *supra* footnote 21, at p. 278 and references therein.

137. UN Department of Social Affairs, *A Study of Statelessness*, E/1112, 1 February 1949, at p. 20:

“In actual fact, the [refugee], since he cannot enter the territory of a State lawfully, often does so clandestinely. He will then lead an illegal existence, avoiding all contact with the authorities and living under the constant threat of discovery and expulsion. The disadvantages of this state of affairs, both to himself and for the country on whose territory he happens to be, are obvious.”

138. On this point, Grahl-Madsen suggests that “directly” should be interpreted loosely as meaning “without delay”, in *The Status of Refugees in International Law*, Vol. II, Leiden, Sijthoff, 1972, at p. 206.

139. J. C. Hathaway, *supra* footnote 22, at pp. 393-399.

140. G. S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, at p. 189.

country to another without having to comply with frontier formalities”¹⁴¹. A larger proposal to exclude refugees “having been unable to find even temporary asylum in a country other than the one in which . . . life or freedom would be threatened” was rejected. The UK representative resisted the amendment precisely because it would introduce the unbearable burden of proving a negative – i.e. that asylum could not be found anywhere else¹⁴². As the House of Lords has underlined,

“[t]he single most important point that emerges from a consideration of the *travaux préparatoires* is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not to deprive them of the benefit of the Article”¹⁴³.

Putting Article 31, CSR, against the broader context of the whole 1951 Convention, one realizes that the provision does not relate to qualification for refugee status. Its field of application is limited to the possibility of imposing penalties on “refugees unlawfully in the country of refuge”¹⁴⁴. Reading in Article 31 that “direct arrival” constitutes a prerequisite for qualification conflates admission with protection and adds an extra criterion to the refugee definition that exceeds the terms of Article 1A (2), in direct contravention of Article 42 (1) of the Convention¹⁴⁵. The travel route is irrelevant to the refugee definition. Binding the application of Article 1A (2) to the “coming directly” clause would be to ignore the specific object of Article 31 (1), CSR, creating the risk of depriving Article 1A (2) of its *effet utile*¹⁴⁶. Direct arrival may determine the imposition of penalties under the circumstances reflected in Article 31 (1), CSR, but it should not be read as a condition for the provision of protection as a refugee¹⁴⁷.

141. Statement by Mr. Colmar, A/CONF.2/SR.13, 10 July 1951, para. 13.

142. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records, A/CONF.2/SR.14, paras. 10-13.

143. *R v. Asfaw*, [2008] UKHL 31, at 56. The majority agreed that “the Refugee Convention must be given a purposive construction consistent with its humanitarian aims” (at para. 11), so that immunity from penalties should cover not only infractions committed in relation to irregular entry, but also where the refugee, in the course of his flight, attempts to leave a country without authorization.

144. This is the title of Art. 31, CSR.

145. Art. 42 (1), CSR, sets out that: “[a]t the time of signature, ratification or accession, any State may make reservations to Articles of the Convention *other than* to Articles 1, 3, 4, 16 (1), 33, 36-46 inclusive” (emphasis added).

146. For a similar argument, *mutatis mutandis*, see ECtHR, *Amuur v. France*, Appl. No. 19776/92, 20 May 1996, para. 43, where the Court recognized that, although the absence of a right of entry might justify detention under certain conditions, “such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status”.

147. In similar, the Permanent Court of International Justice (PCIJ) considered itself “bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it. . . .

B. Article 1E, CSR: rights and obligations akin to citizenship

Article 1E of the Convention provides an equally weak basis for a duty to seek asylum in the first safe country. The provision literally stipulates that the Refugee Convention “shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”. As a matter of fact, having been recognized as a refugee by another country does not warrant exclusion from Convention status¹⁴⁸. Only if the person concerned has taken residence elsewhere and enjoys the rights “which are attached” to citizenship is the exclusion from the scope of the Convention justified.

“The question which requires determination is whether recognition by the host country of a person as a refugee confers upon the refugee the same rights and imposes upon him the same obligations, which are attached to the possession of nationality of that country.”¹⁴⁹

The answer to this question shall generally be in the negative. Refugees can be expelled under certain circumstances¹⁵⁰, whereas citizens – or persons who may be assimilated to nationals – are immune from deportation¹⁵¹. Reading Article 1E as an implicit authorization to return the applicant to a purported

To impose an additional condition not provided for in the Treaty of June 28th, 1919, would be equivalent not to interpreting the Treaty, but to reconstructing it”, in *Acquisition of Polish Nationality (Advisory Opinion)*, [1923] PCIJ, Series B, No. 7, p. 6, at p. 20.

148. Justice Hill considered this argument, concluding that:


“[o]f course it is true that a person who is granted de facto citizenship and has rights no less than those of a refugee under the Convention has no need for the grant of refugee status. But that is not the point. Had the members of the United Nations intended to exclude from refugee status a person who has been granted by the state of residence rights no less than those of refugee status (albeit not all the rights of a national), they could have said so”, in *Reza Barzideh v. Minister of Immigration and Ethnic Affairs*, [1996] 69 FCR 417, at 427.

149. *Nagalingam v. Minister for Immigration, Local Government and Ethnic Affairs*, [1992] 38 FCR 191, at 198.

150. See Art. 32, CSR.

151. Art. 3, Prot. 4, ECHR, establishes in paragraph 1 that: “No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.” Para. 2 reads that: “No one shall be deprived of the right to enter the territory of the state of which he is a national.” Art. 22 (5), ACHR, also contains an express “prohibition of expulsion of nationals”. Art. 11 (4), ICCPR, without explicitly prohibiting exile, stipulates that: “No one shall be arbitrarily deprived of the right to enter his own country.” According to Nowak, the prohibition to expel nationals is implicit in this provision and confirmed by its drafting history and the fact that it is also provided for in general international law. See M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, Kehl, Engel, 1993, at pp. 218-221. For the situation of EU citizens having exercised their right to free movement, see Directive 2004/38/EC of 29 April 2004 on the right of citizens of the

“safe third country” where he or she has not taken up residence and does not enjoy the rights attached to the citizenship of that country therefore amounts to an extensive construction of an otherwise clear wording, in defiance of accepted rules of treaty interpretation¹⁵².

C. *A right to choose the country of asylum* 

Outside these two legal bases, it has been argued that the absence of an explicit right to choose the country of refuge in the 1951 Convention is sufficient to justify “safe third country” removals¹⁵³. The fact that Article 31 (2), CSR, allows for restrictions on the movement of refugees unlawfully in the country of refuge “until their status . . . is regularized or they obtain admission into another country” has been understood in this line. However, on closer inspection, the matter of finding such a country seems to have been left to the asylum seeker’s initiative. In the words of Article 31 (2), CSR, “[t]he Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”¹⁵⁴.

There are other indications in the Convention that point to the relevance of the refugee’s own volition. The very definition in Article 1A (2) establishes that a refugee shall be

“any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is *unwilling* to avail himself of the protection of that country”.

According to Article 1C, the Convention “shall cease to apply” where the person

Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77, especially Arts. 27 *et seq.*

152. In this connection, G. Fitzmaurice wrote that “violence is done to the terms of a treaty . . . whenever the existence of a right, obligation, procedure . . . not expressly provided for in the treaty or prima facie contemplated by it, and not a *necessary* consequence of the terms employed, is nevertheless read into it . . .”, in “Law and Procedure of the International Court of Justice” (1951), 28 *BYIL* 1, at 23; and “The Law and Procedure of the International Court of Justice” (1957), 33 *BYIL* 203, at 233. See also *International Status of South West Africa (Advisory Opinion)*, *ICJ Reports 1950*, p. 127, paras. 139-140.

153. Hailbronner maintains that “the Convention is not based on any rule of free choice of asylum countries”, *supra* footnote 17, at pp. 58-59. Fernhout has evolved in his opinion regarding “safe third country” transfers. From underlining the individual responsibility of the State to which asylum has been requested, *supra* footnote 128, he progresses to a reasoning in which “if a third country fulfils [EXCOM Conclusion 58 safety criteria] a State may return an asylum seeker to that country . . . without status determination”, *supra* footnote 16, at pp. 190-191.

154. See also Art. 32 (3) regarding the expulsion of refugees on grounds of national security or public order, replicating the wording of Art. 31 (2), CSR.

“has *voluntarily* re-availed himself of the protection of the country of his nationality; or [h]aving lost his nationality, he has *voluntarily* re-acquired it or [h]e has acquired a new nationality and enjoys the protection of the country of his new nationality; or he has *voluntarily* re-established himself in the country which he left”.

Forced removal to the country of origin is only expressly permitted where the circumstances that caused the person to become a refugee “have ceased to exist”¹⁵⁵. In such cases, the person “can no longer . . . continue to refuse to avail himself of the protection of the country of his nationality [or former habitual residence]”, unless he is a statutory refugee “able to invoke compelling reasons arising out of previous persecution”¹⁵⁶. These provisions suggest that refugees may voluntarily change their status by actions amounting to choice of nationality or residence¹⁵⁷. The only explicit limitation on the freedom to choose the country of protection is for refugees holding multiple nationalities. Otherwise, none of the relevant clauses suggests that the right to seek asylum must be exercised in any particular State party¹⁵⁸ or that the refugee may be compelled to make use of the right to request protection at any precise location¹⁵⁹. To be sure, there is no obligation in international law to seek refuge at the first safe country possible. Hence, it cannot be excluded that a certain “element of choice is indeed open to refugees as to where they may properly claim asylum”¹⁶⁰.

The relevance of this freedom is not obvious, though, and the discussion on whether it exists distorts the real issue. The crux of the matter is not whether the

155. EXCOM Conclusion No. 69 (XLIII) of 1992 *on cessation of status*; Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses), HCR/GIP/03/03, available at: <http://www.unhcr.org/publ/PUBL/3e637a202.pdf>.

156. Art. 1C (5), CSR. See also *R (Hoxha) v. Special Adjudicator*, [2003] 1 WLR 241, [2005] UKHL 19.

157. S. Kneebone, “The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: The Safe Third Country Concept”, paper presented to the “Moving On: Forced Migration and Human Rights” Conference (Sydney, 2005), at p. 25, available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5367.

158. In this line, see M.-T. Gil-Bazo, *supra* footnote 21, at p. 598. This idea is reinforced by the plural used in the wording of Art. 14, UDHR: “Everyone has the right to seek and enjoy in other *countries* asylum from persecution” (emphasis added).

159. *Mutatis mutandis*, in *Young, James and Webster*, Appl. Nos. 7601/76 and 7806/77, 13 August 1981, the ECtHR ruled that Art. 11, ECHR, included a negative right not to be compelled to join a union or association, in spite of the argument by the United Kingdom that the drafters had “deliberately excluded” it from the Convention. Notwithstanding the passage of the *travaux* cited in support of this affirmation, the Court did not deem it decisive, establishing that “the notion of a freedom implies some measure of freedom of choice as to its exercise” (para. 52).

160. *R v. Uxbridge Magistrates Court and Another; Ex parte Adimi*, [1999] EWHC Admin 765; [2001] QB 667 (*per* S. Brown LJ).

individual has a right to choose the country of asylum, but the need to identify whether the State under whose jurisdiction asylum seekers find themselves has any international obligations in their regard¹⁶¹.

Although some authors have maintained that the Refugee Convention says nothing regarding the precise responsibilities of each individual State party concerning any particular refugee¹⁶², the observation is flawed. On the simple contemplation of the terms in which the different articles of the Refugee Convention have been worded, refugee rights appear to accrue progressively. The stronger the level of attachment to the country of refuge, the higher becomes the level of protection and of corresponding States obligations¹⁶³. While some rights require “residence”¹⁶⁴, others only “legal stay”¹⁶⁵ or “legal presence”¹⁶⁶, whereas others accrue on the basis of “simple presence” in the territory of the Contracting State¹⁶⁷. A limited group of rights arises without qualification¹⁶⁸. The fact that the Convention lacks a general clause prescribing that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention”¹⁶⁹, is insufficient to obviate the peremptory language in which the Convention provisions have been drafted.

In the absence of any conclusive counter-indications, the 1951 Convention, adopting the form of a multilateral instrument governed by the rules of general international law, should be presumed to be based on the principle of individual responsibility of each State Party – “[t]he principle of independent

161. This point is made by J.-F. Durieux, *supra* footnote 20, at 76.

162. C. Phuong, “Identifying States’ Responsibilities towards Refugees and Asylum Seekers”, paper presented at the 2005 ESIL Conference, available at: <http://www.esil-sedi.eu/english/pdf/Phuong.PDF>, at p. 11, where the author writes that “[t]he international refugee protection system . . . suffers from a fundamental problem . . ., namely the lack of clear identification of the respective responsibilities of states towards refugees”.

163. See the classification of “criteria of entitlement to treatment in accordance with the Convention”, in G. S. Goodwin-Gill and J. McAdam, *supra* footnote 21, at pp. 524 *et seq.*, and in earlier editions. J. C. Hathaway adopts a similar scheme, *supra* footnote 22, at pp. 154 *et seq.*

164. For instance, Art. 7 (2) (exemption from reciprocity); Art. 14 (artistic rights); Art. 16 (2) (*cautio iudicatum solvi*).

165. E.g., Art. 15 (right of association); Art. 17 (employment); Art. 19 (access to liberal professions); Art. 21 (housing).

166. For example, Art. 26 (freedom of movement); Art. 32 (protection against expulsion); Art. 18 (self-employment).

167. E.g., Art. 31 (exemption from penalties on account of illegal entry) or Art. 4 (freedom of religion).

168. See Art. 3 (non-discrimination among refugees); Art. 16 (1) (access to courts); Art. 33 (1) (*non-refoulement*).

169. Art. 1, ECHR. See also Art. 2 (1), ICCPR: “Each State Party to the Present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . .”

responsibility reflects the position under general international law”¹⁷⁰. Therefore, at the first level of attachment, it is the presence of the individual under the jurisdiction of the State concerned that triggers the obligation. As with other human rights instruments, how the person happens to be there is immaterial. The State must comply with its obligations “irrespective of the circumstances and of the [person’s] conduct”¹⁷¹. The fact that the refugee, through prior transit, may have been under the jurisdiction of another country does not absolve the State in which he or she is present from its own obligations¹⁷². The failure of the intermediary State to act does not dispense the current State of refuge from fulfilling its responsibilities – the opposite may lead to the suspension of a treaty of humanitarian character against the express proscription of Article 60 (5), VCLT¹⁷³.

The obligation of one State is not affected by the failure of another¹⁷⁴. Convention obligations are not only inter-State engagements, but also entail subjective rights owed to the individual refugee¹⁷⁵. The “safe third country” notion puts the emphasis on the historical chain of events that would possibly have linked the refugee to another State party. The fact that in the past some other State may have become responsible for the protection of the person concerned does not diminish the responsibility *ex nunc* of the State which

170. International Law Commission (ILC), Annual Report (2001), *Commentary to the Articles on State Responsibility*, Chap. IV, Commentary to Article 47, para. 3. The whole system of the 1969 Vienna Convention is based on “the sovereign equality and independence of all States” and on the principle of free consent, as denoted by the Preamble. Art. 26, VCLT, enshrining the *pacta sunt servanda* rule, is a direct manifestation of this principle. For an elaboration, see I. Brownlie, *Principles of Public International Law*, 8th ed., Oxford, OUP, 2008; and A. Nollkaemper, “Issues of Shared Responsibility before the Court of Justice”, ACIL Research Paper No 2011-01 (SHARES Series), 8 April 2011, available at: <http://dare.uva.nl/document/450292>.

171. ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, para. 218. See also *Chahal v. UK*, Appl. No. 22414/93, 15 November 1996, para. 79; and *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, paras. 127 and 138-139.

172. Kirby J has reasoned that Australia’s “protection obligations” under the 1951 Convention “[are] not disapplied by the fact that other countries might or might not . . . be willing, or even bound, to receive [the refugee applicant subject to a ‘safe third country’ removal]”, in *NAGV and NAGW of 2002 v. Minister of Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6, para. 84.

173. Art. 60, VCLT, regulates the conditions under which a treaty may be terminated or suspended as a consequence of its breach by one of the parties. Paragraph 5 establishes that the regime does not apply “to provisions relating to the protection of the human person contained in treaties of a humanitarian character . . .”.

174. For a similar opinion, see J. Crawford and P. Hyndman, *supra* footnote 21, at p. 172.

175. *Contra*: Garvey has expressed the opinion that the determination of responsibility to deal with asylum requests should be treated as an inter-State affair. In his view, the “problem becomes more manageable”, in “Toward a Reformulation of International Refugee Law”, (1985) 26 *Harv. Int’l LJ* 482. However, an exclusive focus on the inter-State dimension of the Convention would negate the individual rights which it confers.

presently has jurisdiction over the refugee¹⁷⁶. The *erga omnes* nature of protection obligations suggests that while, in the abstract, all States parties may be obliged to act in comparable circumstances, only the one in the actual situation to do so violates the 1951 Convention if it refuses to take the appropriate steps¹⁷⁷. Where two or more States act independently from each other in contravention of an international obligation, the responsibility of each party is determined individually on the basis of its own conduct and on account of its own international obligations¹⁷⁸. Such responsibility is neither reduced nor precluded by the possible concurrent or subsequent responsibility of another State¹⁷⁹. Any disagreement between the parties to the 1951 Convention relating to its interpretation or application that cannot be settled by other means of dispute resolution shall be referred to the International Court of Justice¹⁸⁰, but ought not to be transferred to the body of the refugee.

The primary question that must be resolved is, thus, the determination of the obligations of the Contracting State concerned vis-à-vis the refugee who is present in its territory.

D. Articles 32 and 33, CSR: non-refoulement in good faith

There is a general consensus both in the laws enacting the principle, as discussed above, and among doctrinal writers that “safe third

176. However, see *Bugdaycay v. Secretary of State for the Home Department*, [1987] 1 AC 514, where Bridge of Harwich LJ claimed that:

“if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the matter . . . he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it”.

In his view, without however citing any authority, “[t]his is . . . in accordance with the ‘international practice’ . . . which must rest upon the assumption that all countries which adhere to the Convention may be trusted to respect their obligations under it”.

177. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*, ICJ Reports 2007, p. 2, para. 461: “The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide.”

178. ILC, Annual Report (2001), *Commentary to the Articles on State Responsibility*, Chap. IV, Commentary to Article 47, para. 8. See also, *Corfu Channel (United Kingdom v. Albania) (Merits)*, ICJ Reports 1949, p. 4; and *Oil Platforms (Islamic Republic of Iran v. United States of America) (Merits)*, ICJ Reports 2003, p. 324. For analysis refer to S. Talmon, “A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq”, in P. Shiner and A. Williams (eds.), *The Iraq War and International Law*, Oxford, Hart, 2008, p. 185, at p. 212.

179. A. Orakhelashvili, “Division of Reparation between Responsible Entities”, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford, OUP, 2010, p. 647, at 657.

180. Art. 38, CSR.

country” removals must respect the principle of *non-refoulement*. This has been endorsed by international jurisprudence, establishing that not only substantive protection against direct and indirect *refoulement* must be provided, but also that sufficient procedural guarantees must be in place to prevent it from occurring¹⁸¹.

There is disagreement with regard to whether any additional rights should be honoured by the removing State. The general tendency, mirrored in the international and domestic rules adopting the notion, is to consider that removal is in conformity with the Refugee Convention, provided the conditions in the “safe third country” concerned amount to “effective protection”. What constitutes “effective protection” is then subject to debate. Different actors propose different “safety” lists with varying criteria to determine the existence and/or availability of “effective protection” in the third country in question¹⁸². The common underpinning to this reasoning is that Article 33 of the Convention only protects against returns to “unsafe” countries and that removals to countries in which protection from persecution is or may be provided are permitted. Yet this approach is not self-evident. The assumption that removal elsewhere is acceptable, simply if it does not entail a risk of persecution, reflects a minimalist approach to Article 33 that is not clearly supported by the letter or the object and purpose of the Convention. The only textual exception to the rule of non-removal is expressed in paragraph 2 of that provision, where the Convention establishes that the prohibition of *refoulement* may not apply on security grounds if the refugee concerned constitutes a danger “to the country in which he is”. As exceptions in law must be explicit and interpreted narrowly¹⁸³, it does not appear to follow that it remains open to States parties to send refugees elsewhere in any other case. Against this background and without further basis, one cannot turn the principle “upside down”, so that expulsion to a third country is no longer the exception but becomes the

181. ECtHR, *T.I. v. UK*, Appl. No. 43844/98, 7 March 2000; *K.R.S. v. UK*, Appl. No. 32733/08, 2 December 2008; *Adbolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 September 2009; *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011.

182. See, e.g., EXCOM Conclusion No. 58; Arts. 35 and 38 recast Procedures Directive; Michigan Guidelines, *supra* footnote 22; S. H. Legomsky, *supra* footnote 18, at pp. 673 *et seq.*; R. Byrne and A. Shacknove, *supra* footnote 21, at pp. 214 *et seq.*; ECRE, *supra* footnote 12, paras. 56 *et seq.*

183. See, among other authorities, ECtHR, *Klass*, Appl. No. 5029/71, 6 September 1978, para. 42; *Silver v. UK*, Appl. Nos. 5947/72, 6205/73, 7052/75, 25 March 1983, para. 97; *Vogt v. Germany*, Appl. No. 17851/91, 26 September 1995, para. 52; *United Communist Party*, Appl. No. 19392/92, 30 January 1998, para. 46. This seems to be dictated by the principle of effectiveness of the primary obligations that represent the core object and purpose of a treaty. In this connection, it is worth recalling that, “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”, see *Airey v. Ireland*, Appl. No. 6289/73, 9 October 1979, para. 24.

rule¹⁸⁴. Inferring, by negative implication, that Article 33, CSR, allows for “safe” removals without limit “would suggest that no Contracting State ever has ‘protection obligations’ to a refugee who may (on whatever basis) be entitled by law to protection by another State”¹⁸⁵. Such a principle would, however, “render the Convention self-destructive”, leading to the absurd result that the greater the number of countries that accept to protect refugees through accession to the 1951 Convention, the lesser the responsibility of any one of them to protect a particular refugee¹⁸⁶. If given full effect, this inferred exception would authorize the shuttling of refugees between multiple States *ad infinitum*, depriving the Convention of “the practical effect it was intended to have”¹⁸⁷.

Putting Article 33 against the wider context of the whole Convention reinforces the rejection of an implicit authorization to remove refugees to “safe third countries” based on discretionary powers. Then one comes to the realization that States parties do not only contract a *non-refoulement* obligation when they ratify the Convention. A series of additional provisions are equally drafted in peremptory terms, creating specific “protection obligations” that accrue at “simple presence” level¹⁸⁸. Taken together, they constitute a legal status owed to refugees found in the territory of the Contracting Party concerned, which is supposed to produce full effects¹⁸⁹. Although it has been advanced that in the absence of an explicit obligation to grant “durable asylum”¹⁹⁰, and in the presence of a provision specifically regulating expul-

184. A. Acherman and M. Gattiker, “Safe Third Countries: European Developments” (1996), 7 *IJRL* 19, at 23: “The principle of the responsible State has thus been turned upside down: expulsion to a third State is no longer the exception but the rule.”

185. *NAGV and NAGW of 2002 v. Minister of Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6, para. 91.

186. In similar terms, the ICJ in *US Nationals in Morocco* rejected the plea of the United States that the 1880 Madrid Convention recognized US capitulatory rights in Morocco by implication. The Court could not “adopt a construction by implication . . . which would go beyond the scope of its declared purposes and objects”; this would involve “radical changes and additions” to the Convention. As “[n]either the preparatory work, nor the Preamble [gave] the least indication of any such intention”, the Court deemed “itself unable to imply such fundamental a change”, in *ICJ Reports 1952*, pp. 196-198.

187. *NAGV and NAGW of 2002 v. Minister of Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6, paras. 92-94.

188. See Arts. 3 (non-discrimination), 4 (religion), 13 (movable and immovable property), 16 (1) (access to courts), 20 (rationing), 22 (public education), 25 (administrative assistance), 27 (identity papers), 29 (fiscal charges), 31 (non-penalization for illegal entry or stay), 33 (*non-refoulement*), and 34 (naturalization).

189. Human rights obligations are not mere limits to the State’s prerogative to exclude aliens, but also and most significantly they translate into a positive duty to protect. On obligations to respect, protect and fulfil, see O. De Schutter, *International Human Rights Law*, Cambridge, Cambridge University Press, 2010, Part II, Chaps. 3, 4 and 5, at pp. 241 *et seq.*

190. G. S. Goodwin-Gill and J. McAdam, *supra* footnote 21, at p. 262. See, however, Art. 18, EUCFR, arguably requiring EU Member States to grant asylum in certain circumstances.

sion in Article 32, CSR, one should not read too much into Article 33, CSR¹⁹¹, the reasoning requires close inspection.

The presumption against redundancy of international obligations requires that provisions in a treaty be given effect as possessing their own independent meaning¹⁹². As a result, accepting that Article 32, CSR, must be interpreted as having a substance of its own, it should indeed mean something different from Article 33, CSR. The provision protects refugees “lawfully in” the country of asylum against expulsion, save where public order or national security grounds may warrant otherwise¹⁹³. However, it does not automatically follow that “simple presence” refugees, whose stay in the territory of the country of refuge has not yet been regularized, may be expelled at the earliest opportunity without justification¹⁹⁴. On a similar reading, some authors have expressed the opinion that, in light of Article 32, CSR, a “safe third country” removal “which respects the requirements of international law may . . . be made only before the refugee concerned is ‘lawfully present’ in the sending State”¹⁹⁵. The protection of Article 32, CSR, acts as a bar not only to “unsafe” returns, but also to “safe” removals under this conception, so that the key to avoid “safe third country” expulsion is for the refugee to reach the level of “lawful presence” in the country of asylum. Once this happens, deportation can only take place in accordance with Article 32 (2) of the Convention.

Against this background, the position maintained here is that, in light of the duty to implement international obligations in good faith and on account of the principle of effectiveness of international engagements¹⁹⁶, the transition from

191. So far, the main argument on which “safe third country” arrangements have rested is a construction of the 1951 Convention as “fall[ing] short of creating . . . a duty on [the] part of the Contracting State to whom a request for asylum is made, to grant it . . .”, in *Rajendran v. Minister for Immigration and Multicultural Affairs*, [1998] 166 ALR 619.

192. “Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning”, in *Cayuga Indians*, Award rendered in Washington on 22 January 1926 (1920), 16 *AJIL* 574, at pp. 576-577. See also A. Orakhelashvili, *infra* footnote 199, at p. 422, stating that “[t]he essence of presumption against redundancy is that every single phrase or provision of a treaty has to be given affect as possessing its own independent meaning”.

193. Art. 32 (2), CSR.

194. Cf. J. C. Hathaway, “Refugee Law Is Not Immigration Law”, (2002) *World Refugee Survey* 38, at 43, arguing that there was no impediment to sending asylum seekers to New Zealand in the aftermath of the *MV Tampa* affair.

195. “The Michigan Guidelines on Protection Elsewhere”, *supra* footnote 22, para. 5.

196. The ICJ has recognized that “one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence” is precisely “that of effectiveness”, in *Libya v. Chad*, *ICJ Reports 1994*, at pp. 24-25. On the “effective implementation” of international obligations see *LaGrand (Germany v. United States of America) (Merits)*, *ICJ Reports 2001*, paras. 77 *et seq.* In this connection, Art. 36, CSR, stipulates that: “The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure

“simple presence” to “lawful presence”, that is, between Articles 33 and 32, CSR, protection must be legally and materially possible to effect. Accordingly, the specification of the conditions determining “lawful presence” in the State party in which refugees find themselves can not be made arbitrarily in domestic legislation.

The words “lawfully in” “do not simply refer back to domestic law”¹⁹⁷. This would amount to authorizing the “municipalization” of the Convention, making the extent of the international obligation enshrined in Article 32, CSR, dependent upon the state of national rules in the Contracting Party concerned¹⁹⁸.

“[T]he plain meaning of treaty provisions has to be considered as their autonomous meaning, that is, their meaning as part of the relevant treaty arrangement and not . . . the same meaning as the relevant word would possess under the national law of the State Party.”¹⁹⁹

“To hold otherwise would result in a State being able to free itself of its treaty obligations by its own unilateral legislative action.”²⁰⁰ This entails that the meaning that should be attached to the phrase “lawfully in” is the one serving the rationale of the treaty in which it is inscribed and not the particular interests of the Contracting State in issue²⁰¹.

This line of reasoning is reflected in Article 27, VCLT, and has been consistently upheld in international jurisprudence. For instance, the word “established” in Article 2 of the 1923 Lausanne Convention, concerning the exchange of Greek and Turkish populations, was interpreted by the Permanent Court of International Justice as “a question of international law”, which could not be determined by reference to definitions contained in the law of any of the parties. The Court observed that “it does not necessarily follow that, by reason of the nature of the situation contemplated in the Convention, there must be an implied reference to national legislation”. It established that “there

the application of this Convention” (emphasis added). On this point the “Michigan Guidelines” conclude that “[l]awful presence must be defined by the sending State in good faith and in accordance with the requirements of international law”.

197. *Mutatis mutandis*, ECtHR, *Medvedyev a. o. v. France*, Appl. No.3394/03, 10 July 2008, para. 53 (on Art. 5 (1), ECHR).

198. See ICJ, *Asylum case (Colombia v. Peru)*, ICJ Reports 1950, p. 266, at pp. 275-276.

199. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, Oxford University Press, 2008, at p. 335. The author subsequently adds that “the concept of autonomous meaning could be the implication of the need to understand words in the light of the context or the object and purpose of the treaty”.

200. M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Brill, 2010, at p. 372.

201. According to R. Phillimore, “[w]hen the same provision or sentence expresses two meanings, that one which most conduces to carry into effect the end and object of the Convention should be adopted”, in *Commentaries upon International Law*, 3rd ed., Vol. II, London, Butterworths, 1882, at pp. 76-77.

[was] no reason why the local tie indicated in the word ‘established’ should be determined by the application of some particular law”. The Court concluded that the word, although reminiscent of “the conception of domicile in several modern legal systems”, denoted “a mere situation of fact” constituted by “residence of a lasting nature”. Otherwise, a reference to Turkish or Greek law “would probably have resulted in uncertainties” and differences in the treatment accorded to the Greek and Turkish populations concerned, which “would not be in accordance with the spirit of the Convention”²⁰². Similarly, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, many years later, has interpreted the “nationality” requirement in Article 4 of Geneva Convention IV within the context of the object and purpose of humanitarian law “and not as referring to domestic legislation”, understanding that “Article 4 intends to look to the substance of relations, not to their legal characterisation as such”. The Tribunal concluded that, if humanitarian protection would be

“solely based on . . . national law [it] would not be consistent with the object and purpose of the [Geneva] Conventions. Their very object could indeed be defeated if undue emphasis were placed on formal legal bonds, which could also be altered by governments”²⁰³ [at will].

In this vein,

“the Refugee Convention must be given an independent meaning derivable from the sources mentioned in Articles 31 and 32 [of the Vienna Convention on the Law of Treaties] and without taking colour from distinctive features of the legal system of any individual contracting state”²⁰⁴.

The words “lawfully in” for the purposes of Article 32, CSR, should be read in light of the object and purpose of the 1951 Convention of “assur[ing] refugees the widest possible exercise of . . . fundamental rights and freedoms”²⁰⁵. At the same time, the fact that neither the Convention nor general international law create an obligation to provide for an autonomous right of entry and

202. *Exchange of Greek and Turkish Populations (Advisory Opinion)*, [1923] PCIJ, Series B, No. 10, at pp. 17-26.

203. ICTFY, *Delalic*, IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 74-81; and *Tadic*, IT-94-1, Appeals Chamber, 19 July 1999, paras. 167-168. The European Court of Human Rights has also attached an autonomous meaning to a series of concepts in different articles of the ECHR. For a detailed analysis on this point see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2007, Chap. 2.

204. *Adan (Lul Omar) v. Secretary of State for the Home Department*, [2001] 2 AC 477, paras. 513-515. See also G. S. Goodwin-Gill, “The Search for the One, True Meaning . . .”, in G. S. Goodwin-Gill and H. Lambert (eds.), *The Limits of Transnational Law*, Cambridge, Cambridge University Press, 2010, p. 204.

205. Preamble, CSR, para. 2.

stay to refugees may be taken into account. But, while States parties enjoy a margin of appreciation in this respect, they are also obliged to exercise this discretion in good faith and implement Article 32, CSR, effectively²⁰⁶. Such latitude should not “lead to results incompatible with the purpose and object of the Convention”²⁰⁷. State discretion is confined and structured by law²⁰⁸. The “principles of natural justice” and “procedural fairness” circumscribe the extent of an exercise of power that affects not only a right in the strict sense, but also an interest or a privilege recognized by law²⁰⁹. State power is to be exercised within the parameters of the rule of law. Therefore, albeit protection against expulsion is not absolute under Article 32, CSR, the instances in which removal may be carried out must be regulated in a way “to avoid all risk of arbitrariness”²¹⁰. The principles of legality and proportionality must be taken into account. The requirements for “legal presence” in the country of refuge must be provided for in clear terms. Any conditions “must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”²¹¹.

The way in which the transition from “simple presence” to “legal presence” is usually regulated in the countries that have adopted the “safe third country” concept is through admissibility decisions taken at a preliminary stage of status determination procedures²¹². Presumably, the objective of “safe third

206. *Mutual Assistance in Criminal Matters (Djibouti v. France) case*, ICJ Reports 2008, para. 145:

“while it is correct, as France claims, that the terms of Article 2 [of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties” (references omitted).

207. *Mutatis mutandis*, ECtHR, *Engel a. o. v. The Netherlands*, Appl. No. 5100/77, 8 June 1976, para. 81.

208. On this point see K. C. Davis, *Discretionary Justice: A Preliminary Inquiry*, Baton Rouge, Louisiana State University Press, 1969. See also G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978; and by the same author, “State Responsibility and the ‘Good Faith’ Obligation in International Law”, in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions*, Oxford, Hart, 2002, p. 75, where he states that the fact that “a certain matter falls within the sovereign competence of the State does not imply unfettered discretion”.

209. *Plaintiff M61/2010E and Plaintiff M69/2010 v. Commonwealth of Australia*, [2010] HCA 41, paras. 74-89 (on the exercise of statutory powers to detain asylum seekers).

210. Among others, *Medvedyev a. o. v. France*, Appl. No. 3394/03, 10 July 2008, para. 53 (confirmed by Grand Chamber in Judgment of 29 March 2010, paras. 76 *et seq.*).

211. *Mutatis mutandis*, CJEU, Case C-55/94 *Gebhard*, [1995] ECR I-4165, para. 37.

212. See, for instance, Arts. 32 and 33, recast Procedures Directive.

country” rules is the avoidance of the “refugee in orbit” phenomenon, while preventing the abuse of Convention rights by non-refugees²¹³. Unauthorized entry, the availability of protection elsewhere and previous presence or transit through the territory of another State are factors employed to distinguish among applicants. The applications of those for whom a “safe third country” exists are qualified as inadmissible and/or unfounded, subject to accelerated procedures, and not examined in detail.

The question that arises in this context is whether a distinction in treatment based on these elements is proportionate or whether it leads to discrimination between refugees²¹⁴. The point is that, although there is strictly no duty to set up status determination procedures, if they are introduced in order to implement protection obligations and as a means to avoid claims by non-refugees to treatment pursuant to the 1951 Convention, their operation should be organized in good faith and in non-discriminatory fashion²¹⁵. Similarly situated applicants should be treated in the same way²¹⁶.

Illegal entry, previous transit, or the returnability of claimants to a third State are conditions *prima facie* unrelated to protection needs²¹⁷. The necessity and appropriateness of a distinction based on these elements, although possibly effective to achieve the fight against abuse and migration control goals pursued when conceptualized in “safe third country” rules, deserves careful consideration. In practice a focus on these factors “puts mainly non-European protection seekers in a less favourable position”, reducing their chances to obtain protection. In the words of Noll²¹⁸, “[t]he exclusionary effect of this distinction moves it very close to a distinction based on . . . race or nationality” in breach of the prohibition of discrimination enshrined in Article 3 of the 1951 Convention and should therefore be rejected in favour of less onerous alternatives²¹⁹.

213. J. Van Selm lists additional objectives, *supra* footnote 20, at p. 56.

214. Art. 3 and recital 1 of the Preamble to the CSR. See also Art. 26, ICCPR; and Art. 14 and Prot. 12, ECHR.

215. S. Peers, *Mind the Gap!*, *supra* footnote 12, at p. 17, referring to a decision by the disappeared Cour d’Arbitrage de Belgique.

216. T. Clark in co-operation with F. Crépeau, “Human Rights in Asylum Sharing and Other Human Transfer Agreements” (2004), 22 *NQHR* 217; T. Einarsen, “Discrimination and Consequences for the Position of Aliens”, 64 *NJIL* 429; J. M. Pobjoy, “Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection” (2010), 34 *Melb. UL Rev.* 181. See also HRC, [1986] General Comment No. 15, *The Position of Aliens under the Covenant*, para. 5.

217. R. Byrne and A. Shacknove note in this connection that “because the possibility of direct flight is often contingent upon air route contracts and landing rights of private airlines, no general conclusion about the respective protection needs of direct and indirect flight asylum seekers can be proffered”, *supra* footnote 21, at p. 205, fn. 71.

218. G. Noll, *supra* footnote 9, at p. 450.

219. *Mutatis mutandis*, CJEU, Case C-331/88, *Fedesa*, [1990] ECR I-4023, para. 13: according to the principle of proportionality, “[w]hen there is a choice between

Even if the “safe third country” notion were not to produce any discriminatory result, there would still be several proportionality conditions to be taken into account. If the deservability of claims were made dependent on the directness of flight, the law of the State Party concerned should define what “coming directly” means. Restricting access to procedures on the basis of indirect arrival, without defining precisely what a “direct flight” entails, contravenes the principles of legality and legal certainty. Beyond a definition in law, “direct flight”, if made a condition for the effective implementation of “legal presence” obligations of a Contracting State, should be legally and materially possible to fulfil in practice²²⁰. If only air arrivals with passports and visas are considered to be direct, these should be possible to effect by those to whom the norm is addressed²²¹. Otherwise, asking for compliance with an impossible requirement cannot be considered a good faith implementation of Article 32, CSR. In such circumstances the “safe third country” rule would bar access to the very procedure enacted by the Contracting State for the implementation of its obligations, thereby frustrating the proper execution of the 1951 Convention²²².

While there is no explicit obligation to provide for entry or asylum in the 1951 Convention, it is no less certain that the Convention is drafted in

several . . . measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.

220. The ECtHR has established that, “although some discretion” is allowed for a Contracting Party to implement its obligations under Art. 13, ECHR, “the remedy required by Article 13 must be ‘effective’ in practice as well as in law”, in *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, paras. 288-291.

221. It is, however, estimated that 90 per cent of the refugees arriving in the European Union rely on irregular means to gain access to a Member State, see ECRE, “Broken Promises – Forgotten Principles: ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection” (June 2004), at p. 17, available at: <http://www.refworld.org/docid/4124b3cc4.html>. See also *Nadarajah Vilvarajah v. Secretary of State for the Home Department*, [1990] Imm AR 457, at 459, observing that

“those who are to claim to be refugees and who arrive in this country seeking asylum may well have to arrive armed with false documents and false passports. It may be that *there is no other way* in which they can leave the country from which they have come and come to this country.” (Emphasis added.)

This paragraph has been quoted by the UKHL in *R v. Naillie; R v. Kanesarajah* [1993] AC 674, [1993] 2 All ER 782, [1993] 2 WLR 927, [1993] Imm AR 462. Within the Schengen system one of the five conditions upon which the grant of a visa is issued is precisely the ability of the applicant to prove willingness and ability to return to the country of departure. See Art. 5 (1) of the Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1, and Art. 21 of the Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, [2009] OJ L 243/1.

222. This configuration may eventually lead to a *de facto* exclusion from refugee status against the express provisions of Arts. 1 and 42 of the Convention, transposing the discussion of Art. 31, CSR, into the realm of Art. 32, CSR.

peremptory terms that create concrete obligations that have to be implemented effectively and in good faith. Arguments based on State sovereignty should be invoked “with the greatest caution”²²³. Although “[r]estrictions upon the independence of States cannot . . . be presumed”²²⁴, once a State concludes a treaty it undertakes to exercise its sovereign rights in conformity with it²²⁵. Sovereignty as such has no independent relevance in the interpretation of treaty obligations. Accordingly, as clarified in international case law,

“[t]he principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation.”²²⁶

As a result, while the regulation of “legal presence” obligations may indeed allow for a margin of appreciation, the exercise of State discretion remains subject to the requirements of the rule of law. Protection from expulsion in the terms of Article 32, CSR, may be regulated in domestic norms, but in a proportionate and non-discriminatory way, in conformity with the object and purpose of the 1951 Convention²²⁷.

In the realm of EU law, an additional layer of regulation should be taken into account in relation to the definition of “legal presence”. The CJEU has

223. *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, [1929] PCIJ, Series A, No. 23, at p. 26.

224. The case of the *S.S. “Lotus”*, [1927] PCIJ, Series A, No. 10, at p. 18.

225. Case of the *S.S. “Wimbledon”*, [1923] PCIJ File E. b. II. Docket III. I., at 25:

“The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation . . . places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”

226. *Arbitration Regarding Iron Rhine Railway (Belgium v. Netherlands)*, Award of 24 May 2005, para. 53. See also the *Lake Lanoux Award*, 12 *RIAA* 306, in light of which the decision was taken, confirming that the presumption of sovereignty must give way to the content of treaty obligations. According to Orakhelashvili, *supra* footnote 199, “[t]he extent of sovereign freedom *in casu* is merely a consequence of the position that obtains through and after the interpretation of a treaty by using normal interpretative methods”, at p. 414. H. Lauterpacht also denies the normative status of the *in dubio mitius* approach, which, unlike the principle of effectiveness, is not part of international law: “Restrictive Interpretation and Effectiveness in the Interpretation of Treaties” (1949), 26 *BYBIL* 48, at 69. I. Brownlie also finds that the principle of restrictive interpretation of treaty obligations has no support in the VCLT, in *Principles of Public International Law*, 7th ed., Oxford, Oxford University Press, 2008, at p. 635.

227. There is, in principle, no reason why the same reasoning would not apply to the transition towards the levels of “legal stay” and “residence” rights. However, a full analysis of the corresponding provisions lies beyond the scope of this contribution.

established, on the basis of the Returns Directive²²⁸, that asylum seekers “should not be regarded as illegally staying on the territory of [a] Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force”²²⁹. In parallel, the Court has recognized a “right to remain” in the territory of the Member State(s) concerned under Article 7 of the Procedures Directive, not only while the examination of an asylum claim is pending, but also within the procedure to determine the Member State responsible for that examination²³⁰. These conclusions should have an impact on the manner in which 1951 Convention obligations are implemented by Member States, possibly indicating that, under EU law – and especially on account of the explicit recognition of a right to asylum in Article 18 of the EU Charter of Fundamental Rights – the transition between “simple presence” and “legal presence” is semi-automatic and only dependent on the refugee concerned lodging an asylum application.

Be it as it may, a good faith approach to 1951 Convention obligations, on the basis of a rights-based perspective to refugee protection – accepting that refugee rights under the Convention accrue with or without status recognition –, requires a reconfiguration of the relationship between the sending State and the individual refugee present in its territory. The principles of effectiveness, legality, proportionality and non-discrimination call into question the validity of the “safe third country” notion as a basis for the articulation of this relationship. Articles 1E and 31 of the Convention provide an insufficient foundation to the notion, while a contextual and systemic reading of Article 33 begs the rejection of the idea that sovereignty alone is enough to justify “safe” expulsions, disregarding individual entitlements to protection. State discretion is not unfettered; it is delimited by general principles of law.

Paragraph 2 **The Horizontal Dimension : The Inter-state Perspective**

Together with the vertical dimension, the horizontal perspective must be considered in the evaluation of the “safe third country” mechanism. A comprehensive appraisal of the notion requires consideration of the relationship between the sending and the receiving States of a “safe third country” removal as well as that between the expelling State and the other parties to the 1951 Convention. The rights and obligations of other States are relevant in this respect. The Vienna Convention on the Law of Treaties declares a number of rules on the creation of international obligations for

228. Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country national, [2008] OJ L 348/98.

229. CJEU, Case C-357/09 PPU, *Kadzoev*, [2009] ECR I-11189, para. 41.

230. CJEU, Case C-179/11, *Cimade and GISTI*, Judgment of 27 September 2012 (nyr), paras. 46-49.

third States together with principles to be observed when existing treaties are reviewed that are crucial to our discussion. In particular, Articles 30, 35, 40 and 41, VCLT, on the application and modification of treaties, provide for a series of substantive and procedural conditions, pointing to the idea that international responsibilities may be “shared”, but not “shifted”, under certain circumstances.

A. Sovereign equality, free consent and pacta sunt servanda

The system of international law is predicated on “the sovereign equality and independence of all States” and on “the principles of free consent and of good faith”²³¹. According to Article 2 (g), VCLT, “‘party’ means a State which has consented to be bound by [a] treaty and for which the treaty is in force”. Article 26, VCLT, declares the *pacta sunt servanda* rule, whereby “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”. It should hence be understood that a State entering an international treaty contracts an obligation for and by itself. Unilateral designations of responsibility through “safe third country” provisions in the national law of one party to the 1951 Convention do not alter this rule. As already discussed above, the principle of independent responsibility, “in the absence of agreement to the contrary between the States concerned”, is the prevailing principle²³².

In addition, it is a generally accepted tenet that in the relations between the parties domestic provisions cannot prevail over those of an international agreement. Both the International Court of Justice²³³ and the International Law Commission have endorsed the supremacy of international law²³⁴. Article 27, VCLT, expressly denies that a State may invoke its internal law as justification not to perform its obligations under a treaty. The rank in the internal hierarchy of norms is not relevant; “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law”²³⁵. The supremacy of treaty provisions concerns not only

231. Preamble, VCLT.

232. ILC, Annual Report (2001), *Commentary to the Articles on State Responsibility*, Chap. IV, Commentary to Article 47, para. 3.

233. *Alabama Claims Arbitration* [1872], in G. F. von Martens, *Nouveau recueil général de traités*, Vol. XX, Goettingen, Dieterich, 1843-1875, at pp. 767 *et seq.* See also *Greco-Bulgarian Communities (Advisory Opinion)*, [1930] PCIJ, Series B, No. 17, at p. 32: “this proposition seems now to be so well understood and so generally accepted that it is not deemed necessary to make citations or to adduce precedents in its support”. Both decisions were cited with approval in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)*, ICJ Reports 1988, p. 34, para. 57.

234. ILC, Report to the General Assembly on the Work of the 1st Session, A/CN.4/13, 9 June 1949, at p. 21.

235. *Polish Nationals in Danzig*, [1932] PCIJ, Series A/B, No. 44, at p. 24.

rules of domestic law already in place at the time of conclusion²³⁶, but also those which may be enacted subsequent to the treaty. Indeed, “[t]he effective application of Article 27 obliges a State to ensure that all these provisions are compatible or brought into line with its international obligations”²³⁷.

Consequently, unilateral action by a treaty party cannot operate to establish the obligations of another party and may ultimately qualify as a breach of treaty²³⁸. The International Court of Justice has stated that an “interpretation, which would mean that the extent of the obligation of one of the [Contracting Parties] would depend upon any modifications which might occur in the law of another, cannot be accepted”²³⁹. Therefore, for our purposes, unless the designation of the “safe third country” as responsible to perform a particular obligation results clearly from the 1951 Convention, the notion should be discarded.

As examined above, neither Article 1E nor Article 31, CSR, provide a solid foundation for the “safe third country” rule. Moreover, “transit” has expressly been rejected as a basis to determine responsibility by potential “safe third countries”. A Background Note submitted to the Executive Committee of UNHCR in 1991 outlined the difficulties attached to the application of the notion, both as a threshold for the identification of the responsible State and concerning its implementation²⁴⁰. The debate revealed a stark division of views and, eventually, no conclusions were adopted²⁴¹. While Western countries generally maintain that earlier presence, through passage or stay, engages the responsibility to determine status and provide protection²⁴², developing States emphasize the negative impact of “safe third country” measures, requiring evidence of a more substantial link with the refugee²⁴³. Turkey has persistently voiced its opposition to “safe third country” returns, underlining

236. See K. J. Partsch: “on the international level international law is supreme and . . . this supremacy is valid in relation to any provision of internal law, whatever its ranking in the municipal order may be”, in “International Law and Municipal Law”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II, Amsterdam, North-Holland, 1995, at p. 1189.

237. M. E. Villiger, *supra* footnote 200, at p. 372. In this connection, see Art. 36, CSR: “The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.” (Emphasis added.)

238. R. K. Dixit, “Amendment or Modification of Treaties” (1970), 10 *IJIL* 37.

239. *Asylum case (Columbia v. Peru)*, *ICJ Reports 1950*, p. 266, at pp. 275-276.

240. “Background Note on the Safe Country Concept and Refugee Status”, EC/SCP/68, paras. 11-17.

241. “Report of the Sub-Committee of the Whole”, A/AC.96/781.

242. Statement by the United Kingdom on behalf of the European Community and Member States, A/AC.96/SR.472, para. 78. See also EXCOM Conclusion No. 58 (XL) of 1989, Report of the 40th Session, A/AC.96/737.

243. Statement by Brazil, A/AC.96/SR.485, para. 2; Statement by Bulgaria, A/AC.96/SR.485, para. 47; Statement by Poland, A/AC.96/SR.475, para. 37; Statement by Sudan, A/AC.96/SR.427, para. 69; Statement by China, A/AC.96/SR.427, para. 10.

the unfair result to which they lead, regionalizing protection and concentrating the burden on transit countries that happen to be closer to refugee producing States²⁴⁴. These differences have not been overcome over the years.

Discussions on the “irregular secondary movements” strand of the *Convention Plus* initiative, launched in 2002 by UNHCR, have yielded no results²⁴⁵ and have prompted calls for a “New Deal” on burden sharing that has yet to materialize²⁴⁶.

Not even within the European Union is practice with regard to the significance of transit uniform. Some Member States require that the asylum seeker has resided in a third State for months; others for a day or two; while still others insist that a very brief stay, perhaps a mere disembarkation into a transit lounge, is sufficient to invoke the responsibility of the third State concerned²⁴⁷. The former position of Greece was paradigmatic of this lack of consensus. Whereas for the majority of EU Member States transit produces responsibility, for a number of years Greek authorities refused to consider claims to refugee status where the applicant was *in transit through Greece* to another State²⁴⁸. As a result, there is no consistent practice, in the sense of Article 31 (3) (b), VCLT²⁴⁹, that would allow for the conclusion that a rule exists in the 1951 Convention buttressing the “safe third country” notion and the transit rule as the default mechanism to determine responsibility²⁵⁰.

B. Articles 34 and 35, VCLT: treaties and non-parties

As much as a party to a treaty cannot unilaterally determine the responsibilities of another party in its national law, the same is true when

244. “Report of the Sub-Committee of the Whole”, A/AC.96/671, para. 68. See also statements by Turkey, A/AC.96/SR.418, para. 74; A/AC.96/SR.430, para. 66; A/AC.96/SR.456, paras. 6-7.

245. For an overall presentation and access to related documents go to: <http://www.unhcr.org/pages/4a2792106.html>.

246. “UNHCR chief calls for ‘New Deal’ in managing the world’s displaced”, *UNHCR News Stories*, 8 October 2010, available at: <http://www.unhcr.org/4caf29e79.html>.

247. See *supra* footnote 12.

248. S. Peers, “Mind the Gap!”, *supra* footnote 12, at p. 18. The European Commission started infringement proceedings against Greece on account, *inter alia*, of its treatment of Dublin returnees. Greece took legislative action, purportedly with a view to conforming to EU standards. The Case C-130/08 was then struck out of the list of cases on 22 October 2008. These amendments, however, leave very much to be desired. See *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, for details.

249. For analysis and commentary see P. Sands and J. Commission, “Treaty, Custom and Time: Interpretation/Application?”, in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties Thirty Years On*, The Hague, Martinus Nijhoff, 2010, p. 39.

250. On this point see G. S. Goodwin-Gill, “The Protection of Refugees and the Safe Third Country Rule in International Law”, in *Asylum Law*, London, 1st Judicial International Conference, 1995, p. 89.

the designation occurs through a subsequent *inter se* agreement between certain parties, excluding the party concerned. The approval in Article 3 (3), of the Dublin Regulation “to send an asylum seeker to a third country” or the authorization in Articles 35 and 38 of the recast Procedures Directive to “apply the safe third country concept” is without effect in the absence of the express accord of the third country in question to receive the refugee. In general, an international instrument cannot create either obligations or rights for a third State without its consent²⁵¹. The principle *pacta tertiis nec nocent nec prosunt* dates back to Roman law and has been consistently maintained in international jurisprudence²⁵² – the CJEU has also explicitly endorsed the rule²⁵³. An international agreement binds solely its parties, which cannot impose it on non-parties. Whereas with regard to treaties providing for rights for third States their “assent shall be presumed so long as the contrary is not indicated”²⁵⁴, the centrality of consent for the creation of obligations for non-parties has crystallized in the 1969 Vienna Convention.

According to Article 35, VCLT, “[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing”. Although a rule of “implied consent” was proposed during the preparations of this provision²⁵⁵, the Cambodian motion suggesting that the obligation had to be accepted “in writing” received majority support²⁵⁶. Thus, two conditions are required. On the one hand, the parties that intend to create an obligation for a third State have to provide for this specifically in their treaty. On the other hand, the third State has to accede to that very obligation

251. Art. 34, VCLT.

252. *Certain German Interests in Polish Upper Silesia* case, [1926] PCIJ, Series A, No. 7, at p. 30: “a treaty only creates law as between States which are parties to it”; *Territorial Jurisdiction of the International Commission of the River Oder* case, [1929] PCIJ, Series A, No. 23, at pp. 19 *et seq.*; *Free Zones of Upper Savoy and the District of Gex*, [1932] PCIJ, Series A/B, No. 46, para. 141, establishing that Art. 435 of the Versailles Treaty had not created obligations for Switzerland against its will; *North Sea cases*, ICJ Reports 1969, p. 25; *Aerial Incident of 27 July 1955 (Israel v. Bulgaria) (Preliminary Objections)*, ICJ Reports 1959, p. 138, where the Court considered that its statute was “without legal force so far as non-signatory States were concerned”.

253. CJEU, Case C-386/08, *Firma Britta*, [2010] ECR I-1289, paras. 44 *et seq.*

254. Art. 36, VCLT.

255. Waldock Report III, [1964] YBILC II, at 19.

256. OR 1969 Plenary 59, paras. 5 *et seq.* (adopted by 44 votes to 19, with 31 abstentions). Art. 35 itself was adopted unanimously, see OR 1969 Plenary 60, para. 8, and 158, para. 49. Although the requirement of written consent might have appeared innovative at the time of its adoption, considering the unanimous endorsement of Art. 35, Villiger suggests that “most likely [this requirement has] come to share the customary basis of the provision as a whole”, *supra* footnote 200, at p. 479. The ICTFY has referred to the “general principle” enshrined in Art. 35, in Appeals Chamber, *Blaksic*, 29 October 1997, para. 26. This condition is, in any event, parallel to the general provision in Art. 2 (1) (a), VCLT, establishing that a “‘treaty’ means an international agreement concluded between States *in written form*” (emphasis added).

expressly and in writing²⁵⁷. Any of these conditions failing, the obligation will not be perfected.

Albeit the Dublin Regulation and the Procedures Directive are not international treaties, in light of its customary value as embodying general principles of interpretation, the 1969 Convention should be deemed applicable (*mutatis mutandis*) to our purposes²⁵⁸. As a result, it is not obvious whether the abstract designation of a “safe third country” as responsible for the provision of protection through a *renvoi* to national law in Article 3 (3) of the Dublin Regulation and Articles 35 and 38 of the recast Procedures Directive fulfils the first requirement of Article 35, VCLT. These provisions do not clearly aim to create an obligation for any particular third State, but simply allow for such a possibility if this is contemplated in the domestic order of the Member State concerned. In these circumstances, neither the obligation nor its addressee are distinctly determined. But even assuming they were, it would still remain to be established whether the second condition of Article 35, VCLT, is properly met.

As there is no customary obligation to readmit non-nationals under general international law, the duty can only exist if provided for by explicit agreement. Readmission treaties thus generate such obligation *ex novo*. What should be determined is whether the general accord to readmit non-nationals expressed thereby amounts to consent to provide for international protection to the refugees among them in accordance with the 1951 Convention. However, these instruments characteristically lack any protection related provisions²⁵⁹. Asylum seekers returned on the basis of readmission agreements are considered to fall within the personal scope of application of the instrument, not by reason of their presumptive refugee status as protection claimants, but only as “persons who do not, or who no longer, fulfil the conditions in force for entry into, presence in, or residence on, the territory of the requesting Member State”²⁶⁰. Saving clauses are generally added, establishing that readmission

257. I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, Manchester University Press, 1984, at p. 102.

258. The significance of the VCLT in the context of EU law has been recognized, among others, in Case C-1/96, *The Queen v. Minister of Agriculture*, [1998] ECR I-1251; Case C-223/98, *ADIDAS*, [1999] ECR I-7081; Case C-191/99, *Kvaerner*, [2001] ECR I-4447; Case C-37/00, *Herbert Weber*, [2002] ECR I-2013; Case C-315/00, *Maierhofer*, [2003] ECR I-563; Case C-344/04 *IATA*, [2006] ECR I-403.

259. See “Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country”, adopted on 30 November and 1 December 1994, SN 10339/94. While previous drafts contained substantial provisions aimed at preserving the rights of refugees and asylum seekers, these were finally abandoned in the finalized text. See E. Guild and J. Nissen, *The Developing Immigration and Asylum Policies of the European Union*, The Hague, Kluwer, 1996, at p. 407.

260. Art. 3 (1), Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorization, [2005] OJ L 124/22. All EU readmission agreements follow this pattern.

agreements leave other international obligations unaltered and that they are “without prejudice to the rights, obligations and responsibilities . . . arising from international law, in particular, from . . . the Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of Refugees”²⁶¹. Yet, at face value, this fails to create any new protection obligations on the parties. Such clauses are declaratory in nature and merely confirm the applicability of pre-existing protection duties to the extent that Contracting States are already bound²⁶². Under these circumstances, it is difficult to argue that the second condition of Article 35, VCLT, is thus fulfilled. The note to be handed to the asylum seeker in accordance with Article 38 (3) (b) of the recast Procedures Directive, establishing that when implementing a decision based on the “safe third country” notion “[EU] Member States shall provide [the applicant] with a document *informing* the authorities of the third country, in the language of that country, that the application has not been examined in substance”, is no substitute for the explicit requirement of express consent in the 1969 Convention²⁶³.

This does not mean that responsibility to protect refugees cannot be shared among States parties to the Refugee Convention. While, as specified earlier, Convention obligations are triggered by “jurisdiction”, “simple presence”, “legal presence”, “legal stay”, or “residence” in the territory of the party concerned, the modification of these rules through mutual consent is not excluded. The Preamble is cognizant of the fact that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution . . . cannot therefore be achieved without international co-operation”. Nonetheless, Contracting Parties are not completely free to modify the 1951 Convention at will. Inter-State agreements seeking to implement the rules of the Refugee Convention have to conform to a number of requirements. But, provided that the necessary conditions are fulfilled pursuant to the Vienna Convention on the Law of Treaties, collaborative agreements for the implementation of the Refugee Convention are admissible under international law²⁶⁴.

261. Art. 17, EU-Albania Readmission Agreement.

262. On this point refer to N. Coleman, *supra* footnote 16, at p. 306.

263. Silence or lack of opposition to the readmission of a returnee, known to be an asylum seeker through an informative note or otherwise, should not be too quickly considered to constitute acquiescence by the third country in question to both readmit *and* provide protection. In similar settings, the ICJ has not accepted silence as constitutive of consent, evidencing the high threshold required. See, for instance, *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999, p. 1045, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Reports 2001, p. 575.

264. See, for instance, the (unused) 1980 European Agreement on Transfer of Responsibility for Refugees, CETS No. 107, on a partial transfer of responsibility, only for issuing travel documents to refugees who change their place of residence. Note that the agreement creates neither a right nor an obligation for the (recognized) refugee to move and reside in a “second State”. The text is available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/107.htm>.

C. Articles 39-41, VCLT: co-operation through modification of multilateral instruments

Article 39, VCLT, establishes that “a treaty may be amended by agreement between the parties”. In such cases, the general rules on “conclusion and entry into force of treaties” apply²⁶⁵. Article 40, VCLT, regulates modifications “as between all the parties” – a possibility which is expressly contemplated in the 1951 Convention²⁶⁶. Some special rules govern modifications “between certain of the parties only” to amend the treaty *inter se*. Article 41, VCLT, lists a series of material and formal conditions that apply cumulatively. First, the possibility of such a modification shall be provided for by the treaty or, at least, not be prohibited. The intended amendment shall not affect the enjoyment by the other parties to the treaty of their rights or the performance of their obligations. In addition, the modification shall not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. Beside these material conditions, the parties willing to amend the treaty *inter se* shall notify the other parties of their intention thereto and specify the content of the envisioned modification.

Examples of partial *inter se* agreements “based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967”²⁶⁷, adopted with a view to “reaffirming their obligation to provide protection for refugees on their territory in accordance with those instruments”²⁶⁸, are provided by the United States-Canada Safe Third Country Agreement and the Dublin Regulation. In so far as these agreements can be implemented separately and independently by the parties to it, the first condition of Article 41, VCLT, may be fulfilled. Article 3 (3) of the Dublin III Regulation, upholding the “safe third country” notion with regard to non-parties, is problematic in this context for the reasons already discussed above²⁶⁹.

265. Part II, VCLT.

266. Art. 45, CSR, on “Revision” stipulates that:

“Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.”

267. Recital 2, Dublin II Regulation.

268. Recital 1, United States-Canada Safe Third Country Agreement.

269. ECRE has observed with regard to the Dublin Convention that

“the orbit practice would not be suppressed between the [31] Contracting States and the some 170 third States around the world, due to the fact that the Convention endorses the right of the individual State to decide unilaterally that it does not consider itself responsible but that it considers yet another (third) State to be ‘responsible’”, in “Safe Third Countries: Myths and Realities”, *supra* footnote 12, para. 29.

Probably, only “closed circuit” agreements aiming at sharing the responsibility for the provision of protection to refugees under the 1951 Convention may be deemed to comply with Article 41 (1) (b) (i), VCLT²⁷⁰.

However, even where *inter se* arrangements can be executed autonomously, their compatibility with the object and purpose of the original treaty has to be established. Critics emphasize how the implementation of the Dublin regime and Dublin-like arrangements enhance the risk of direct and indirect *refoulement*, delay status recognition, may lead to violations of refugee rights through prolonged detention and poor reception conditions, separate families, and overburden “first entry” countries against the principles of international solidarity, burden-sharing and good-neighbourliness²⁷¹. Such systems are said to be “neither fair nor efficient”²⁷². As a result, in spite of the saving clauses that are usually introduced therein, formally assuring the compatibility of these instruments with human rights and refugee law standards²⁷³, their conformity in practice with the object and purpose of the 1951 Convention remains dubious. Therefore, unless “the effective execution” of the original treaty can be guaranteed, as required by Article 41, VCLT, these arrangements should not be pursued. The *erga omnes* character of protection obligations under the Refugee Convention pre-empts the conclusion of subsequent *inter se* agreements which are incompatible with them²⁷⁴.

Concerning the formal requirements in Article 41 (2), VCLT, it suffices to note that there is no evidence that the parties to the Dublin system or the United States–Canada Agreement notified the other parties to the 1951 Convention of their intention to amend the treaty among themselves prior to the

270. Marx and Lumpff argue in this regard that:

“The international system of individual State responsibility can only be replaced by a multilateral system of co-operation which ensures that asylum seekers will not be returned to their countries of origin before full and fair examination of their claims has taken place”, *supra* footnote 9, at p. 436.

271. G. Noll, *Negotiating Asylum*, The Hague/Boston/London, Martinus Nijhoff, 2000, Chap. 5. See also UNHCR, “The Dublin II Regulation – A Discussion Paper”, *supra* footnote 81; ECRE, “Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered”, *supra* footnote 81. The European Commission’s own evaluation reveals serious inconsistencies as well. See “Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System”, COM(2007) 299 final. Most significantly: ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011.

272. See A. Hurwitz, *supra* footnote 6, Chap. 3, at p. 121.

273. Recital 15, Dublin II Regulation:

“The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.”

274. See, for instance, *Barcelona Traction (Second Phase)*, ICJ Reports 1970, p. 3, at p. 32.

conclusion of these agreements. Although a State opposing such agreements could ultimately not prevent their conclusion, failure to notify on the part of the Contracting Parties may give rise to a breach of treaty and to issues of State responsibility²⁷⁵.

D. Article 30, VCLT: collaboration through subsequent, separate agreements

A last option to consider is the possibility for Treaty parties to collaborate with non-participating States for the implementation of the 1951 Convention through the conclusion of a separate agreement. Article 30, VCLT, regulates the “[a]pplication of successive treaties relating to the same subject matter”. Paragraph 4 (b) establishes that

“[w]hen the parties to the later treaty do not include all the parties to the earlier one, as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”.

This clause, although stating which treaty rules apply between which parties, does not establish a hierarchy of obligations specifying whether the posterior agreement may become invalid on account of the earlier treaty. Paragraph 5, nonetheless, warns that this rule

“is without prejudice to . . . any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty”²⁷⁶.

The State where the refugee is present may indeed seek assistance from other States to fulfil its obligations and share its responsibility to provide protection, but that responsibility cannot generally be “shifted” and remains with the removing State. International co-operation “is a complement to States protection responsibilities and not a substitute for them”²⁷⁷. In reality, under international law²⁷⁸, “no State can avoid responsibility by outsourcing

275. D. N. Hutchinson, “Solidarity and Breaches of Multilateral Treaties” (1988), 59 *BYBIL* 151.

276. ECtHR, *Al-Saadoon and Mufdhi v. UK*, Appl. No. 61498/08, 2 March 2010 (final on 4 October 2010), para. 138: “it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention”.

277. Amman Expert Meeting, Amman, 27-28 June 2011, “Summary Conclusions on International Cooperation to Share Burdens and Responsibilities”, reproduced in (2012), 24 *IJRL* 471, at 474.

278. ILC, Articles on the Responsibility of States for Internationally Wrongful Acts (2001), UNGA A/56/10 corrected by A/56/49(Vol.I)/Corr.4. The majority of these provisions are considered to reflect the current state of customary law. See, for

or contracting out its obligations, either to another State, or to an international organisation”²⁷⁹. The pronouncements of the European Court of Human Rights with regard to the European Convention on Human Rights are relevant in this respect. The Court has explained that “[w]here States establish . . . international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights”, ruling categorically that “[i]t would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements]”²⁸⁰. The Court has also considered that “[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State . . .”²⁸¹. This reasoning may be transposed to the fulfilment of obligations under the 1951 Convention so that a party may not avoid responsibility through the conclusion of a subsequent agreement with a third State. From this perspective, a full delegation of Convention obligations to the third State in question is not possible. Both the ILC Articles on State Responsibility and the International Court of Justice have adopted this approach²⁸². As pointed out earlier, when a plurality of States is responsible for the same wrongful act, the general rule is that “in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act”²⁸³. Therefore, strictly speaking, there cannot be a “transfer” of international responsibility.

Without rehearsing the discussion on “effective protection elsewhere” and the conditions to be fulfilled by the third country so that it can be considered safe, some remarks should be made concerning the content of the agreement

instance, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Gen. List No. 91, paras. 173, 385 and 388.

279. G. S. Goodwin-Gill, “The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations” (2007), 9 *UTS Law Review* 26, at 34.

280. ECtHR, *T.I. v. UK*, Appl. No. 43844/98, 7 March 2000, at 15; *K.R.S. v. UK*, Appl. No. 32733/08, 2 December 2008, at 15; ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, paras. 342 *et seq.*

281. ECtHR, *Saadi v. UK*, 37201/06, 28 February 2008, para. 126.

282. See, among others, *Libya v. Malta case (Italian Application to Intervene)*, ICJ Reports 1984, p. 3, at p. 25; *Nicaragua (Jurisdiction and Admissibility)*, ICJ Reports 1984, p. 392, at p. 392. See also I. Brownlie, *State Responsibility*, Part I, Oxford, Clarendon Press, 1983, at p. 189 and references therein.

283. ILC, Annual Report (2001), *Commentary to the Articles on State Responsibility*, Chap. IV, Commentary to Article 47. Art. 47 of the ILC Articles on State Responsibility stipulates that “[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act” (emphasis added). For analysis, refer to J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, at pp. 272 *et seq.*

with a non-party. On account of the non-transferability of international obligations, and taking into consideration the necessity of ensuring their effective implementation, ultimately the subsequent agreement will have to incorporate the substance of the 1951 Convention. It is difficult to see how responsibility could otherwise be shared, if the obligations that may potentially give rise to it are not the same. Such a common commitment should be consensual and in writing. Informal arrangements, in so far as they are incapable of guaranteeing *de jure* the fulfilment of obligations should be deemed inappropriate. The same is true with regard to their unsuitability to preserve the legal enforceability of the individual rights that the 1951 Convention recognizes to refugees²⁸⁴. These agreements, to be considered compatible with the object and the purpose of the Refugee Convention, could not produce a diminution of rights for the individual refugee, a denial of status, or lead to the impossibility of claiming and enjoying it in practice.

This is why, in the end, accession to the 1951 Convention, as the only way of obtaining “a binding commitment by a State to respect the provisions of the Convention and to implement those provisions in practice”²⁸⁵, should be considered a legal prerequisite for collaboration. To be sure, ratification is a necessary condition, though insufficient to guarantee by itself the feasibility of the responsibility-sharing endeavour²⁸⁶. The remarks above on the conditions for collaboration between parties to the 1951 Convention become applicable in this respect.

In sum, the 1969 Vienna Convention restricts the way in which “safe third country” arrangements may be designed and implemented both in law and in practice.

In a system based on equal sovereignty and free consent, protection obligations on third countries cannot be created without their express accord, either unilaterally or through bilateral or multilateral *inter se* agreements. The amendment of the 1951 Convention by all or part of its Contracting States is also subject to substantive and procedural conditions that pre-empt the distortion of its purpose and essence. The end result is that responsibility for refugee protection may be shared (but not shifted) only where a genuine co-operative basis conducive to the realization of the 1951 Convention objectives is really present.

284. See, *mutatis mutandis*, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, para. 354, establishing that “diplomatic assurances”, without containing “any individual guarantee”, do “not amount to a sufficient guarantee”. Art. 13, ECHR, requires the enactment in domestic law of an effective remedy to safeguard ECHR rights (paras. 385-396).

285. R. Byrne and A. Shacknove, *supra* footnote 21, at p. 200.

286. The ECtHR has underlined that “the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection”. *M.S.S.*, para. 353.

SECTION 4 CONCLUSIONS: FROM UNWORKABILITY TO ILLEGALITY

The starting point of this contribution was the uncertainty surrounding the debate on the “safe third country” notion and the proposition that a change of perspective, based on general rules of interpretation, would lead to a definite conclusion on its legality. Indeed, the observation that “the 1951 Convention neither expressly authorizes nor prohibits reliance on protection elsewhere policies”²⁸⁷ cannot be the end result of the interpretation exercise under Article 31, VCLT. The statement that the text is unclear cannot be the final outcome of treaty interpretation²⁸⁸. The principle of effectiveness of international law calls for the rejection of a construction that maintains a precarious position through the prolongation of uncertainty – as Lauterpacht posited, “the object of the law is order, not the perpetuation of disagreements”²⁸⁹.

The foregoing analysis has attempted precisely to bring clarity to, and to demystify, the discussion of “safe third country” mechanisms. The point of departure has been a reframing of the debate from the perspective of the law of treaties. Political priorities, security concerns or national preferences in the organization of migration policy, as elements extraneous to accepted rules of treaty interpretation, have been set aside to allow the “one true [legal] meaning” to emerge²⁹⁰.

From the point of view of the relationship of the removing State vis-à-vis the individual refugee liable to expulsion, the overall conclusion arrived at in light of Article 31, VCLT, criteria is that neither Article 31 nor Article 1E of the Refugee Convention provide an adequate legal basis to the “safe third country” notion. The absence of an explicit right to choose the country of refuge is insufficient in itself to displace Convention obligations accruing at “simple presence” level, as is the absence of an express entitlement to permanent asylum. In addition, it has become clear that, in light of the principle of effectiveness, the transition from “simple presence” to “legal presence” rights in the Refugee Convention shall be legally and practically possible to realize. Recourse to notions such as “transit” or “coming directly” to carry out such transition, used beyond the strict confines of Article 31, CSR, produce unacceptable outcomes in violation of the principles of legality, proportionality and non-discrimination. “Safe” removals, although possibly not in breach of

287. M. Foster, *supra* footnote 22.

288. H. F. Köck, *Vertragsinterpretation und Vertragsrechtskonvention. Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969*, Berlin, Dunker & Humblot, 1976, at p. 60.

289. H. Lauterpacht, *The Development of International Law by the International Court*, London, Stevens, 1958, at pp. 233-234.

290. *Adan (Lul Omar) v. Secretary of State for the Home Department*, [2001] 2 AC 477, paras. 516-517 (*per* Lord Steyn).

the letter of Articles 33 and 32, CSR, constitute an insufficient implementation of the positive obligations incumbent upon parties at these levels, if the execution of the 1951 Convention is to be carried out in good faith. As noted already, State discretion is not unlimited, but rather confined and structured by the rule of law. Taken as a whole, these conclusions point to the necessity for a full reconfiguration of the removing State/individual refugee relationship, premised on the rejection of the “safe third country” notion.

The analysis from the inter-State perspective has also exposed a number of essential flaws in the way in which “safe third country” arrangements have been conceived of and operationalized in practice, taking account of international rights and obligations of Contracting Parties. Unilateral designations of responsibility either in the domestic law of a party to a multilateral treaty, such as the Refugee Convention, or in a subsequent *inter se* agreement, such as the Dublin system, must be rejected when they merely provide for a deflection mechanism incompatible with the realization of the object and purpose of the Convention. The principles of equal sovereignty, free consent and independent responsibility enshrined in the 1969 Vienna Convention must be observed. Only genuine attempts at sharing responsibility among the parties to the 1951 Convention, through the fulfilment of Articles 35 and 41, VCLT, conditions, are apt to provide a basis for international collaboration.

Existing provisions, as codified in the Dublin Regulation, the United States-Canada Safe Third Country Agreement, or the Australian “safe third country” regime do not comply with VCLT requirements. They shift rather than share protection burdens, illustrating the general tendency among developed countries of destination “to interpret their own and other States’ duties in the light of sovereign self-interest”²⁹¹. The declared objectives they pursue have, in addition, not been achieved in practice. “Safe third country” removals are prone to perpetuate and enlarge “orbit situations”, instead of solving them²⁹². The concept “stresses the random geographic proximity of host States to the country of origin, runs counter to the intended universal scope of the Refugee Convention . . . and undermines the principle of burden sharing”²⁹³. Having an erosive effect on refugee rights and international protection standards, the notion is unsuited to provide for durable solutions.

In the presence of multiple options to implement international obligations, good faith requires State Parties to choose the one which is more likely to advance the object and purpose of the Convention over one that jeopardizes its effective execution. In light of its shortcomings, the “safe third country” notion should be abandoned in favour of a legal and proportionate solution. Parties to

291. G. S. Goodwin-Gill, “The Protection of Refugees and the Safe Third Country Rule”, *supra* footnote 250, at p. 91.

292. J. Van Selm, *supra* footnote 20, at p. 25.

293. R. Byrne and A. Shacknove, *supra* footnote 21, at p. 215.

the 1951 Convention should refrain from creating unnecessary obstacles to the fulfilment of international obligations that they have contracted of their own free will and pursue the legitimate aim of asylum management and migration administration within the margins of the rule of law.

