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Examining the European Geography
of Refugee Protection
Exclusions, Limitations and Exceptions
from the 1967 Protocol to the
Present

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EXAMINING THE EUROPEAN GEOGRAPHY OF REFUGEE PROTECTION EXCLUSIONS, LIMITATIONS AND EXCEPTIONS FROM THE 1967 PROTOCOL TO THE PRESENT

*Elspeth Guild**

Introduction: the Geography of the Refugee Convention

Refugee protection is premised on the principle that national territory and state sovereignty matter. A refugee exists in relation to at least two states (unless stateless), that of origin which either actively seeks to persecute him or her or passively allows or is unable to prevent others from persecuting the individual; and that of protection where the sovereign claim to territory permits the protecting state to provide shelter. Borders matter a lot for refugees as it is only by crossing borders of sovereignty out of and into territories that they come into existence.

As Goodwin-Gill puts it in the opening words of his book on the refugee in international law – ‘the refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation’.¹ In this article I am going to examine some of the issues around the geography of refugee protection in Europe since the end of WWII.

Universality and the Refugee Convention

Universality in relation to refugee protection is a much contested issue among international jurists. The Universal Declaration of Human Rights 1948 (UDHR) – the cornerstone declaration of all the states of the United Nations regarding universal norms following the catastrophe of WWII – provides strong support for a universal approach to protection. Article 14 states that everyone has the right to seek and enjoy in other countries asylum from persecution. Its second paragraph establishes the national security exception – this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes

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1 G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford: OUP 2009 at 6.

or from acts contrary to the purposes and principles of the United Nations. However, the interpretation and legal status of the UDHR in contemporary international law has been much disputed.² Nonetheless, its relationship with the UN Convention relating to the status of refugees 1951 and its 1967 Protocol (Refugee Convention) has been firmly fixed not so much by the drafting history of the Refugee Convention as by courts around the world charged with its interpretation.³ The central principle of the right to seek asylum in the UDHR is that of protection – in Refugee Convention terms, non-refoulement – an entitlement to remain on the sovereign territory of a state where the alternative is return to a state which is likely to persecute the individual.

It might be thought by those not familiar with the legal literature in the area that this is a rather straightforward matter and that the conclusion could be the acceptance of the principle of non-refoulement as a norm of customary international law. This is certainly not the case. A vivid discussion of the issue can be found in Chimni's *International Refugee Law Reader*⁴ which poses the debate between Goodwin-Gill, Hailbronner and Hathaway on the issue. Universality of the principle of non-refoulement cannot, as yet at least, be taken as accepted in the international community. The reason is founded in the investment of national sovereignty in controls on the movement of persons at borders of states. A universal obligation to resist refusing admission and refrain from sending back a person claiming a need for international protection to the country from which he or she claims protection sits uneasily with statist claims to control and choose who enters the territory of a state and who does not. It is this geography of refugee protection which I will examine further here.

The Refugee Convention and its Geography

The Refugee Convention in its definition of a refugee in Article 1(A)(2) sets out the starting parameters of geography:

'As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear unwilling to avail himself of the protection of that country; or who, not having a nationali-

2 Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol', in A. Zimmermann et al., *The 1951 Convention, a Commentary*, Oxford: OUP 2011, p. 37-75 at 47.

3 J. McAdam, 'Interpretation of the 1951 Convention', in Zimmermann et al. 2011, p. 91 and 106.

4 New Delhi: Sage 2000, p. 109-117.

ty and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.'

Until the individual is outside his or her country of nationality or habitual residence, he or she is not a refugee. At best the person is an internally displaced person for whom there is no specific international convention providing a source of rights.⁵ The border of state sovereignty creates the refugee, conjuring into existence a status of entitlements embedded in international law. However, at the same time, borders can be deceptive for the refugee. State borders are not always contiguous with state sovereignty when it comes to international protection obligations. The appearance of a state on a map does not necessarily provide the contours of the state's border which is central to the ability of a person to transform him- or herself into a refugee.

Moreno Lax has examined this issue in depth and with elegance in her recent research 'The Legality of the "safe third country" Notion Revisited: an appraisal in light of general international rules on the law of treaties'.⁶ Among the most notorious examples of this kind of shifting sovereignty which she documents in detail has taken place in Australia. That country has excised some of its territory exclusively so that the Refugee Convention (and other protection obligations) does not apply in that excised bit of land. The individual arriving apparently within Australian sovereignty is by that same sovereignty excluded from protection by a sovereign decision to redefine the borders of its sovereignty for the Refugee Convention. Moreno Lax documents and challenges these invisibilisation measures, if one can call them that, calling into question their very legality in international law.

Nonetheless as the Refugee Convention began as an exercise in geography, it is perhaps not surprising that its geography continues to haunt it. It commences with a temporal limitation – the events occurring before 1 January 1951. Article 1(B)(1) and (2) extend this limitation to a spatial one as well:

'For the purposes of this Convention, the words "events before 1 January 1951" in article 1 section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951" or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specify-

5 E. Guild, *Security and Migration in the 21st Century*, Cambridge: Polity 2009, p. 68-86.

6 V. Moreno Lax, 'The "Safe Third Country" Notion Revisited: An Appraisal in light of General International Rules on the Law of Treaties', in G.S. Goodwin-Gill (ed.), *2010 Study Session, The Hague Academy of International Law*, The Hague: Martinus Nijhoff 2012.

ing which of these meanings it applies for the purpose of its obligations under this Convention.'

As Goodwin-Gill and McAdam point out, the Refugee Convention was not conceived to provide protection for all refugees, only those defined in time and space by WWII.⁷ Schmahl notes that the Convention was primarily designed to create secure conditions such as would facilitate the sharing of the European refugee burden after WWII.⁸ Thus, Europe is the geographical centre of the Refugee Convention. Of the two options for the temporal meaning of the Convention (1 January 1951), both commence with the notion of Europe either as an exclusive source of the transformative capacity to create refugees or as the principal source, which can be augmented by 'elsewhere'. The geographical limitation on refugee protection was surprisingly popular not least in Europe itself. Indeed by 2011 only four contracting parties to the Convention have retained the Europe limitation – two of them in Europe itself – Monaco and Turkey and two in Africa – Congo and Madagascar.⁹ Oddly, the USA has only ratified the Protocol not the Convention itself (it is the only state to have done so).

The Universalist Push – the 1967 Protocol

The drafting history of the Protocol indicates that the push to lift the temporal and geographical limitations of the Refugee Convention arose in the 1960s as a result of refugee movements and needs in Africa.¹⁰ UNHCR was a key actor kicking off the discussion in 1964 as a result of the organization's problems in refugee protection in that region. The objective of the Protocol was to endow the Refugee Convention with the universalism which it was, until then, lacking.¹¹ The problem, as it appeared at that time, was not with the substance of the definition of a refugee or protection but with the temporal and geographical limitations. Refugees were perceived as an intra-African issue which could be resolved by a Protocol to the Refugee Convention. This was also a way to ensure the life span of the Convention, particularly in face of competition from the Organization of African Unity which had already begun its own refugee convention.

The Protocol states:

7 Goodwin-Gill & McAdam 2009 at 36.

8 Schmahl, *Zimmermann Commentary on the 1951 Convention*, Oxford: OUP 2011 at 469.

9 UN Documents: Accessions to the Protocol 1967.

10 Louise W. Holborn, *Refugees: A Problem of Our Time. The Work of the United Nations High Commissioner for Refugees, 1951-1972*, Metuchen, NJ: Scarecrow Press 1985, p. 823-956.

11 Einarsen 2011.

'2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (1) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.'

European response to the Protocol was fairly enthusiastic at least from the Western side of the Berlin Wall. Of the 2012 EU Member States which were not under Communist rule in the 1960s and 1970s, 14 signed up between 1967 (Sweden signed in 1967 and Cyprus, Denmark, Finland, Greece, Ireland, the Netherlands and the UK in 1968) and 1978 (Spain was the late comer). A very cursory look at the UK's refugee arrival situation in 1979 indicates that there were under 2,000 applications for refugee status or asylum in that year. The majority of applications were from Iranians (25%) followed by Sri Lankans (14%). The African contribution to UK asylum applications in that year was limited to Somalia (7%), Uganda (6%) and Ghana (5%). The undifferentiated category 'rest of the world' which accounted for 27% of applications no doubt also included other nationals of African countries.¹² According to Eurostat,¹³ in 2011 the UK had received 26,430 asylum applications. The top four countries of origin of asylum seekers to the UK in the second quarter of 2011 (the most recent available from Eurostat) were: Pakistan (890), Iran (635), Libya (585), Sri Lanka (505) and Afghanistan (440).¹⁴ For the EU the top countries of origin of asylum seekers were, in order of importance, Afghanistan, Russia, Pakistan, Iraq and Serbia.¹⁵ I include these figures only to indicate that the change in numbers and to a lesser extent source countries of refugees to the UK was not immediately or obviously changed by the ratification of the Protocol. We must look elsewhere to find reasons for the changing face of refugee claims in the UK and the EU over the past 30 years.

What is interesting is the enthusiasm for changing the Refugee Convention from one subject to a temporal and geographical limitation to a universal in-

12 *Home Office statistical bulletin*, Issue 22/90; 24 July 1990.

13 Eurostat Newsrelease 46/2012, 23 March 2012.

14 Eurostat *Statistics in Focus* 11/2012.

15 Eurostat Newsrelease 46/2012, 23 March 2012.

strument. Many European states embraced the idea and acceded among the first to the new universalism.

Changing Protection Challenges: Another Step towards Universalism

The question of the geographical scope of refugee protection receded into the background in Europe from the end of the 1960s until the end of the 1980s as regards activities at the international level. Instead, the adequacy of the scope of protection became a matter of concern and international action. The UDHR prohibits torture under Article 5. While this prohibition had been included in the International Covenant on Civil and Political Rights (Article 12) 1966, no separate convention against torture had been developed under the Article 5 UDHR framework. The use of torture by a number of regimes in Latin America (Chile, Argentina, etc.) and in Europe in Greece, Portugal and Spain under the dictatorships in the 1960s and 1970s outraged international public opinion. In December 1975 the UN General Assembly adopted a Declaration against torture and in 1977 formally requested the drafting of a text for a binding Convention against Torture based on the 1975 Declaration.¹⁶ In the first draft produced in 1978 what is now Article 3 prohibiting return to torture was already present. The provision went through a variety of changes and amendments in the finalization of the Convention but it was never excluded. UNHCR was active in the negotiations on the Convention and intervened a number of times on the exact wording of the provision. However, from Nowak's detailed analysis of the negotiation process, nowhere was the exact relationship of the Convention to the Refugee Convention overtly discussed. Instead it was the use of the word 'extradite' which led to much soul searching in the various meetings as states fretted about the consequences which this might have on their extradition agreements.

In 1984 the UN Convention against Torture (UNCAT) was adopted by the UN General Assembly and opened for ratification. From the first draft of the Convention the prohibition on return to torture was present.¹⁷ Now incorporated into Article 3 UNCAT, it states:

'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

¹⁶ M. Nowak & E. McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford: OUP 2008, p. 3-4.

¹⁷ *Ibid.*, p. 130-131.

The geography of international protection which had been widened to the whole world through the Refugee Convention's 1967 Protocol was now changed again. The personal scope of protection was no longer limited to persons fearing persecution on one of the five grounds but would now apply also to anyone at risk of torture (as defined in the Convention.) Among European states, France, Lithuania, Sweden and Bulgaria were among the first to ratify the new Convention in 1986. Most of the EU states ratified the Convention between 1987 and 1989. The last one to ratify it was Ireland in 2002. Generally one can see a certain enthusiasm in Europe for the Convention, including Article 3.

It is somewhat ironical that the treaty body, the UN Committee against Torture, which under Article 22 of the convention may receive individual complaints in respect of any state which has acceded to the complaints mechanism, has received the largest number of complaints in respect of Article 3 against Sweden. The UNCAT has also found the largest number of violations of Article 3 by Sweden. These decisions are not about torture taking place in Sweden but about the refusal of Sweden to allow persons seeking refuge from torture to remain in the country.¹⁸

The European Court of Human Rights Catches Up

The most famous European regional human rights instrument is the European Convention on Human Rights 1950 (ECHR). It constitutes a foundational document of the Council of Europe which encompasses 47 countries in the region. The ECHR does not contain an express prohibition on refoulement either for refugees or torture victims. It does, however, contain a prohibition on torture. The ECHR created a court, the European Court of Human Rights (ECtHR) which is charged with examining interstate and individual complaints that Council of Europe states have violated their ECHR obligations. The reach of the ECHR is very specific: according to Article 1 it applies to anyone within the jurisdiction of a Member State. While this is primarily a state territorial concept, the actions of states beyond their geographical territory but within their jurisdiction (for instance the actions of state agents abroad) come within the scope of the ECHR.¹⁹

The territorially bound approach to international protection was taken up by the European Court of Human Rights (ECtHR) swiftly after UNCAT was ratified by a number of European states. It interpreted Article 3 ECHR – its prohibition on torture, inhuman and degrading treatment or punishment – as includ-

¹⁸ *Ibid.*, p. 127-128.

¹⁹ *Al-Skeini and Others v. the United Kingdom* - 55721/07 [2011] ECHR 1093 (7 July 2011).

ing return to a country where there is a substantial risk of such treatment in 1989 and 1991.²⁰ First in a challenge to the extradition of a German national from the UK to the USA, the ECtHR considered the UN Convention against Torture and how it related to the ECHR obligation in Article 3 to prohibit torture, inhuman or degrading treatment or punishment. The Court moved to align its jurisprudence with the developments taking place at the international level and for the first time found that expulsion (or in this case extradition) of an individual to a country where there was a serious risk that the individual would suffer torture, inhuman or degrading treatment was contrary to Article 3 ECHR: 'That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture".' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.²¹ The development of the ECtHR's jurisprudence on the prohibition of return of an individual to a country where there is a serious risk that he or she would be subjected to torture has been most eloquently described by Mole.²²

While the ECtHR has come under intense pressure on occasion to reduce the space for international protection, through for instance the acceptance of diplomatic assurances from states of origin, it has been robust in the defense of the principle of protection against return to torture, inhuman or degrading treatment of punishment as an inherent component of Article 3 ECHR.²³

20 *Soering v. United Kingdom* - 14038/88 [1989] ECHR 14 (7 July 1989); *Cruz Varas & Ors v. Sweden* - 15576/89 [1991] ECHR 26 (20 March 1991); *Vilvarajah & Ors v. United Kingdom* - 13163/87; 13164/87; 13165/87 [1991] ECHR 47 (30 October 1991).

21 *Soering v. United Kingdom* - 14038/88 [1989] ECHR 14 (7 July 1989).

22 N. Mole & C. Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files No. 9, Strasbourg: Council of Europe 2010.

23 *Saadi v. Italy* - 37201/06 [2008] ECHR 179 (28 February 2008).

Diminishing the Geography of Refugee Protection in Europe: the Aznar Protocol

The European Union's relationship with refugee protection has been somewhat complicated. The European Economic Community Treaty dates from 1957, one of the founding treaties of the EU. While it includes a right to free movement of workers within the territory of the Member States, no mention is made of refugees. Indeed, the first appearance of refugees in an EU legislative measure was in Regulation 15/61, on the coordination of social security rights. This remains the only reference until the EU treaty was created and the other treaties revised in 1993. More important was the treaty changes which took place in 1999 when the EU institutions were charged with adopting legislative measures to create a Common European Asylum System. It is worth remembering, however, that the EU's move to competence in the field of asylum only came into being with the EU objective of removing border controls, including on persons moving among the Member States.

Resulting from this ambition to abolish border controls on the movement of persons within the EU, the first concern of the EU in this area was how to keep asylum seekers (and indeed recognized refugees) in the territory of the state responsible for them and to prevent them roaming around the border control free EU. This ambition was pursued first through an intergovernmental treaty only open to EU Member States (the Dublin Convention which I will return to below) and a power for Member State officials to discuss refugee issues and draw up resolutions (contained in the Maastricht Treaty in 1993). Subsequently asylum was made a fully EU competence for law making in 1999 through the Amsterdam Treaty.²⁴ This was accompanied by Protocol 24 on asylum for nationals of Member States of the European Union (now attached to the Treaty on the European Union). This protocol is commonly called the Aznar Protocol after the Spanish President who championed it and lobbied hard for its adoption.

The protocol has nine pre-ambular paragraphs and one sole article. The article states that given the level of protection of fundamental rights in the EU, all Member States shall be regarded as safe countries of origin in respect of each other for all legal and practice purposes in relation to asylum matters.²⁵ The article goes on to state that this means that an application for asylum

24 H. Battjes, *European Asylum Law and International Law*, The Hague: Martinus Nijhoff 2008; G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Dordrecht: Martinus Nijhoff 2000.

25 E. Guittet, "Ne pas leur faire confiance serait leur offense". *Antiterrorisme, solidarité, démocratie et identité politique*, *Cultures et Conflits*, (61)2 2006, p. 51-76.

made by a national of a Member State may be taken into consideration or declared admissible in another Member State only where:

- The Member State of origin has derogated from the provisions of the ECHR;
- The Council of Ministers of the EU has begun formal proceedings against the Member State of origin for failure to comply with human rights obligations (provided for in Article 7 TEU) (or where a decision against the Member State has been adopted under those provisions);
- Where a Member State unilaterally considers an application for asylum from a national of a Member State, this must be on the basis of a presumption that the application is manifestly unfounded.

The preamble justifies the protocol on the following grounds:

- The TEU recognizes rights, freedoms and principles as set out in the EU Charter of Fundamental Rights and as guaranteed by the ECHR;
- The Court of Justice of the EU has the power to ensure fundamental rights are respected within the scope of EU law;
- The TEU provides that membership of the EU is only open to states which comply with European fundamental rights and a mechanism for sanction exists against states which fail to live up to their commitments;
- EU citizens are entitled to a special status and have the right to move and reside freely across the territory of the Member States in an area without internal frontiers; and finally
- The institution of asylum should not be used for purposes alien to those for which it was intended.

The protocol was controversial when it was adopted as part of the treaty. Belgium made a declaration confirming that it would continue to consider all asylum applications made to it (see below).

The protocol effectively seeks to introduce a personal scope limitation which acts as a geographic limitation to the obligations of the Member States under the Refugee Convention. While Article 33(1) of the Refugee Convention provides that 'No Contracting Party shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social ground or political opinion', the Aznar Protocol permits a Member State to limit its obligations to a refugee where his/her state of origin is a Member State of the EU. This purports to modify the underlying obligation of the state to ensure *non-refoulement* except in accordance with the Convention, but it does so without an amendment of the Convention (or indeed any recourse to the Executive Committee established by the Convention or the

United Nations High Commissioner for Refugees (UNHCR) whose office is responsible for oversight of the implementation of the Convention).

Once again Europe declared itself at the centre of the Refugee Convention but this time in an exact mirror image of what it did in 1951. Instead of Europe as the sole source of refugees and in search of international burden sharing, now Europe designates itself as a space which produces no refugees at all.

The Aznar Protocol was, *inter alia*, the product of a prolonged discussion particularly in Spain about the right of its nationals to seek asylum in another Member State. In the 1980s, this occurred a number of times in respect of British nationals who sought asylum (and protection from extradition) in other Member States on the basis of the fear of persecution in Northern Ireland specifically in relation to the political violence which was taking place there.²⁶ It is worth recalling that in 1995 the UK authorities were condemned by the ECtHR for the extrajudicial killing of three presumed IRA terrorists in Gibraltar.²⁷ In the 1990s the spotlight turned to Spanish nationals from the Basque country who sought asylum in other Member States. In 1995 a number of members of the Spanish interior ministry, including a minister, were convicted by Spanish criminal courts of operating an extrajudicial killing policy in respect of suspected members of the ETA (the Basque separatist organization engaged in political violence) and served jail sentences.²⁸ In light of political violence (or terrorism) sponsored by parts of the Spanish state, a number of Spanish nationals were recognized as refugees in a number of EU Member States. A particularly annoying matter, for the Spanish government, was dragging on in Belgium at the end of the 1990s in which the Belgian government refused to interfere in the judicial consideration of the asylum claims of a number of Spanish nationals considered by the Spanish authorities to be 'terrorists'.²⁹

The response of the Spanish government was to seek the Aznar Protocol which would exclude EU nationals, including Spanish nationals, from being recognized as refugees in other Member States. Solidarity among the governments of the Member States was intended to replace readiness to provide protection to EU citizens potentially at risk of persecution. While a number of non-governmental organizations and UNHCR counseled against the adoption of the Protocol, it became part of the EU treaties in 1999. The attempted exclusion of EU nationals from protection in the Member States is directly related to some Member States' concerns about political violence and the possibility that their

26 D. Bigo, E. Guittet & A. Smith, 'La participation des militaires à la sécurité intérieure : RU, Irlande du Nord', *Cultures et Conflits*, (54)1 2005, p. 11-34.

27 *McCann and others v. the United Kingdom* - 18984/91 [1995] ECHR 31 (27 September 1995).

28 Guittet 2006.

29 For a full discussion of the matter see Guittet 2006, *supra*.

nationals had and might again receive protection in another Member State. However, the need of EU nationals for international protection has not disappeared because of the Aznar Protocol. According to UNHCR's statistics,³⁰ 23% of Hungarians who sought asylum in Canada received protection in 2010. Similarly, 20% of Slovakian nationals seeking it received protection in Canada while 62% of asylum-seeking Romanian nationals were granted asylum there. Clearly the Canadian asylum authorities did not agree with the Aznar Protocol that EU nationals, by definition, do not require refugee protection even at the beginning of the 21st century.

The principle set out in the Aznar Protocol of the exclusion of nationals of the Member States from international protection in another Member State has been reflected in the other instruments forming part of the secondary legislation of the EU on asylum, the personal scope of which is limited to third country nationals – that is persons who are not nationals of the Member States.³¹

The Troubling Geography of Refugee Protection in the EU

The Aznar Protocol was not without precedent in changing the geography of refugee protection in Europe. Already in 1990 the EU Member States adopted two conventions, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (The Dublin Convention)³² and the Schengen Implementing

30 Available at <http://www.unhcr.org/4dfa11499.html> (visited 14 May 2012).

31 See for instance Art. 2 Qualification Directive (2011/95) '(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply; (d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee; (e) "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country; (f) "subsidiary protection status" means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection; (g) "application for international protection" means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately.'

32 OJ C 254/1 19 Aug.1997, 1-23.

Convention,³³ both of which included the principle that third country nationals who seek international protection in a Member State are excluded from seeking protection again in a second Member State (except in exceptional circumstances). The substance of these measures regarding responsibility for asylum seekers is part of the Dublin II Regulation.³⁴ For the purposes of this analysis, however, the important element is the move towards exclusion of classes of persons from the scope of protection in a manner which modifies the objective of the Refugee Convention. Geographically, the EU treats itself as a single space for the consideration of asylum applications. Whether the application is made in Riga or Athens, the consequence is that state sovereignty no longer applies as it normally does. Instead, the fact of the application having been made in one place excludes the applicant from applying again anywhere else in the EU. Further, if the first application is rejected, that rejection has validity everywhere in the EU. If the person travels across the invisible borders of Europe and seeks asylum again in a second state, the application will usually simply be inadmissible or possibly subject to a manifestly ill founded presumption.³⁵ Europe's geography of state sovereignty melts before the claim to protection.

Nonetheless, state sovereignty and geography matter for the asylum seeker. As UNHCR's 2010 statistics show, an Afghan who applies for asylum in Greece has at best an 8% chance of receiving protection. However, the Afghan who applies for asylum in Finland has a 56% chance of receiving protection. A Somali who seeks protection in Sweden has a 35% chance of receiving it while in Austria the percentage success is 87%.³⁶

This move has been the subject of academic criticism but this has primarily been directed at the outcome for the individual refugee rather than what may be considered the undermining of international rule of law.³⁷ Moreno Lax attacks the principle in international law and finds it wanting. Similarly, what ju-

33 OJ L 239/19, 22 Sept.2000, 19-35.

34 Council Regulation No. 343/2003 OJ L 50/1, 18 Feb.2003, 1-14.

35 M. Garlick, 'Asylum Legislation in the European Community and the 1951 Convention: Key Concerns regarding Asylum Instruments Adopted in the "First Phase" of Harmonization', in T. Balzacq & S. Carrera, *Security versus Liberty? A Challenge for Europe's Future*, Aldershot: Ashgate 2006, p. 45-60. Also see J. Vedsted-Hansen, 'Common EU Standards of Asylum – Optional Harmonisation and Exclusive Procedures?', in E. Guild & P. Minderhoud, *The First Decade of EU Migration and Asylum Law*, The Hague: Martinus Nijhoff 2011, p. 255-272.

36 Available at <http://www.unhcr.org/4dfa11499.html> (visited 14 May 2012).

37 A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford: Oxford University Press 2009; I. Boccardi, *Europe & Refugees Towards An EU Asylum Policy*, The Hague: Kluwer Law International 2002.

jurisprudence there has been on the issue has also focused on the first aspect.³⁸ In 2000, the European Court of Human Rights (ECtHR) found that the onward shifting of a Member State's responsibility for protection from the risk of torture to another Member State had the effect, not of lifting responsibility from the first Member State, but rather aggregating it with that of the second. However, the Court did not condemn the Dublin Convention per se.³⁹ Only ten years later did the ECtHR come back to this principle in a pair of judgments which place limits on the legality of this territorial move (see below, final section). Also in 2000, the UK's House of Lords (as it then was) examined the compatibility of interpretations of the Refugee Convention and Protocol in different Member States when considering the removal of an asylum seeker from the UK to those states, but did not challenge the principle.⁴⁰ In the meantime, the EU took further the principle of territorial exclusion through the negotiation and ratification of readmission agreements with third states which include the return of third country national asylum seekers (i.e. nationals of states other than parties to the agreement).⁴¹ This means that in principle where an asylum seeker makes a claim for protection in an EU Member State and the Member State can establish within the relevant time limits that the person transited or stayed on the territory of the state party to a readmission agreement, it can return the individual to that state party without a substantive consideration of the asylum claim. Currently the EU has readmission agreements agreed, in order of their signature with the following countries or territories (in order of signature): Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Serbia, Montenegro, Bosnia, Macedonia, Moldova, Pakistan and Georgia (though the EU is seeking to renegotiate the agreements with Russia, Moldova and Ukraine). Negotiations are underway with (in order of opening of negotiations) Morocco, Algeria, Turkey, China, Cape Verde, Belarus, Armenia and Azerbaijan.

Geographically speaking what this has meant is that the space of refugee protection has been modified. The refugee who arrives in an EU country having passed through one of these other states or territories can be summarily returned to that state or territory to pursue his or her claim to protection. It is as if

38 V. Moreno Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carrier Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', (2008) 10(3) *European Journal of Migration and Law*, p. 315-364.

39 ECtHR, *T.I. v. the United Kingdom* (Admissibility) (2000), Application No. 43844/98.

40 *Secretary of State For The Home Department, Ex Parte Adan R v. Secretary of State For The Home Department Ex Parte Aitseguer* [2000] UKHL 67.

41 N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, The Hague: Martinus Nijhoff 2009.

the EU states disappear from the protection map and all that is left is the third state in bold letters.

The European Court of Human Rights Rethinks the Geography of Protection

The map of refugee protection is not exclusively the result of state sovereign measures, negotiations and decisions. It has also become judicialized in a supranational fashion. While national courts remain, by and large, bound to interpret national law as provided to them by their legislation as adopted by their legislative bodies, supranational courts are bound to interpret the international instrument(s) for which they are responsible. The result is often different from the outcome in a state which is able to control the judicial consideration of sovereignty by changing a procedural rule or excluding a section of a rule from judicial oversight.⁴² Changing the rules of judicial oversight at the supra national level is much more complex and requires all the states parties to the instrument to agree, often a very difficult endeavour indeed.⁴³ The result is much less fluidity at the supranational level for the courts, and less capacity for any one state to influence the interpretative process as effectively as it can within its own national borders. This does not mean that supranational courts are necessarily liberal or conservative in any political sense. It does mean that they are less susceptible to arguments and claims based on national sovereignty. They are not animals created by a single state sovereign arrangement alone and answerable within a system of state sovereignty exclusively. Thus the obviousness of state sovereign claims about geography may seem less obvious.

As I discussed earlier, the EU's Common European Asylum System depends on the acceptance by states and courts alike that the EU territory is single and unique for the refusal of any asylum application (though fragmented into state territories for the recognition of any asylum claim). While the claim is determined only by one state according to a set of rules determined by the EU, all other Member States are entitled to rely on the refusal as binding and thus divest themselves of any responsibility to provide protection to the individual.

42 W. van Bennekom & J.H. van der Winden, *Asielrecht*, Amsterdam: Boom 2011.

43 In 2011/12 the UK Government, holding the revolving presidency of the Council of Europe embarked on such an effort to convince the other 46 Member States to amend the ECHR to limit the powers of the ECtHR to consider evidence and to reduce the number of cases brought to the ECtHR. The final declaration of the meeting of heads of government at the end of the UK presidency in Brighton, UK on 19-20 April 2012 indicates that little agreement could be reached. Only one substantive amendment was agreed for the ECHR – to insert into the preamble a reference to the principles of a margin of appreciation (a notion developed by the ECtHR itself) and subsidiarity. See <http://www.coe.int/en/20120419-brighton-declaration/>.

Where an asylum seeker whose claim to international protection has been allocated to one Member State, according to rules which, too, are based on a geographical principle, if that person turns up in another Member State, that second state is entitled by EU law to send him or her back to the first state with no substantive consideration of the protection claims. This is the organizing principle of the Dublin II system described above.

On 21 January 2011, however, the ECtHR handed down a judgment in *MSS v. Belgium and Greece*.⁴⁴ The facts of the case are particularly sad. An Afghan national escaped overland to the EU to seek asylum. He was stopped in Greece where he was fingerprinted. He then continued on to Belgium where he applied for asylum. Under the EU rules, Greece was the country responsible for determining his asylum claim and he was sent back there. In Greece he was detained in dreadful conditions which had already been condemned by the ECtHR in 2010 as incompatible with Article 3 ECHR.⁴⁵ He was then dumped out of detention without any reception facilities and ended up living rough in a park in Athens with no food, sanitary facilities or other amenities. He continued to try to escape Greece without success. On one occasion he was stopped by the Greek authorities as he sought to get to Italy and he was transferred to the Greek Turkish border for the purposes of an irregular expulsion. This was only prevented by the arrival of the Turkish border guards who challenged their Greek counterparts attempt to push the group of Afghan men across the border with no procedure whatsoever.

Among the many questions which the case raised is whether Belgium, by sending M.S.S. back to Greece in happy reliance on EU law, was in breach of the ECHR. The decision of the ECtHR was that Belgium had in fact breached its duty to protect M.S.S. from torture, inhuman and degrading treatment prohibited by Article 3 ECHR. It reasoned

'358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

360. Having regard to the above considerations, the Court finds that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention.'

44 *M.S.S. v. Belgium and Greece* - 30696/09 [2011] ECHR 108 (21 January 2011).

45 *Tabesh v. Greece* - 8256/07 (French Text) [2009] ECHR 2224 (26 November 2009); *S.D. v. Greece* - 53541/07 French Text [2009] ECHR 2050 (11 June 2009).

By this decision, the ECtHR began to question the legitimacy of the EC's claim that it is entitled to determine in what EU space an asylum seeker may make a claim for international protection. This is particularly so as the EU's claim goes so far as to maintain that the actual conditions in which an asylum seeker may find him- or herself in the Member State to which he or she may be allocated is irrelevant to the EU Member State's decision to send him or her there.⁴⁶ This is so even where those conditions have been found lacking in European human rights law. It is the claim contained, *inter alia*, in the Aznar Protocol that all EU Member States fully respect human rights which takes the direct challenge. The ECtHR stated what all EU asylum authorities knew (as indeed the ECtHR pointed out in its judgment) the reception conditions for asylum seekers in Greece offend against even the most basic obligation to ensure that people are not subject to inhuman and degrading treatment. In the case, human rights protection trumped EU geography; Belgium was found to have violated its protection duty to M.S.S. by sending him to Greece under the Dublin II regulation. For an interesting analysis of this decision see Moreno-Lax.⁴⁷

Just over a year later, the ECtHR determined the case of *Hirsi & Os v. Italy*⁴⁸ regarding the actions of the Italian authorities in pushing away from Italian waters a little boat full of people seeking to get to Italy from Libya, some of them in order to seek asylum. In *Hirsi*, the applicant and his colleagues had been embarked onto a little boat with the assistance if not coercion of the Libyan authorities, according to the judgment. The Italian authorities intercepted the little boat in international waters, took the people onto the Italian boat and then went to Libya and made them all disembark there into the hands of the Libyan authorities. At no time did the Italian authorities permit the people to make asylum or any other kind of claims to them. Further, all the people's personal effects, according to the ECtHR 'including documents confirming their identity were confiscated by the [Italian] military personnel' (para 11, second paragraph). There is no indication that these personal effects were ever returned to their owners. One of the arguments of the Italian authorities was that as the events took place in international waters and the waters of Libya, they took place outside Italian state sovereignty and thus the state magic which the crossing of an international border creates never happened. Whatever happened on the high seas could not be confounded with an act relating to the crossing of an international border, an essential element to becoming a refugee. The ECtHR disagreed, indeed it was singularly unimpressed by this argu-

46 See Vedsted Hansen 2011, *supra* footnote 35.

47 V. Moreno Lax, 'Dismantling the Dublin System: M.S.S. v Belgium and Greece', (2012) 14(1) *European Journal of Migration and Law*, p. 1-31.

48 *Hirsi Jamaa and Others v. Italy* - 27765/09, 23 February 2012.

ment. As the people had been in the control of Italian authorities, those authorities were responsible for the protection of their human rights in accordance with the ECHR. This includes an assessment of the risk of return to torture or punishment contrary to Article 3. Further, the ECtHR found that the Italian authorities had carried out a collective expulsion in violation of Article 4 Protocol 4 ECHR and deprived these people of an effective remedy in breach also of Article 13. The ECtHR warned:

'179. The above considerations do not call into question the right of States to establish their own immigration policies. It must be pointed out, however, that problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention. The Court reiterates in that connection that the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness (see Mamatkulov and Askarov, cited above, § 123).

180. Having regard to the foregoing, the Court considers that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.'

For an interesting analysis of the case see Nascimbene.⁴⁹ The European geography of state sovereign border controls changes substantially as a result of these two paragraphs. The activities of states regarding preventing people from getting to their borders become part of the border control activities which must comply with European human rights norms. When people are in the control of state authorities, irrespective of the physical place where this may happen, if those authorities belong to states bound by the ECHR, then the treatment of those people as regards immigration management must comply with the ECHR rules. Not only does the non-refoulement obligation apply, but further, states are obliged to provide a procedure to consider each case individually and an effective remedy against refusal to allow those people to arrive at the sovereign borders of the state in order to enter. Any action to the contrary, even when applied to people who do not need international protection may consti-

49 B. Nascimbene, *The 'Push-back Policy' Struck Down Without Appeal? The European Court of Human Rights in Hirsi Jamaa and Others v Italy*, Istituto Affari Internazionali Documenti IAI 12, 02E – March 2012.

tute unlawful collective expulsion prohibited by the ECHR. This means that the prohibition on collective expulsion does not simply apply to expulsion from sovereign territory but it also includes expulsion from state jurisdiction. This indeed changes not only the geography of European refugee protection but also immigration controls in general.

One of the most sobering aspects of the *Hirsi* judgment is outside the formal argument of the decision itself. In an annex on page 38 of the judgment, after the reasoning and findings, the ECtHR includes a list of the applicants – who were these people and where they are now. I have copied the schedule and attach it here at Annex 1. It is the people who have died who are the most troubling. What happened to these people to bring about their deaths after the Italian authorities handed them over to their Libyan counterparts? One can only hope that this question disturbs the sleep of some officials in Europe.

In both *M.S.S.* and *Hirsi* a central question is what geography applies to asylum in Europe. Can states modify unilaterally or by collective sovereign decision the space available to the individual seeking protection? In *M.S.S.* it seems that there are limits to this territorial move. Where a state seeks to duck its refugee responsibilities by passing the individual on to another state, it may still remain liable for what happens to the individual. Even where the other state is an EU state with all the human rights characteristics so grandly proclaimed in the preamble to the Aznar Protocol, there is no umbrella to protect the sending state from a breach of its human rights obligations where it knew or ought to have known that the treatment the individual would get in the receiving state would not pass the torture, inhuman and degrading treatment test.

This line of reasoning regarding the geography of protection also informs the ECtHR judgment in *Hirsi*. In the face of attempts by states to avoid their human rights obligations to people potentially arriving at their borders by sea, the ECtHR effectively found that EU officials carrying out border related activities carry with them the jurisdiction of the ECHR irrespective of their actual relationship with the border of state sovereignty. People can be expelled unlawfully from a state even before they have arrived at its formally recognized border as a result of the activities of border guards seeking to prevent them so arriving. People seeking international protection (at least under Article 3 ECHR) it seems, are entitled to seek this from officials even in international waters and those officials are obliged to provide them with an opportunity to seek asylum.

The geography of protection is clearly on the move. The attempt, by some European states, to establish a monopoly over the space of protection is resulting in a change in international jurisprudence on where and how human rights obligations apply and who is entitled to their protection has come up against regional human rights obligations. The reach of human rights law appears to be adjusting to follow state actors, at least from Council of Europe countries, wher-

ever they go in the world. The beneficiaries are increasingly global, no longer trapped in a human rights geography which is instrumentalized to render them without rights or remedies. Article 1 ECHR seems to be filling the lacunae which other parts of the human rights *acquis* have left open – everyone now really does seem to mean what it says. Further, jurisdiction is no longer tied to state borders when the activities which state actors are carrying out are designed to efface those borders as regards access to protection.

Annex 1
LIST OF APPLICANTS

	Name of applicant	Place and date of birth	Applicant's current situation
1.	JAMAA Hirsi Sadik	Somalia, 30 May 1984	Refugee status granted on 25 June 2009 (N. 507-09C00279)
2.	SHEIKH ALI Mohamed	Somalia, 22 January 1979	Refugee status granted on 13 August 2009 (N. 229-09C0002)
3.	HASSAN Moh'b Ali	Somalia, 10 September 1982	Refugee status granted on 25 June 2009 (N. 229-09C00008)
4.	SHEIKH Omar Ahmed	Somalia, 1 January 1993	Refugee status granted on 13 August 2009 (N. 229-09C00010)
5.	ALI Elyas Awes	Somalia, 6 June 1983	Refugee status granted on 13 August 2009 (N. 229-09C00001)
6.	KADIYE Mohammed Abdi	Somalia, 28 March 1988	Refugee status granted on 25 June 2009 (N. 229-09C00011)
7.	HASAN Qadar Abfillzhi	Somalia, 8 July 1978	Refugee status granted on 26 July 2009 (N. 229-09C00003)
8.	SIYAD Abduqadir Ismail	Somalia, 20 July 1976	Refugee status granted on 13 August 2009 (N. 229-09C00006)
9.	ALI Abdigani Abdillahi	Somalia, 1 January 1986	Refugee status granted on 25 June 2009 (N. 229-09C00007)
10.	MOHAMED Mohamed Abukar	Somalia, 27 February 1984	Died on unknown date
11.	ABBIRAHMAN Hasan Shariff	Somalia, date unknown	Died in November 2009
12.	TESRAY Samsom Mlash	Eritrea, date unknown	Whereabouts unknown
13.	HABTEMCHAEL Waldu	Eritrea, 1 January 1971	Refugee status granted on 25 June 2009 (N. 229-08C00311); resident in Switzerland
14.	ZEWEIDI Biniam	Eritrea, 24 April 1973	Resident in Libya

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15.	GEBRAY Aman Tsyehansi	Eritrea, 25 June 1978	Resident in Libya
16.	NASRB Mifta	Eritrea, 3 July 1989	Resident in Libya
17.	SALIH Said	Eritrea, 1 January 1977	Resident in Libya
18.	ADMASU Estifanos	Eritrea, date unknown	Whereabouts unknown
19.	TSEGAY Habtom	Eritrea, date unknown	Held at Chucha Detention Camp, Tunisia
20.	BERHANE Ermias	Eritrea, 1 August 1984	Refugee status granted on 25 May 2011; resident in Italy
21.	YOHANNES Roberl Abzighi	Eritrea, 24 February 1985	Refugee status granted on 8 October 2009 (N. 507-09C001346); resident in Benin
22.	KERI Telahun Meherte	Eritrea, date unknown	Whereabouts unknown
23.	KIDANE Hayelom Mogos	Eritrea, 24 February 1974	Refugee status granted on 25 June 2009 (N. 229-09C00015); resident in Switzerland
24.	KIDAN Kiflom Tesfazion	Eritrea, 29 June 1978	Refugee status granted on 25 June 2009 (N. 229-09C00012); resident in Malta