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Introduction

1.1 RECEPTION OF ASYLUM SEEKERS IN THE EUROPEAN UNION

THIS BOOK IS about the reception of asylum seekers in the European Union. Asylum seekers form a special category of aliens.[1] They are outside their country of nationality and apply to another country for protection, invoking (one of the) various prohibitions of *refoulement* that have been laid down in international law. Pending the determination of their application for protection, it has to be examined whether a prohibition of *refoulement* actually applies and, consequently, whether or not they are able to be returned to their country of nationality or origin. During this determination, asylum seekers may not be expelled, even though they might not have fulfilled legal requirements for entering and/or staying in the country in which they apply for protection. The duration of this period is highly variable; it may last for several weeks or for several years.[2] Asylum seekers therefore find themselves in a state of legal limbo; they might not be able or are not willing to invoke the protection of their country of nationality or origin, while it has not yet been determined whether they qualify for international protection.[3]

Since asylum seekers usually arrive without means in the host country, they are often dependent on the possibility to work and/or on the eligibility for public benefits in order to meet their basic needs during the time in which their applications are being examined. In many European countries, asylum seekers' access to the labour market and public benefits has been subject to change during the last decades. As from the mid-1980s, EU Member States were confronted with increasing numbers of asylum applications. In 1992 the number of asylum applications lodged in the

[1] Eg Gibney: '[A]sylum seekers raise a unique set of practical and moral issues' (Gibney 2004, p 9).

[2] Bank 2000, p 287.

[3] Fox O'Mahony and Sweeney have termed this 'double displacement' (Fox O'Mahony and Sweeney 2010).

European Union reached a peak at 672,385.[4] One general reaction to this increase in asylum applications has been the restriction of asylum seekers' access to the labour market and/or their eligibility for public benefits. Many states introduced separate welfare schemes for asylum seekers providing benefits in kind, whereas other states only provided general welfare benefits for a limited period of time or at a limited level.[5] In addition, states introduced dispersal policies for asylum seekers, housing them in accommodation centres throughout the country.[6] The literature suggests that by implementing such restrictive measures, states have mainly tried to deter potential asylum seekers and to facilitate expulsion of rejected asylum seekers by impeding social integration.[7] In this way, these authors argue, social law was used as an instrument of immigration control and exclusion from general welfare schemes and from the labour market was introduced as an alternative for closure at the border.[8]

In the early 2000s, the reception of asylum seekers became a European Community affair. In 1991 already, the European Commission called for the approximation and harmonization of reception conditions for asylum seekers in the Member States, in order to 'prevent any diversion of the flow of asylum seekers towards the Member State with the most generous arrangements'.[9] Under the Treaty of Amsterdam, concluded in 1997, Member States of the European Union transferred powers over asylum to the European Community. The Treaty of Amsterdam provided that the Council should adopt within five years after the entry into force of the Treaty of Amsterdam measures on asylum, including 'minimum standards on the reception of asylum seekers in Member States'.[10] In 2003 the Council adopted a directive on minimum standards for the reception

[4] P Juchno, 'Asylum applications in the European Union' 2007, available at: www.epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-SF-07-110. In 2012, 331,975 asylum applications were lodged in the EU (source: Eurostat). As some Member States produce statistics based on cases, the number of individuals per counted application may vary and is in many cases greater than 1. In addition, asylum application statistics for some countries may include repeat applications and appeals. The number of asylum applications mentioned above therefore does not correspond to the actual number of persons arriving in a certain year in Europe and applying for international protection.

[5] Bank 2000; Minderhoud 1999; Schuster 2000.

[6] Bank 2000; Robinson, Andersson and Musterd 2003; Schuster 2000.

[7] Eg Bank 2000; Bloch and Schuster 2002; Bouckaert 2007; Geddes 2000; Liedtke 2002; Mabbett and Bolderson 2002; Minderhoud 1999; Morris 2010; Sawyer and Turpin 2005; Schuster 2000. More generally, Tazreiter identifies withdrawal or limiting social and economic rights as a general form of deterrence in asylum policy (Tazreiter 2004, p 53).

[8] *Cf* Bosniak 2004, p 332. See also Geddes 2000, p 145.

[9] Communication from the Commission to the Council and the European Parliament on the right of asylum, Brussels 11 October 1991, SEC(91) 1857 final, p 7.

[10] Art 63(1)(b) of the Treaty establishing the European Community (TEC).

of asylum seekers (Directive 2003/9).[11] The Treaty of Lisbon, adopted in 2009, provided the basis for the adoption by the European Parliament and the Council of measures for a Common European Asylum System compromising 'standards concerning the conditions for the reception of applicants for asylum or subsidiary protection'.[12] In 2013, a recast of Directive 2003/9 was adopted: Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)[13] (Directive 2013/33, together, the Directives are also referred to as the EU Reception Conditions Directives). Member States should implement Directive 2013/33 into their national laws before 21 July 2015.

Both Directives have to be in accordance with relevant international law. According to their legal basis in the treaty,[14] the Directives should be in accordance with the Refugee Convention and other relevant treaties. The preambles of the Directives refer to the 'full and inclusive application' of the Refugee Convention and to Member States' 'obligations under instruments of international law to which they are party'.[15] Such explicit references to international law are not common in primary or secondary Union law. They make international law a direct standard of review for the EU Reception Conditions Directives.[16] The standards ultimately laid down in the Directives have, however, been criticized from an international law point of view.[17]

The aim of this study is to investigate in depth which obligations for EU Member States stem from 'relevant treaties' of international refugee law, international social security law and international human rights law with regard to the reception of asylum seekers and to compare them with the minimum standards laid down in the EU Reception Conditions Directives. When examining which obligations stem from international law with regard to the reception of asylum seekers, two different questions need to be addressed. It should be examined whether international law does in fact contain any binding obligations for states with regard to social and economic policy. Further, it should be examined if it makes a difference that

[11] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] OJ L31/18.

[12] Art 78(2)(f) of the Treaty on the Functioning of the European Union (TFEU).

[13] [2013] OJ L180/96.

[14] Arts 63(1) of the TEC and 78(1) of the TFEU.

[15] See recitals 2 and 6 of the preamble to Directive 2003/9 and recitals 3 and 10 of the preamble to Directive 2013/33.

[16] Battjes 2006, pp 97–105; Reneman 2012, pp 61–62. This seems also to be the approach of the Court of Justice of the European Union (see, eg, CJEU 2 March 2010, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla* [2010] ECR I-1493, para 53).

[17] See, eg, Battjes 2006, pp 496–507; Guild 2004; Ippolito 2013; UNHCR 2003. On the other hand, Bank has argued that international law imposes very few limitations on states' discretion in designing reception policies (Bank 2000).

it concerns state obligations with regard to aliens in general and asylum seekers in particular. What difference does the alienage of asylum seekers make with regard to the existence, scope and content of state obligations in the socioeconomic sphere? It will turn out that this latter question is a very important, and sometimes even decisive, aspect of the examination of state obligations for asylum seekers under international law.

The general approach, research questions and outline of the book will be further discussed below in sections 1.3 and 1.4. Section 1.5 will explain the terminology used in this book and section 1.6 will discuss the sources used for this study. Finally, section 1.7 will discuss the method of interpretation to be applied. First, however, some attention will be paid to the more theoretical debate on the rights of aliens.

1.2 SOVEREIGNTY AND EQUALITY

It is important to stress at the outset that the aim in this section is not to offer a comprehensive study of the large literature on the tension between the sovereignty of the state and the ideal of equal human rights with regard to the position of aliens. The more limited aim of this section is to give a rough sketch of a number of analytical concepts presented in this literature, with which the results of this study can be analysed and explained. For this purpose, this section will mainly draw upon the work of Linda Bosniak, as her work is particularly elucidating with respect to the themes in this book.

It is generally acknowledged that the tension existing in liberal democratic states between sovereignty, on the one hand, and the ideal of human rights, on the other hand, comes to the fore with regard to immigration issues.[18] This is caused by the fact that immigration control is generally seen as a crucial and fundamental aspect of state sovereignty.[19] Benhabib has provided convincing arguments for the importance attached to the interest of immigration control. In her view, a certain degree of closure is required for the legitimacy of democratic governance, which is one of the cornerstones of current liberal democratic states. The core of democratic governance is the ideal of public autonomy, which can be summarized in the principle that those who are subject to the law should also be its authors. Such a principle can only function properly if those in whose name the laws have been enacted are clearly demarcated from those upon whom the laws are not binding. Hence, a circumscribed people upon a given territory is crucial for the sake of maintaining democratic legitimacy,

[18] Benhabib 2004; Gibney 2004; Morris 2010, p 24 with further references; Noll 2000, pp 73–96.

[19] Benhabib 2004; Bosniak 2004, p 329.

according to Benhabib.[20] Another important liberal value and foundation of democratic constitutional states is the observance of individual human rights as recognition of inherent dignity and equal rights of all human beings.[21] Human rights by definition accrue to people on the basis of their personhood; not on their membership to a particular state. Accordingly, in Benhabib's words: 'There is thus an irresolvable contradiction (…) between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conceptions of democratic closure'.[22] As Morris notes, much of the theorizing around the phenomenon of asylum tends to weigh these two principles against each other and tries to find a balance.[23]

Bosniak has identified two different regulatory domains in the migration context in which these two principles meet and compete.[24] I will call these domains the 'border domain' and the 'material rights domain'.[25] The border domain concerns the admission and expulsion of aliens into and from the national territory, hence the more 'traditional' instrument of immigration control. In this domain, the principle of sovereignty usually prevails over the principle of universal human rights. Even though exceptions should sometimes be made on the basis of human rights, states are generally free to decide who to admit and who to expel. In other words, the main rule in this domain can be summarized as: no, unless. … Aliens do not have a right to enter or remain in the country, unless refusal of entrance or expulsion would be in violation with human rights norms.[26]

The second regulatory domain, which I have called the 'material rights domain', concerns the general, ie non-immigration-related treatment of aliens who are present on the territory. This domain concerns the rights of aliens that are not related to permission to enter, stay or reside in the territory, such as employment, social security and education rights

[20] Benhabib 2004.
[21] See also Habermas 1996, p 99.
[22] Benhabib 2004, p 19.
[23] Morris 2010, p 24 with further references.
[24] Bosniak 2004, p 329.
[25] These domains could also be referred to as the domain of 'immigration law' and the domain of 'immigrant or aliens law' (Martin 2001, p 88).
[26] Bosniak 2004, p 329. See also the Human Rights Committee in General Comment no 15 on the position of aliens under the Covenant: 'The Covenant does not recognize the right of aliens to enter or reside in the territory of a state party. It is in principle a matter for the State to decide who it will admit to its territory'. Also the ECtHR generally states in immigration cases that 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory' (for the first time in *Abdulaziz, Cabales and Balkandali v United Kingdom* app nos 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985), para 67). With reference to this case law of the ECtHR, the European Committee on Social Rights has adopted the same position (*Defence for Children v the Netherlands* complaint no 47/2008 (European Committee of Social Rights, 20 October 2009), para 41).

('material rights'). This book will focus completely on this second domain. In this domain, the relation between the principles of state sovereignty and human rights is more complex. No straightforward main rule can be identified in this field.[27] Bosniak argues that the main question in this domain is in fact a jurisdictional one: Where does the regulatory regime of the border legitimately begin and end?[28] Or stated differently: '[H]ow far does sovereignty reach before it must give way to equality'?[29] Bosniak discerned two broad models for answering this question, and, accordingly, for finding a proper balance between the principles of sovereign self-determination and equal universal human rights. She calls these models, inspired by the theories of Walzer,[30] the sphere separation model and the sphere convergence model.[31]

Under the 'sphere separation model', the state's interest in immigration control, or the sphere of membership regulation, must remain more or less confined to the border. The state's immigration power may only be exercised legitimately as regards decisions on entrance and expulsion made at the border. To structure an immigrant's status within the national territory according to the state's border-regulative interests or imperatives would be illegitimate under the sphere separation model. In other words, immigration status is relevant for decisions made at the border, but it may not be the decisive factor with regard to decisions made about the treatment of aliens within the border. Hence, this model implies that social law cannot be used as an instrument of immigration control. In the words of Owen Fiss: 'Admission laws can be enforced by fences at the borders, deportation proceedings, or criminal sanctions, not, I maintain, by imposing social disabilities'.[32] In short, under the separation model, national society may be 'hard on the outside', but must be 'soft on the inside'.

[27] Bosniak 2004.

[28] Bosniak 2006, p 76.

[29] Ibid, p 39.

[30] In his book *Spheres of Justice*, Walzer advocates a system of 'complex equality'. In such a system, different social goods, such as money, security and welfare, and political power, should be distributed in their own sphere on the basis of their own distributive principles. Justice exists if dominance between the different spheres is prevented; a certain social good should not be distributed on the basis of the possession of another social good. In other words: 'no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good' (Walzer 1983, p 19). He formulates therefore the following 'open-ended distributive principle': No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x' (Walzer 1983, p 20).

[31] Bosniak 2006. The same distinction has been made by Legomsky, albeit less elaborated. He distinguishes between the 'dichotomous, or bipolar, model' and the 'continuum model' (Legomsky 1995, p 1463). In the same vein, Noll distinguishes between divisible and bundled jurisdiction (Noll 2010).

[32] Fiss 1998. With the term 'Social disabilities', Fiss refers to exclusion from the labour market, exclusion from education and exclusion from welfare benefits. See for other adherents of this line of reasoning: Bosniak 2006, pp 124–29 with further references.

Under the 'sphere convergence model', the interest of immigration control or the immigration status continues to play a legitimate and even decisive role in defining the position of aliens who are physically present on the territory. Under this model, the national community is envisioned as a series of concentric circles or as a continuum, with nationals in the innermost circle or at the ultimate edge enjoying full benefits and burdens of membership and those farther away possessing progressively few claims on the community. According to Michael Perry:

> [The] proposition that the members of a political community may appropriately decide whether, to what extent, and under what conditions persons who are not members may enter the territory of the political community and share its resources and largesse (…) necessarily entails the view that a person, in some respects at least, is more deserving by virtue of his status as a citizen than a person who is not a citizen.[33]

Hence, under this model, material rights are characterized as membership rights.[34] For persons who are not full members yet, their legal status or the state's immigration power may affect the content and scope of their material rights. In other words, the regulatory domain of the border may, to a certain extent, converge with the 'material rights domain'.

Adherents of this model disagree, however, about the basis for an accretion of rights. For some proponents rights should increase through a change in legal status,[35] sometimes combined with the length of legal residence and the degree of integration,[36] while others argue that rights should accrue through the mere passage of time.[37] Still others have identified other facts of 'social reality' that should have significance for the level of rights. Martin, for example, distinguishes between three different categories of non-admitted aliens as regards membership levels: entrants without inspection, parolees and applicants at the border. He argues that applicants at the border have the lowest claim to membership rights as they will not have established any community connection yet. Entrants without inspection deserve a higher rank as they might have established significant social ties in the (local) community, particularly when they remain for a lengthy period. 'Such connections then deserve some weight in deciding on the exact protections owed to them in light of this complex relationship they hold to our polity and society'.[38] Parolees have not

[33] Michael Perry, cited in Bosniak 2006, p 76.

[34] Da Lomba argues that states do indeed characterize the right to health care as a membership right (Da Lomba 2011).

[35] Legomsky 1995.

[36] Hailbronner 2008, p 12.

[37] See, eg, Carens 2005.

[38] Martin 2001, p 99. Martin recognizes that there are also sound arguments to place entrants without inspection below applicants at the border, as they failed to respect elemental

been formally admitted but are released from detention and allowed a certain freedom to move at large in the territory during their procedure for admission. They have the strongest claims of these three categories of aliens, according to Martin, as their social ties established in the community 'will have occurred with a form of deliberate permission from the US government, following an opportunity for screening'.[39] While Martin treats all applicants for admission the same, Aleinikoff argues that asylum seekers should 'occupy some circle closer to the centre than that occupied by other applicants for entry'. According to Aleinikoff, the fact that an asylum seeker might not have a political community to return to should count in establishing his constitutional position.[40]

While Bosniak distinguishes between the separation and the convergence model, she does not wish to overstate the distinction between these two models and notes that adherents of the convergence model also argue for some insulation from the border regime for aliens present on the territory, while separation proponents usually allow some convergence (eg with regard to political rights). In addition, she argues that complete separation between the border regime and the material rights regime cannot, as a matter of fact, be achieved. For aliens, the exclusionary territorial border is always, to some extent and in some form, present on the territorial inner area as well.[41]

Nevertheless, the jurisdictional dispute between the border regime and the material rights regime and the two possible solutions to this dispute are valuable concepts with which the results of this study can be analysed and explained. In answering the question which state obligations stem from international law as regards the reception of asylum seekers, this study will shed light on how this jurisdictional dispute is dealt with under contemporary international law. As has been stated above, it will indeed become evident that this question is a relevant and often decisive aspect of establishing which state obligations result from international law as regards the reception of asylum seekers. Should the regulatory domain of the border with its emphasis on the interest of immigration control remain confined to the border, as a result of which asylum seekers

border procedures and simply established their presence on the territory in defiance with the law. Applicants at the border have at least attempted to establish their community membership on the right footing and have provided the authorities with the possibility to apply their immigration policy (Martin 2001, pp 97–98). Nevertheless, he finds that more weight should be attached to de facto community ties.

[39] Martin 2001, pp 99–100. Martin acknowledges that according parolees a lower status can be justified on pragmatic grounds. If parole is applied only in order to avoid needless confinement, providing them with more rights might prompt some curtailments of the use of parole.

[40] Aleinikoff 1983, pp 257–58.

[41] Bosniak 2006, pp 122–40.

are entitled to equal treatment with nationals as regards their material rights (separation model)? Or does the state's immigration power have some bearing on the normative content of state obligations as regards asylum seekers' material rights under international law? (convergence model.) If so, to what extent? It will turn out that in establishing relevant state obligations for asylum seekers under international law, both elements of the separation model and elements of the convergence model will frequently pass in review.

In order to avoid repetition, the results of the present study will primarily be analysed in the light of these theoretical concepts in the concluding chapters to Part II (chapter seven) and Part III (chapter thirteen) and, most elaborately, in chapter 14. However, throughout the book, references to these concepts will be made in a more ad hoc way.

1.3 AIM AND GENERAL APPROACH

In view of the above, the aim of this study is twofold. First of all, it aims to identify and describe the international legal framework with regard to the social rights of asylum seekers in Europe and to assess the minimum standards adopted within the European Union on the reception of asylum seekers for compatibility with this framework. Secondly, on a more abstract level, it aims to examine to what extent the immigration power of the state may converge with the field of social policy under current international law. Does the state's immigration power have some bearing on the normative content of state obligations with regard to asylum seekers' social rights under international law? And if so, to what extent?

This study applies a positivist, systematic legal approach and understands law as an argumentative discipline.[42] It tries to offer a convincing argument on the meaning of the relevant law, without necessarily endorsing the outcome or merely describing the law from an outside perspective.[43] Without denying the close relationship between law, politics and morality, it conceives law as an autonomous system that can be analysed as such.

Especially in the field of human rights research, it is important to make one's specific perspective on human rights explicit. Dembour has convincingly shown that when people talk about human rights, they are not necessarily talking about the same thing. She has detected four different 'schools' in human rights research. In brief, she presents them as 'natural scholars' who conceive of human rights as *given*, 'deliberative scholars' who conceive of human rights as *agreed*, 'protest scholars' who conceive of human rights as *fought for*, and 'discourse scholars' who

[42] MacCormick 2005, p 14–15.
[43] *Cf* Hart in his postscript (Hart 1994, p 242–44).

conceive of human rights as *talked about*.[44] While acknowledging that the different schools overlap and that the model does not always reflect the complexity of arguments made about human rights in reality, she submits that the distinction in four schools helps to clarify intellectual and moral positions, which enables an understanding of the reasons for and implications of arguments made by a particular author.[45] The approach adopted in this study shows most similarity to the 'deliberative school' identified by Dembour, in that it views human rights as legal standards and not as moral principles, and, consequently, acknowledges the limited scope of human rights. In addition, it does not presume outcomes in advance and certain outcomes may be found unreasonable on moral grounds.[46]

The distinction between legal rules on the one hand and moral and political rules on the other hand is often made on the basis of the source from which the rules result. In this view, in order to qualify as international law, a rule has to derive from one of the accepted sources of international law.[47] This view is adopted in this book as well. The question of which sources of international law are accepted, will be discussed in section 1.6.1. In order to offer a convincing argument on the meaning of the legal rules found in these sources, it is important to identify the relevant and acceptable forms of legal argument.[48] Which forms of legal arguments or, put differently, methods of interpretation will be applied in this study will be explained in section 1.7.

The next section will list the research questions for this study, discuss more specific delimitations and explain the outline of the book.

1.4 RESEARCH QUESTIONS, DELIMITATIONS AND OUTLINE OF THE BOOK

The main question of this book can be formulated as follows:

Which state obligations for EU Member States stem from international refugee law, international social security law and international human rights law with regard to the social security of asylum seekers and their access to wage earning employment and how do these obligations relate to the standards laid down in Directive 2003/9 and Directive 2013/33 (the EU Reception Conditions Directives)?

The choice to focus on the social security of asylum seekers and their access to the labour market has been prompted by the wish to concentrate

[44] Dembour 2006 pp 232–71.
[45] Dembour and Kelly 2011, pp 18–22.
[46] Ibid, p 15.
[47] Nollkaemper 2005, p 16; Hathaway 2005, p 15; Jennings and Watts 1992, p 23.
[48] See Patterson who states that the best way of understanding truth in law is in the use of forms of legal arguments. '[L]aw has its own argumentative grammar, and it is through the use of this grammar that the truth of legal propositions is shown' (Patterson 1999, p 73).

on asylum seekers' ability to generate income and on the protection against the absence or loss of (enough) income. Other aspects addressed by the EU Reception Conditions Directives, such as access to education, entitlement to information and documentation, detention and protection of family unity, will not form part of the object of inquiry of this study. The term 'wage-earning employment' implies that self-employment does not fall under the scope of this study, either.

This study will discuss and assess provisions of both Directive 2003/9 and Directive 2013/33, as Directive 2003/9 will remain effective until 20 July 2015 and as Directive 2013/33 does not apply to the United Kingdom, as a result of which Directive 2003/9 will continue to apply for the United Kingdom even after 20 July 2015.

The main question can be divided in a number of sub-questions. First of all, which standards concerning access to employment and social security are laid down in the EU Reception Conditions Directives has to be examined. For the evaluation of these standards under international law, it is necessary to pay attention to the rationale and official justifications brought forward for their inclusion. Consequently, not only should the standards laid down in the Directives be described and analysed, but it should also be examined which reasons have been put forward by Member States for including these standards.

In order to further a better understanding of the choices made by the European legislator, it is helpful to examine national developments as regards the reception of asylum seekers as well. Obviously, the Directives did not appear out of the blue, but are for a large part based on pre-existing national rules and practices. In order to gain a better understanding of the background of the provisions of the Directives, it is therefore important to have some insight into the development of the social rights of asylum seekers at the national level.

These issues will be examined in Part I. This part will argue that there is a strong convergence between the sphere of asylum policy and the sphere of asylum seekers' material rights in the EU, which manifests itself in the background, legal basis and negotiating history of the EU Reception Conditions Directives and in the actual provisions laid down in these Directives.

With regard to the subsequent examination of relevant state obligations under international law a distinction will be made between two kinds of provisions: provisions on equal treatment and non-discrimination, on the one hand, and other provisions with relevance to social security and access to employment, on the other hand.[49] Part II will systematically

[49] This distinction reflects the distinction that was made under international aliens law. Before the rise of international human rights law after the Second World War, individuals were not yet considered to be subjects of international law. The treatment of aliens was mainly dealt with within the doctrine of diplomatic protection and state responsibility. Under this

examine equal treatment and non-discrimination provisions of international refugee law, international social security law and international human rights law as to their relevance for asylum seekers' access to social security schemes and access to wage-earning employment. It will be examined whether and to what extent asylum seekers are entitled to equal treatment with nationals in these fields.

This part will argue that Member States are not required under current international law to provide asylum seekers with access to their labour markets on an equal footing with nationals. With regard to social security schemes, however, Member States are obligated under international law to grant equal treatment to asylum seekers as compared to nationals if asylum seekers fulfil certain conditions with regard to legal status and/or community ties. This part will examine in detail the meaning of the different conditions used in international law with regard to legal status of aliens in general and refugees in particular.

Finally, Part III of the book will investigate whether any obligations for EU Member States as regards the social security of asylum seekers and access to the labour market stem from international law *not* devoted to equal treatment and non-discrimination. In other words, this part of the book will examine provisions of international law other than provisions on equal treatment and non-discrimination with possible relevance for asylum seekers' social security and access to the labour market. It will be examined whether international law contains positive obligations or obligations to provide asylum seekers with social security benefits or access to the labour market, besides the (possible) obligation to grant complete equal treatment with nationals. Part III will therefore examine whether such other kinds of obligations for EU Member States stem from international law and what the scope and content of such obligations is.

This part will argue that, under certain circumstances, Member States can be responsible under international law for preventing asylum seekers from becoming destitute. In addition, this part will argue that this responsibility may extend under international law, if the degree of state control exercised over asylum seekers increases. Finally, this part will show that international law does contain some obligations for Member States with regard to the access to wage-earning employment.

doctrine, an injury to a citizen is an injury to his state (Brownlie 2003, p 497). If an alien was injured by acts contrary to international law, the host state incurred responsibility and the state of nationality of the alien was permitted to seek redress through diplomatic protection (Lillich 1984, pp 8–14). The question as to which acts were contrary to international law has been answered in two different ways. Under the theory of national treatment, aliens were entitled to equal treatment with nationals. If aliens were granted equality of treatment, state responsibility and the right to diplomatic protection did not arise. Opponents of this theory held that there is an 'international minimum standard' for the protection of aliens that must be upheld irrespective of how the state treats its own nationals. Under this theory, a state that failed to guarantee this minimum standard to aliens incurred international liability (Brownlie 2003, pp 500–05; Lillich 1984, pp 14–17; Shaw 2003, pp 733–37).

The final chapter will contain conclusions. Besides answering the main question of this study, the final chapter will also reflect on the state obligations identified under international law and list a number of relevant factors for their existence. Further, it will reflect upon the more abstract question as to the extent to which international law allows for a convergence of the regulatory domain of the border or the state's immigration power with the domain of aliens' material rights. This study will show that it is possible to identify binding state obligations resulting from international law with regard to employment and social security in general, but that the alienage of asylum seekers is often decisive for the content and scope of these obligations with regard to asylum seekers. Hence, even though human rights generally accrue to 'everybody', this study will show that in order for human beings to receive full protection of international law, a number of additional factors have to be met. The final chapter will elaborate on these relevant factors. Taking these factors into account, this study will argue that international law does set a number of limits on and attaches some consequences to the large degree of convergence between the state's immigration power and the field of social security and employment as manifested in the EU Reception Conditions Directives. The final chapter will provide guidance with regard to the interpretation of the EU Reception Conditions Directives in order to ensure compliance with international law. In addition, it will show that with regard to a number of issues conciliatory interpretation is not possible, as a result of which some provisions of the EU Reception Conditions Directives fall short of Member States' obligations under international law.

This study was concluded on 1 August 2013. Later developments have only been taken into account in exceptional cases.

1.5 TERMINOLOGY

This section will explain the meaning attached to the terms 'asylum seeker' and 'social security' for the purpose of this study.

1.5.1 Asylum Seeker

For the purpose of this book, 'asylum seeker' is defined as a person who is outside his country of nationality or is stateless and who applies for protection in or at the border of another country, until a final decision on that application has been made.

Some terms need further specification. 'Application for protection' is understood broadly. A person is considered to be an asylum seeker as from the moment he has made his intention to apply for protection known to the authorities, irrespective of whether he has officially lodged

his application yet. In addition, it is implied by the concept of *seeking* asylum that it has not been established yet that the person concerned meets the relevant criteria. Furthermore, the basis on which the application has been lodged is irrelevant. The application can be lodged on the basis of the Refugee Convention, on the basis of another prohibition of *refoulement* stemming from international law, for example Article 3 of the European Convention on Human Rights, or on the basis of a domestic title for protection. The decisive criterion is that the person concerned applies for protection from some kind of danger abroad, or, more formally, for protection from subjection to human rights violations abroad.[50]

'Final decision' has a specific meaning as well for the purposes of this research. If an asylum application has been granted, a 'final decision' has been taken, and the person concerned is no longer an asylum seeker. The term 'final decision' also includes the granting of 'temporary protection' within the meaning of Directive 2001/55/EC.[51] If an asylum application is rejected, this decision is only 'final' for the purpose of this research if no domestic or international possibility of review is available, either because the period in which to lodge an application for review has expired, or because the person concerned has decided not to make use of the possibility. This means that in this book persons whose asylum application has been rejected in the final instance at the domestic level and who have lodged a complaint with, for example, the European Court of Human Rights or the Human Rights Committee also fall under the scope of the term 'asylum seeker'.

The requirement that persons need to be outside their country of nationality and apply in or at the border of another country means that persons who apply from abroad, for example at embassies or during a process of resettlement, do not fall within the scope of this research. This book only addresses persons who already find themselves in or at the border of the host state, without it being established that they are eligible for protection by that state.

1.5.2 Social Security

The term 'social security' has a wide variety of meanings.[52] It is therefore important to adopt a working definition for the purposes of this book.

[50] Battjes 2006, pp 6 and 8.

[51] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. [2001] OJ L212/12.

[52] Noordam and Vonk 2011, pp 1–3; Pieters 2006, pp 1–2.

The International Labour Organization has defined the concept of 'social security' as:

> [A]ll measures providing benefits, whether in cash or in kind, to secure protection, inter alia, from
>
> (a) lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member;
> (b) lack of access or unaffordable access to health care;
> (c) insufficient family support, particularly for children and adult dependants;
> (d) general poverty and social exclusion.[53]

This definition is suitable for the purposes of this book. The list of social risks against which social security should provide protection under this definition are the same as the contingencies mentioned in ILO Convention no 102 on Minimum Standards of Social Security, complemented with the social condition of 'need' or 'destitution'.[54] A difference between this latter condition and the risks mentioned in ILO Convention no 102 is that the cause of the loss or absence of income is not relevant. It is important to note that social security in the definition adopted here is not limited to cash benefits, but includes benefits in kind as well. The in-kind support provided to asylum seekers in many EU Member States therefore falls under this definition of social security.

As the ILO report notes, access to social security is a public responsibility, and is typically provided through public institutions, financed either by contributions or general taxes.[55] According to this report:

> What distinguishes social security from other social arrangements is that: (1) benefits are provided to beneficiaries without any simultaneous reciprocal obligation (thus it does not, for example, represent remuneration for work or other services delivered); and (2) that it is not based on an individual agreement between the protected person and provider (as, for example, a life insurance contract) but that the agreement applies to a wider group of people and so has a collective character.[56]

In international social security law, a distinction is generally made between contributory and non-contributory social security schemes and between social insurance and social assistance schemes. Contributory benefits

[53] International Labour Organization, *World Social Security Report 2010/11. Providing Coverage in Times of Crisis and Beyond*, Geneva 2010, p 13.

[54] See the definition adopted by Noordam and Vonk 2011, pp 3–5.

[55] International Labour Organization, *World Social Security Report 2010/11* (n 53), p 14. See also Noordam and Vonk 2011, pp 5–6.

[56] International Labour Organization (n 53), p 14. The same approach is adopted by Pieters (Pieters 2006, pp 4–5).

are benefits the grant of which depends on direct financial participation by the persons protected or their employer or on a qualifying period of occupational activity. Hence, the financing of such benefits is primarily employment-based. Non-contributory benefits are benefits the grant of which does not depend on direct financial participation by the persons protected or their employer or on a qualifying period of occupational activity. Such benefits are primarily residence-based. The distinction between social insurance and social assistance schemes lies essentially in the cause of the loss or absence of income. Social assistance provides protection against need or poverty and does not require that there is a link between the reason for that need and a recognized social risk. Social insurance schemes, on the other hand, do require a link between the reason for the shortage of income and one of the recognized social risks. These terms will be further explained in chapter five.

Social assistance schemes can be subdivided into general and categorical schemes. General schemes have a general scope of application, whereas categorical schemes only apply to persons who belong to a certain group of people needing social assistance.[57] Support provided to asylum seekers in kind, under a separate scheme, can be seen as a categorical social assistance scheme. Throughout this book, the terms 'material reception benefits' or 'minimum subsistence benefits' will also be used to refer to such (categorical) social assistance schemes.

1.6 SOURCES

1.6.1 Sources of International Law

Although there is no explicit authoritative document in the international legal order that exhaustively enumerates the international sources of law, Article 38(1) of the Statute of the International Court of Justice is generally regarded as providing an authoritative list.[58] This article states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;

[57] Pieters 2006, pp 26 and 97.

[58] Brownlie 2003, p 5; Nollkaemper 2005, pp 53–54; Jennings and Watts 1992, p 24; Shaw 2003, p 66; Wallace 2002, p 8.

d. (…), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The first source mentioned in this article, international conventions, is often considered to be the most important source of international law.[59] Section 1.6.2 below will list the specific conventions used for this study.

With regard to international custom, Article 38(1) refers to 'evidence of a general practice accepted as law'. This means that a 'general recognition among States of a certain practice as obligatory is needed'.[60] Two elements can be deduced from this: 1) state practice and 2) the conviction that such practice reflects law (*opinio juris*).[61] In order to gain the status of customary international law, state practice must be 'both extensive and virtually uniform'.[62] With regard to the requirement of *opinio juris*, the International Court of Justice has held:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[63]

In the legal doctrine, a number of human rights are identified as customary international law. These include: freedom from slavery, genocide, racial discrimination and torture.[64] Some authors also mention freedom from gender discrimination,[65] murder or enforced disappearance of

[59] Shaw 2003, p 89; Nollkaemper 2005, p 67.
[60] JL Brierly, *The Law of Nations,* cited in Brownlie 2003, p 6.
[61] Cassese 2005, p 119.
[62] *North Sea Continental Shelf* ICJ Reports 1969 (International Court of Justice, 20 February 1969), p 3, para 74.
[63] Ibid, para 77.
[64] Brownlie 2003, pp 537–38; Cassese 2005, pp 370–71; Hannum 1996, pp 340–51; Shaw 2003, pp 256–57. Hathaway is of the opinion that, in light of non-conforming state practice, only the right to freedom from systematic racial discrimination forms part of customary international law (Hathaway 2005, pp 36–39). I do not follow this view, since for a rule to become customary law, it is sufficient for a majority of states to engage in a consistent practice. Universal participation in the formation of a customary rule is not required (Brownlie 2003, pp 7–8; Cassese 2005, p 123). In addition, the non-conforming state practice Hathaway is referring to, such as genocide in Bosnia and Rwanda and the existence of 'not less than 27 million' slaves in the world, has been followed by widespread protest and accordingly 'have been treated as breaches of that rule, not as indications of the recognition of a new rule' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986 (International Court of Justice, 27 June 1986), p 14, para 186).
[65] Cassese 2005, p 370.

individuals,[66] prolonged arbitrary detention,[67] the right to a fair trial[68] and the prohibition of *refoulement*[69] as forming part of customary international law. However, the absence of consensus on the status of these rights might lead to the conclusion that the necessary general state practice and/or *opinion juris* is lacking. It is therefore assumed that in any case the right to freedom from slavery, genocide, racial discrimination and torture have acquired the quality of customary law. Accordingly, they are binding upon all states of the world. However, these rights are laid down in widespread ratified human rights conventions (such as the International Covenant on Civil and Political Rights (ICCPR)) as well. The fact that they have gained the status of international customary law therefore does not have much added value. Accordingly, no separate attention will be paid to international custom in this study.

The same conclusion applies to the third source of international law mentioned in Article 38(1) of the Statute of the International Court of Justice: the general principles of law. This source was inserted in Article 38(1) to close the gap in the case of an apparent absence of relevant legal rules.[70] There is no universally agreed definition of general principles of law and it is not clear whether it refers to principles of the international legal order or to principles appearing in municipal systems.[71] It is clear, however, that in order for general principles to acquire any authority, very strong international consensus is required. The International Court of Justice has used this source only sparingly.[72]

Judicial decisions and 'the teachings of the most highly qualified publicists of the various nations' are included in Article 38(1) as subsidiary means for the determination of rules of law. As Brownlie observes, 'the practical significance of the label "subsidiary means" in Article 38(1)(d) is not to be exaggerated. A coherent body of jurisprudence will naturally have important consequences for the law'.[73] Nevertheless, judicial decisions cannot be regarded as formal sources of law, since the task of judges is to apply existing law and not to make law.[74] This means that these sources can be used as authoritative evidence of the state of the law[75] and serve as a method of interpretation. Consequently, these sources will be discussed further in section 1.7.3.

[66] Brownlie 2003, p 537.
[67] Brownlie 2003, p 537; Hannum 1996, p 345.
[68] Hannum 1996, pp 345–46.
[69] Battjes 2006, p 13; Hannum 1996, p 346 with further references.
[70] Shaw 2003, p 93.
[71] Wallace 2002, pp 22–23; Shaw 2003, pp 93–94.
[72] Jennings and Watts 1992, p 37.
[73] Brownlie 2003, p 19. See also Shaw 2003, p 103.
[74] Jennings and Watts 1992, p 41.
[75] Brownlie 2003, p 19.

1.6.2 International Refugee Law, International Social Security Law and International Human Rights Law

The research in this book is limited to sources of international refugee law, international social security law and international human rights law that are considered relevant for the issue of the access of asylum seekers to social security and employment. This subsection will list the specific international conventions used as sources for this study. Given the large amount of social security and, especially, human rights conventions, it is necessary to restrict the research to a number of general treaties.

First, two general remarks will be made about the scope of the study. This study will only address instruments with possible relevance for *all* asylum seekers in Europe. Accordingly, instruments or provisions that apply to only a subset of asylum seekers, such as women, children, disabled asylum seekers or older asylum seekers, fall outside the scope of this book. This approach resembles the approach adopted by Hathaway in his study on the rights of refugees under international law.[76] As Hathaway notes, this does not reflect the view that more specialized instruments applicable to members of other internationally protected groups, such as the Convention on the Rights of the Child or the Convention on the Elimination of all Forms of Discrimination against Woman, are not of real importance. To the contrary, especially the Convention on the Rights of the Child seems to be becoming more and more important for the rights of non-national children. This is clearly reflected in case law of the European Court of Human Rights and the European Court of Justice.[77] Nevertheless, the goal of this study is to examine which state obligations stem from international law as regards asylum seekers on the sole basis that they fall within this category of aliens. An advantage of this approach is that by doing so, the consequences of the special legal situation in which asylum seekers find themselves come to the fore, regardless of their specific identity or circumstances.[78]

A second general remark is that the research in this book will not be limited to conventions that have been ratified by *all* EU Member States, but will also include (social security) conventions that have been ratified by only a number of EU Member States. While these treaties might not be 'relevant treaties' within the meaning of Article 78(1) of the TFEU and therefore not direct instruments of review for the EU Reception Conditions Directives,[79] they may be relevant sources for the interpretation of other instruments of international law discussed in this study (see

[76] Hathaway 2005.
[77] See, eg, Reneman 2011.
[78] Hathaway 2005, p 8.
[79] Battjes 2006, p 97.

section 1.7.2). Given the evident relevance of international social security conventions for this study's research question, these conventions are therefore included.

The instruments of international law dealt with under the heading of international refugee law in this book are the 1951 Refugee Convention and the 1967 Refugee Protocol. Even though these instruments can also be seen as forming part of human rights law,[80] they will be examined separately in this study.

As regards international social security law, conventions on social security adopted within the framework of the International Labour Organization (ILO) and within the framework of the Council of Europe (CoE) will be addressed. The research will be limited to conventions that are wide in scope (applying to different kind of social security benefits) and which have been ratified by relatively many EU Member States. Accordingly, at the ILO level, Convention no 102 on Social Security (Minimum Standards), Convention no 97 on Migration for Employment and Convention no 118 on Equality of Treatment will be discussed. The instruments on social security adopted within the framework of the CoE to be addressed by the study are: the European Interim Agreements on Social Security, the European Convention on Social Security and the European Convention on Social and Medical Assistance (ECSMA).

The examination of international human rights law is also conducted at the UN and CoE level. The investigation is limited to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR) and the European Social Charter (revised) (ESC). No separate attention will be paid to the International Covenant on Civil and Political Rights, as it is assumed that this convention has only limited impact on the issues at stake here in addition to the obligations arising from the ECHR.[81]

1.6.3 The Charter of Fundamental Rights of the European Union

With the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights of the European Union (CFR or the Charter) became a legally binding instrument.[82] The CFR applies to the institutions, bodies,

[80] Hathaway 2005, pp 4–5.

[81] *Cf* Koch, who also argues that although the Human Rights Committee has adopted a similar integrated or holistic approach to the ECtHR with respect to the relevance of social demands, judgments from the ECtHR are 'far more developed and much more comprehensive, and unlike *views* from the HRC the judgments of the ECtHR are binding on the Contracting States' (Koch 2009, p 10).

[82] TEU, Art 6(1).

offices and agencies of the Union and to the Member States when they are implementing Union law.[83] Secondary Union law, such as the European Reception Conditions Directives, has therefore to be in accordance with the CFR.[84] The preambles to the European Reception Conditions Directives frequently refer to the CFR.[85] It is therefore at first sight a very relevant instrument of review for these Directives.

Case law of the Court of Justice of the European Union (CJEU)[86] on the scope and meaning of Charter provisions is still scarce, especially with regard to the provisions with possible relevance for the research question in this book (eg Articles 15 on the right to engage in work; 21 on non-discrimination; 34 on social security and social assistance; and 35 on health care).[87]

The CFR itself contains, however, a few instructions for interpretation. The preamble to the Charter makes clear that its provisions are to a large extent based on pre-existing standards of international law.[88] Article 52(3) of the CFR provides that

> [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

This article also stipulates that this provision shall not prevent Union law from providing more extensive protection.[89] Hence, the ECHR functions as a minimum standard of review for the interpretation of the Charter.

[83] CFR, Art 51.

[84] Ie directives have to be interpreted in conformity with the CFR and the validity of provisions of directives can be tested against the CFR. See, eg, the *Test Achats* case in which the CJEU declared a provision of a directive invalid because of incompatibility with provisions of the CFR (CJEU 1 March 2011, Case C-236/09 [2011] ECR I-773).

[85] See recital 5 of the preamble to Directive 2003/9 and recital 35 of the preamble to Directive 2013/33.

[86] The abbreviation CJEU is used to refer to the European Court of Justice (pre-Lisbon) and to the Court of Justice of the European Union (after Lisbon).

[87] While the CJEU frequently refers to provisions of the CFR, these provisions do not often function as the decisive standard for deciding cases. According to de Burca, the CJEU has, between December 2009 and the end of 2012, made reference to provisions of the CFR in at least 122 judgments. In only 27 of these 122 judgments, did the CJEU engage substantially with arguments based on Charter provisions (de Búrca 2013, p 169).

[88] The preamble to the CFR states that it is necessary to strengthen the protection of fundamental rights 'by making those rights more visible in a charter'. In addition, the preamble states that the Charter seeks to 'reaffirm' the rights as they result from a large number of sources, such as the international obligations common to the Member States and, in particular, the ECHR. Barkhuysen and Bos observe that the Charter brings together all human rights already laid down in the ECHR, ESC and the UN human rights conventions in one document. It does contain a few novelties, connected to advancing technological and social developments, such as a prohibition of the reproductive cloning of human beings and the protection of personal data (Barhkuysen and Bos 2011, p 7).

[89] Remarkably, this latter sentence refers to *Union law* and not to the Charter.

More generally, on the basis of Article 53 of the CFR, the same is true for human rights recognized in international law and by international agreements to which all the Member States are party.

In addition, Article 52(7) of the CFR provides that the explanations to the Charter should be given due regard. This is also emphasized in Article 6(1) of the TEU, as the explanations 'set out the sources of those [the Charter's] provisions'. These explanations were prepared under the authority of the Praesidium of the Convention which drafted the Charter and have been updated under the responsibility of the Praesidium of the European Convention.[90] Hence, it has been explicitly laid down in primary Union law that the intention of the drafters should be taken into account when interpreting the Charter. The explanations frequently refer to the ECHR and the ESC as relevant sources of Charter provisions.

The foregoing makes clear that instruments of international law, in particular the ECHR and the ESC, are very important sources of inspiration for the interpretation of the CFR.

For the purpose of this study, the text of relevant Charter provisions will be described and analysed in the introductory chapters to Part II and Part III. It will turn out that the text of these provisions does not contain indications that the protection offered is more far-reaching than the protection offered by similar provisions laid down in other instruments of international law. Consequently, in the absence (so far) of a body of case law of the CJEU indicating that the provisions of the CFR do indeed contain more far-reaching obligations for the Member States than those resulting from pre-existing standards of international law with regard to the issues relevant in this study, the attention paid to the CFR in this book will be rather marginal. The conclusions of this study might, however, serve as a relevant resource for the interpretation of the CFR.

1.7 METHOD OF INTERPRETATION

1.7.1 Introduction

This section will examine which methods and rules of interpretation arise from accepted sources of international law and, accordingly, will determine a methodology of interpretation that will be applied in this book. A distinction can be made between, on the one hand, rules of interpretation, such as the rules laid down in the Vienna Convention on the Law of Treaties, and, on the other hand, authoritative interpretations by various organs. These organs have to apply the rules of interpretation as well;

[90] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).

however, owing to their authority, a deviation from their interpretation needs explicit argumentation.[91] Consequently, they function as a valuable supplement to the interpretation rules. Examples of such authoritative interpretations include the already-mentioned judicial decisions and 'teachings of the most highly qualified publicists of the various nations', mentioned in Article 38 of the Statute of the International Court of Justice as subsidiary means for the determination of rules of law. This section will first examine the rules of interpretation. Then, the legal value of various forms of authoritative interpretations will be discussed.

1.7.2 Rules of Interpretation

The rules on interpretation of international treaties are laid down in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (hereafter Vienna Convention). According to the International Court of Justice, these rules reflect customary law.[92] This means that these rules are binding upon all states in the world. This section will provide a brief overview of the relevant rules.[93]

Article 31 of the Vienna Convention reads as follows:

> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

[91] Battjes 2006, pp 19–23.

[92] See, eg, *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* ICJ Reports 1994 (International Court of Justice, 3 February 1994), p 6, para 41; *La Grand Case (Germany v United States of America*) ICJ Reports 2001 (International Court of Justice, 27 June 2001), p 466, paras 99 and 101; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* ICJ Reports 2002 (International Court of Justice, 17 December 2002), p 625, para 37.

[93] See for a more extensive discussion of these rules, eg, Aust 2007; Brownlie 2003; Sinclair 1984.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

This article thus includes literal ('ordinary meaning'), systematic ('in their context') and teleological ('in the light of its object and purpose') interpretation methods.[94] Although some authors argue that Article 31 confirms the primacy of the text and others argue that the object and purpose should be determinative,[95] the position that there is no hierarchy in these different methods and that all elements of Article 31 are equally important has gained most support.[96] Indeed, the singular noun in 'general rule' indicates that there is only one rule, with different elements.[97] This means that all aspects of a treaty—the wording used in the text of the treaty, its preamble and its annexes, the internal harmony between the different provisions, the aim of the treaty and the intention of the parties—must be taken into account.

The duty to interpret treaties 'in good faith' is often held to imply a principle of effectiveness.[98] According to this principle, 'provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text'.[99] In the *Territorial Dispute* case, the International Court of Justice called the principle of effectiveness 'one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence'.[100] Especially in the field of human rights, the International Court of Justice has adopted a value-oriented approach based on this interpretation principle.[101] In the case law of the European Court of Human Rights too, the principle of effectiveness plays a central

[94] Cassese 2005, p 179.
[95] See, eg, Vanneste 2010, pp 221–25.
[96] McAdam, 'Interpretation of the 1951 Convention' in Zimmermann 2011, p 83; Aust 2007, p 243; Battjes 2006, p 16; Vanneste 2010, pp 225–26 with further references. Vanneste argues that the approach of the ECtHR (and the Inter-American Court of Human Rights) endorses the view that this article should be understood as favouring such a 'holistic approach' (Vanneste 2010, p 345).
[97] Brownlie 2003, p 603; ILC, *Draft Articles on the Law of Treaties with Commentary*, Yearbook 1966, vol II, pp 219–20.
[98] Brownlie 2003, p 606; Hathaway 2005, p 62.
[99] Fitzmaurice 1986, p 50.
[100] *Territorial dispute (Libyan Arab Jamahiriya v Chad)* (n 90), p 6, para 51. See also *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment* ICJ Reports 1998 (International Court of Justice, 4 December 1998), p 432, para 52.
[101] Shaw 2003, pp 842–44; Zyberi 2008, p 31.

role.[102] The principle has its limits, however. In the *Interpretation of Peace Treaties* case, the Court held that the rule of effectiveness 'cannot justify the Court in attributing to the provisions (…) a meaning which, as stated above, would be contrary to their letter and spirit'.[103]

Article 31(3)(a) and (b) indicates that subsequent agreements between the parties and subsequent practice in the application of the treaty must be taken into account. Obviously, an agreement 'regarding the interpretation of the treaty or the application of its provisions' can only be reached with all the parties to a convention. Nevertheless, the agreement does not have to be a legally binding document in order to be of value for interpretation.[104] Subsequent practice needs only to be taken into account if the practice is consistent and is common to, or accepted by all parties.[105]

Article 31(3)(c) contains the principle of 'systematic integration' within the international legal system.[106] This principle means that a treaty should be interpreted against the background of other relevant and applicable rules of international law.[107] The International Court of Justice has made clear that treaties have to be interpreted within the framework of the entire legal system prevailing at the time of interpretation.[108] Hence, it is not the rules of international law in force at the time of the conclusion of the treaty, but the contemporary international legal system that has to be taken into account.[109] In addition, with reference to Article 31(3)(c) of the Vienna Convention, the European Court of Human Rights has observed that in searching for common ground among the norms of international law, it does not distinguish between sources of law according to whether or not they have been signed or ratified by a certain state.[110] For the Court '[i]t will be sufficient … that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law … and show, in a precise area, that there is common ground in modern societies'.[111] The rule of systematic integration also has its limits.

[102] Merrills 1993, p 113. The Court generally holds: 'Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory' (see, eg, *Demir and Baykara v Turkey* app no 34503/97 (ECtHR, 12 November 2008), para 66).

[103] *Interpretation of Peace Treaties (second phase)*, Advisory Opinion ICJ Reports 1950 (International Court of Justice, 18 July 1950), p 229.

[104] Aust 2007, p 240.

[105] Aust 2007, p 241; Brownlie 2003, p 605.

[106] McLachlan 2005.

[107] See also *Demir and Baykara v Turkey* (n 102), para 76.

[108] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* ICJ Reports 1971 (International Court of Justice, 21 June 1971), p 16, para 53.

[109] Battjes 2006, p 19.

[110] *Demir and Baykara v Turkey* (n 102), para 78.

[111] Ibid, para 86.

Clear conflicts of different norms of international law cannot be resolved by reference to this interpretation rule.[112]

Pursuant to Article 31(4) it is only allowed to give a 'special meaning' to a term in a convention if it is established that the parties so intended.

Article 32 of the Vienna Convention contains supplementary means of interpretation. According to this article:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

So, if no satisfactory result has been reached by applying Article 31, or if the result of applying Article 31 needs to be confirmed, recourse may be had to supplementary means of interpretation, such as the preparatory work of the treaty. It has often been mentioned that preparatory work should be used with care, since the records of conference proceedings may be confusing, incomplete or inconclusive and circumstances may have changed over time.[113] Aust concludes with regard to preparatory work: '[t]heir investigation is time-consuming, their usefulness often being marginal and very seldom decisive'.[114] Accordingly, preparatory work will be used with the required caution and only as a subsidiary method of interpretation.[115]

Paragraph 4 of Article 33 of the Vienna Convention deals with differences in meaning between various authentic texts of treaties. According to this provision

> when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

[112] McLachlan 2005. In such cases, other rules exist for resolving the conflict, such as *lex specialis* and *jus cogens* (McLachlan 2005, pp 285–86).

[113] Aust 2007, pp 244 and 246–47; Battjes 2006, pp 17–18; Brownlie 2003, p 606; Sinclair 1984, p 142.

[114] Aust 2007, p 247.

[115] Hathaway states that 'there appears to be neither theory nor practice to justify the view that the designation of a treaty's preparatory work as a supplementary means of interpretation requires that it be relegated to an inherently subordinate or inferior place in a comprehensive, interactive process of treaty interpretation' (Hathaway 2005, p 59). Nonetheless, as Sinclair explains, the fact that international tribunals in practice regularly assess preparatory work is probably caused by the fact that disputes about the interpretation of treaty provisions often reach the stage of international adjudication *because* the text is ambiguous or obscure in the sense of Art 32 of the Vienna Convention. Moreover, counsel for the parties in these disputes will often seek to derive support for their interpretation from an analysis of the preparatory work, as a result of which international tribunals are called upon to assess the significance of it (Sinclair 1984, p 142).

1.7.3 Authoritative Interpretations

This section will discuss the various authoritative interpretations of treaties that are available and the legal value to be attached to them. The most attention will be paid to the value of views and decisions of treaty-monitoring bodies for the interpretation of treaties, as this is most contested.

Judicial Decisions

Article 38(d) of the Statute of the International Court of Justice designates judicial decisions as subsidiary means for the determination of rules of law. The adjective 'judicial' means that the decision has to be taken by a court or tribunal of competent jurisdiction.[116] Obviously, judgments from international courts, such as the International Court of Justice or the European Court of Human Rights, function as very authoritative interpretations of international law.[117] Besides judgments from international courts, Article 38(d) applies to decisions from national courts as well. Generally, decisions from national courts will, however, provide merely evidence of the existence of a customary rule or of state practice.[118] Accordingly, judgments of national courts will be used sparingly in this book and primarily as evidence of state practice, not as authoritative interpretations. In addition, owing to the practical difficulty in examining decisions from all national courts in the world, national judicial decisions will mainly be used to falsify interpretations derived from applying other interpretation methods.

Legal Doctrine

'Teachings of the most highly qualified publicists of the various nations' are mentioned in Article 38(d) of the Statute of the International Court of Justice as subsidiary means for the determination of rules of law as well. Hence, texts from scholarly writers are also relevant for interpretation. However, as Schwarzenberger states very clearly: 'Comparatively speaking, no other element in this hierarchy [hierarchy in law-determining agencies] deserves to be treated with so much reserve as writers on international law'.[119] Since the risk of subjectively coloured judgements

[116] 'Judicial decision' can be defined as the '[a]pplication by a court or tribunal exercising judicial authority of competent jurisdiction of the law to a state of facts proved, or admitted to be true, and a declaration of the consequences which follow' (Black's Law Dictionary, 6th edn, 1990) or as 'the determination by a court of competent jurisdiction on matters submitted to it' (WordNet, wordnet.princeton.edu).

[117] Brownlie 2003, p 19; Shaw 2003, p 103.

[118] Brownlie 2003, p 22; Jennings and Watts 1992, pp 41–42; Shaw 2003, p 105.

[119] Schwarzenberger 1957, p 36.

is obviously large and individual writers often reflect national and other prejudices,[120] publications of academics will be used with the requisite caution. In the absence of relevant judicial decisions, legal doctrine sometimes functions as a good starting point for interpretation,[121] but these writings have always to be assessed as to their observance of the interpretation rules and the quality of their reasoning.[122]

Views and Decisions of Treaty-monitoring Bodies

For almost all treaties that will be examined in this book, monitoring bodies have been established to supervise states' compliance with the obligations laid down in the treaties. The European Convention on Human Rights is the only treaty that has established a court with the power of issuing binding decisions.[123] As has been stated above, the decisions of such a court have an important legal value for the interpretation of the convention.

The monitoring bodies that have been established to examine compliance with the other treaties do not have the power to issue binding decisions.[124] Nevertheless, the views and decisions of treaty-monitoring bodies do have particular significance for interpretation. Different arguments have been put forward for the relevance of the opinions of treaty-monitoring bodies for legal interpretation. It has been argued that (some of) their decisions are 'judicial decisions' in the sense of Article 38(1)(d) of the Statute of the International Court of Justice, as they fulfil the criteria established by the European Court of Human Rights (ECtHR) for 'tribunals'.[125] Other arguments for the relevance for interpretation is that the output of treaty-monitoring bodies should be taken into account as 'subsequent practice' in the sense of Article 31(3)(b) of the Vienna Convention[126] or as part of states' obligation to act in good faith.[127] Finally, the fact that states have accepted their monitoring power by becoming a party to

[120] Brownlie 2003, pp 23–24.

[121] '[T]he more the field is covered by decided cases the less becomes the authority of commentators and jurists' (Lord Summer quoted in Schwarzenberger 1957, p 37).

[122] See Schwarzenberger, who assesses the hierarchy of 'law-determining agencies' by subjecting them to a 'threefold scrutiny which ought to take into account the degree of its generic and individual independence, its international outlook and its technical standards' whereby he states that '[t]he degree of skill and technical qualification attained by the element concerned is obviously of the highest importance' (Schwarzenberger 1957, p 30).

[123] ECHR, Art 46.

[124] Battjes 2006, pp 20–23; Churchill and Khaliq 2004, pp 437–40; Cullen 2009, p 75; Mechlem 2009; Sepúlveda 2003, pp 87–88.

[125] Rieter 2010, p 810.

[126] Mechlem 2009, p 920; Nu berger 2007, p 47.

[127] Human Rights Committee, General Comment no 33 on the Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, para 15.

the treaty is a relevant factor for giving weight to the interpretations of treaty-monitoring bodies.[128]

As the output of monitoring bodies is non-binding, its authority hinges on the body's legal standing and, particularly, the persuasiveness and coherence of its reasoning.[129] The quality of the reasoning of relevant views and decisions will be examined, especially in the light of the interpretation rules of the Vienna Convention, in the chapters in which they come up for discussion. Here, some general remarks will be made about the legal standing of various committees.

Under the Refugee Convention, there is no specific monitoring body,[130] but the Office of the United Nations High Commissioner for Refugees (UNHCR) has been given the duty of supervising the application of the provisions of the convention.[131] The UNHCR was established by a General Assembly resolution of 1949.[132] Pursuant to the Statute of the UNHCR,[133] an Advisory Committee on Refugees was established by the Economic and Social Council. This 'Executive Committee' consists of representatives of the Member States of the UN. Its conclusions could therefore be taken into account as evidence of 'subsequent agreement between the parties' in the sense of Article 31(3)(a) of the Vienna Convention.[134]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not provide for a monitoring body, but leaves oversight to the Economic and Social Council of the United Nations.[135] By a resolution from the Economic and Social Council, the Committee on Economic, Social and Cultural Rights (Com ESCR) was established for the purpose

[128] Battjes 2006, p 19. Craven mentions that also the endorsement of the Annual Report of the Committee on Economic, Social and Cultural Rights by the UN General Assembly gives considerable weight to the committee's interpretation (Craven 1995, p 92).

[129] Battjes 2006, pp 19–23; Mechlem 2009; Sepúlveda 2003, pp 87–111; Schwarzenberger 1957, p 30.

[130] Settlement of disputes between parties relating to interpretation or application of the convention is referred to the International Court of Justice (Art 38 RC).

[131] RC, Art 35.

[132] Resolution 319 (IV) of 3 December 1949 of the United Nations General Assembly.

[133] This statute was adopted by the General Assembly on 14 December 1950 as Annex to Resolution 428 (V).

[134] Battjes 2006, p 20; Hathaway 2005, pp 54–55. Not all states parties to the Refugee Convention are members of the Executive Committee at any given moment and not all members of the Executive Committee are members of the Refugee Convention. However, all states parties to the convention are invited to observe and to comment upon draft proposals. As Hathaway observes: 'While this process is no doubt imperfect, it is difficult to imagine in practical terms how subsequent agreement among 145 state parties to the Refugee Convention could more fairly be generated' (Hathaway 2005, pp 54–55, fn 146). The *Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* has been requested by the Executive Committee, but has not been adopted by this committee (Battjes 2006, p 20). Consequently, this handbook is not evidence of subsequent agreement between the states parties.

[135] See ICESCR, Arts 16 to 21.

of assisting the Council.[136] This resolution provides that the committee has 18 members 'who shall be experts with recognized competence in the field of human rights', who serve in their personal capacity and who shall be elected for a term of four years. On the basis of this resolution, the committee has the competence to submit to the Economic and Social Council a summary of its considerations of the reports submitted by states parties to the ICESCR and to make suggestions and recommendations of a general nature. Since the committee is a subsidiary organ of the Economic and Social Council, the interests of states parties to the covenant are represented only in so far they are taken up by the Economic and Social Council. As Craven notes, the committee differs quite significantly from other (UN) human rights committees in this regard.[137] On 5 May 2013, the Optional Protocol to the ICESCR entered into force. This protocol provides the committee with the competence to receive and consider individual complaints and to transmit its views to the parties concerned. State parties to this Optional Protocol explicitly recognize this competence of the committee.[138] The protocol provides that states parties should give due consideration to the views of the committee and should submit to the committee within six months a written response, including information on any action taken.[139] At the time of writing, the Optional Protocol has been ratified by three EU Member States.[140]

The European Social Charter establishes a 'Committee of Experts' to examine the reports submitted by states parties.[141] As from 1998 this committee has been called the European Committee of Social Rights (ECSR). The members of the committee are elected by the Committee of Ministers 'from a list of independent experts of the highest integrity and of recognised competence in international social questions, nominated by the Contracting Parties'.[142] They are elected for a term of six years.[143] On the basis of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, the committee is competent to consider collective complaints about unsatisfactory application of the Charter lodged by organizations of employers, trade unions or non-governmental organizations. The protocol provides that the committee is to examine the

[136] ECOSOC Resolution 1985/17 of 28 May 1985.
[137] Craven 1995, p 50.
[138] Art 1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.
[139] Ibid, Art 9.
[140] The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has been ratified by the following EU Member States: Portugal, Slovakia and Spain. see treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3-a&chapter=4&lang=en_.
[141] ESC, Art 24.
[142] ESC, Art 25(1).
[143] ESC, Art 25(2).

complaint and present its conclusions as to whether or not the contracting party concerned has ensured the satisfactory application of the Charter.[144] On the basis of this report, the Committee of Ministers of the Council of Europe must adopt a resolution. If the ECSR finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers should adopt a recommendation addressed to the contracting party concerned.[145] This additional protocol has been ratified by 12 countries, including 10 EU Member States.[146]

The annual report that each ILO member state has to submit on the measures which it has taken to give effect to the provisions of ILO conventions to which it is a party[147] are examined by the Committee of Experts on the Application of Conventions and Recommendations. This committee was established by the Governing Body of the ILO in accordance with a resolution adopted by the International Labour Conference in 1926.[148] However, just like the Refugee Convention, the ILO Constitution provides that any question or dispute relating to the interpretation of the Constitution or of any convention should be referred to the International Court of Justice.[149]

In brief, the legal standing of the various monitoring bodies differs significantly. Some bodies, such as the European Committee on Social Rights, are established by the treaty itself, and therefore with the consent of all state parties to the treaties. The treaty concerned also contains important safeguards as regard independence and impartibility. Other bodies, such as the Committee on Economic, Social and Cultural Rights and the ILO Committee of Experts, have merely been established as subsidiary organs in order to assist the organ that has been assigned with the task of supervising state reports. The Refugee Convention does not provide for a specific monitoring process, but the UNHCR has been assigned the general task of supervising the application of the convention by the treaty itself. For these latter bodies, the authority of their views hinges even more on the quality of the reasoning.[150]

With the exception of the UNHCR, all bodies typically carry out two or three main functions: 1) they formulate 'concluding observations' (Com ESCR), 'conclusions' (ECSR) or 'observations' (ILO Committee of Experts)

[144] Art 8 of the Additional Protocol.
[145] Art 9 of the Additional Protocol.
[146] The additional protocol has been ratified by the following EU Member States: Belgium, Cyprus, Finland, France, Greece, Ireland, Italy, the Netherlands, Portugal and Sweden. See conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=158&CM=7&DF=01/07/2011&CL=ENG.
[147] ILO Constitution, Art 22.
[148] International Labour Conference, eighth session, vol I, Geneva 1926, app VII, p 429.
[149] ILO Constitution, Art 37(1).
[150] See also Sepúlveda 2003, p 90.

on state reports; 2) they develop 'General comments' (Com ESCR), 'statements of interpretation' (ECSR) or 'General surveys' (ILO Committee of Experts) which contain more general statements of understanding based on the examination of different state reports; and 3) they adopt views on individual complaints (Com ESCR) or on collective complaints (ECSR). This book will only examine the latter two forms of output from the monitoring bodies. The concluding observations and conclusions are rather country specific and their jurisprudential impact has been described as marginal and exceptional.[151]

1.7.4 Summary

In brief, (provisions of) treaties will be interpreted using the literal, systematic and teleological interpretation rules. In addition, they will be interpreted in the light of the entire contemporary international legal system. Only if no satisfactory result has been reached by applying these rules, or if the result of applying them needs to be confirmed, will supplementary means of interpretation be applied, such as the preparatory work of the treaty. Further, judicial decisions, in particular from international courts, serve as important authoritative interpretations. The authority of non-binding views and decisions of treaty-monitoring bodies is dependent on the body's legal standing and on the quality of the reasoning. The legal doctrine and domestic case law will be used cautiously mainly in order to falsify interpretations derived from applying other interpretation methods.

[151] Mechlem 2009, p 923 with further references.